

CANADA / JUDGMENT

Swartz v. Barabas

2024 BCSC 2315

COURT

Supreme Court of British Columbia

DECIDED

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2024 BCSC 2315 Swartz v. Barabas

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Swartz v. Barabas,

2024 BCSC 2315

Date: 20240521

Docket: M222783

Registry: New Westminster

Between:

Gillian Swartz

Plaintiff

And

Sonia Barabas

Defendant

Before: The Honourable Justice Veenstra

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

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Counsel for the Defendant:

J. Grewal

N. Brar

Place and Dates of Trial:

Vancouver, B.C.

May 13, 15-16, 2024

Place and Date of Judgment:

Vancouver, B.C.

May 21, 2024

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- [1] THE COURT: On January 17, 2018, shortly after 1:00 p.m., there was a collision (the "Accident") at the intersection of Highway 10 and 132nd Street in Surrey involving a grey 2007 Toyota Yaris driven by the plaintiff and a red 2012 Chrysler 200 driven by the defendant.
- [2] The plaintiff and the defendant each commenced actions alleging that the other was at fault for the Accident. At one point there was an order for a trial as to liability in both actions; however, Ms. Barabas has resolved her claim as plaintiff against Ms. Swartz. As a result, the present trial was only in the one proceeding: Ms. Swartz's claim as plaintiff against Ms. Barabas as defendant.

Background

- [3] Just before the Accident, the plaintiff was travelling eastbound on Highway 10 and attempting to make a left turn to northbound 132nd Street. The defendant was travelling westbound on Highway 10 intending to travel straight through the intersection. The posted speed limit for travel on Highway 10 in that area is 80 kph.
- [4] On the approach to its intersection with 132nd Street, Highway 10 has four lanes going in each direction. The left-most lane is a left-turn lane, the right-most lane is a right-turn lane, and the two centre lanes continue straight through. Leading up to the Accident, the plaintiff was in the eastbound left-turn lane, while the defendant was in the westbound left through lane.
- [5] The intersection is controlled by traffic lights. As well, there are advance warning flasher ("AWF") signs a short distance before the intersection. The AWF is a yellow overhead sign. It contains the words "Prepare to Stop," a picture of a standard traffic control light (red, yellow, green) and two amber lights. The amber lights on the AWF begin flashing a few seconds before the traffic control signal at the intersection turns yellow.
- [6] It appears to be common ground that a large vehicle was in the westbound left-turn lane. The various witnesses described it alternatively as a large van or a large truck. Its position put it directly across the intersection from the plaintiff's vehicle. It was to the left of the defendant's intended path as she approached the intersection.
- [7] Post-accident photographs of the two vehicles were in evidence. The point of impact was the front left corner of each vehicle, with damage to each vehicle continuing down the left side to just before the driver's side door.

The Traffic Signals

- [8] There was no expert evidence at the trial. The plaintiff had obtained the report of an accident reconstruction engineer, Jonathan Gough, to which the defendant objected. The plaintiff elected to have Mr. Gough provide fact evidence only, putting before the Court various engineering drawings and "signal timing sheets" obtained from the Ministry of

Transportation with respect to the intersection of Highway 10 and 132nd Street and providing some basic explanation of the terminology. The parties were agreed that these documents were authentic business records.

- [9] The documents placed in evidence included both the current signal timing sheet created on January 13, 2017, and implemented on January 20, 2017, as well as the previous signal timing sheet dated January 28, 2010, and implemented on October 16, 2014. On cross-examination, Mr. Gough acknowledged that the Ministry of Transportation will review signal timing from time to time and change them based on changing traffic volumes. He agreed that he had no way of knowing whether the signal timing sheets that had been provided to him had been updated in the roughly one year between January 20, 2017, and January 17, 2018 (the date of the Accident). He had not personally attended the intersection at any material time in order to verify the information in the signal timing sheet.
- [10] In closing submissions, the defendant argued that no consideration should be given to the drawings and signal timing sheets because given Mr. Gough's inability to say with absolute certainty that they were in effect as of January 2018, they did not constitute reliable evidence. I do not accept this submission. In all of the circumstances, and given that it would have been open to the defendant to tender more recent drawings if there were any, it is my view that the engineering drawing and signal timing sheet in evidence are the best available evidence. I note as well that the changes from the 2010 to the 2017 signal timing sheet were minimal. The only change appears to be related to the length of green lights, and not to the timing of the AWF lights, yellow lights, and red lights.
- [11] The key information drawn from these documents, in my view, is as follows:
- a) the AWF sign for westbound drivers was 112 m from the stop line, while the AWF sign for eastbound drivers was 99 m from the stop line,
 - b) the AWF signs for both directions would begin to flash 6.0 seconds prior to the traffic signal turning yellow
 - c) the duration of the yellow light for both directions was 4.6 seconds, and
 - d) there was a period of 1.5 seconds after the traffic lights turned red before the light for 132nd Street traffic would turn green.

The Evidence

- [12] Five witnesses to the Accident gave evidence at trial.

The Plaintiff

- [13] The plaintiff had been on a lunch break from her work at a local secondary school. She had stopped at a convenience store and picked up a package of cigarettes. She had lit one of the cigarettes before leaving the convenience store and had it in her left hand as she was driving back to the school.
- [14] The plaintiff described the weather as overcast, but said that it was not raining. The road was dry and visibility was good (weather-wise).
- [15] The plaintiff's evidence was that she entered the intersection on a green light. Her car was all the way forward into the intersection when the light was still green. She then waited while the light turned yellow. At the end of the yellow, she took her foot off the brake and began to "edge", "inch", or "creep forward". She acknowledged that at the end of this process she began to angle her wheels to the left, then, when the light turned red, she put "subtle" pressure on the gas pedal.
- [16] The plaintiff said that she did not see the defendant's vehicle until "right before it hit me", but that it seemed to be travelling very quickly. She acknowledged on cross-examination that she has no training in estimating the speed of moving vehicles.
- [17] The plaintiff described there being a large white vehicle in the opposing left-turn lane. She was not sure whether it was a van or a truck. Her evidence was that while she was waiting, she was scanning the intersection as well as watching the light but that she waited through the traffic light because the large white vehicle blocked her view of oncoming through traffic. Her evidence was that she was in no hurry, and so she just waited for the light.
- [18] The plaintiff described the impact as "hard" and "terrifying". Her airbags went off. The impact caused the front end of her car to twist further to the left. She was able to get out of her car. The driver of a car stopped for the light in the eastbound left through lane, Sukhjot Battu (who was also a witness), approached the plaintiff and invited her to sit down in the back seat of Ms. Battu's car. Ms. Battu also called 911. The plaintiff called her husband to tell him what had happened. She called her mother, who lived nearby, to come to the scene.
- [19] The plaintiff said that emergency services arrived. She said that she was in the ambulance briefly but chose to leave with her mother.
- [20] The plaintiff also said that she spoke with a police officer and told him about the details of the Accident.
- [21] Constable Ladhar was the RCMP officer who attended the Accident scene. His handwritten notes with respect to his discussions with the plaintiff about the Accident simply say "turning left onto 132nd Street from Highway 10. Yellow for her."

[22] A "General Occurrence" report, typed up by Cst. Ladhar and submitted electronically shortly after his attendance at the Accident scene, records slightly more detail. It reports the plaintiff as saying that:

she was making a left hand Northbound turn onto 132nd Street from Highway 10 when the light turned yellow so she started making the left turn and saw the Chrysler drive through at a fast pace and strike her car.

[23] The plaintiff says that her discussion with the officer was much more extensive than either of these notes reflect. When asked about these notes, she said that she told the officer that she was waiting in the intersection as the lights turned yellow and then red, having crept forward on the yellow, and then she proceeded to turn and was struck.

[24] The plaintiff also said that she called ICBC later that day to report the Accident and spoke with an adjuster for several minutes. Notes taken by the ICBC adjuster from that telephone discussion simply state:

INS ?B in lane 2/3 waiting to make left turn at intersection. TP in lane 2/3 in heading straight in opposite direction. INS waited for light to change (yellow) then proceeded. TP heading straight through intersection when ins made left turn ins L/F bumper collided with TP R/F bumper. Two witness. Fire, police & ambulance attended. INS did not obtain TP info as she was being looked at by the medics.

[25] When asked about these notes, the plaintiff said that they are not completely encompassing of everything that was said. She noted as well that the reference to the other vehicle's right front bumper was incorrect as the damage to both vehicles was to the left front areas and that she was not in a straight-through lane.

Sukhjot Battu

[26] Sukhjot Battu was called as a witness by the plaintiff. Ms. Battu was driving a vehicle eastbound on Highway 10. Her evidence was that the weather on the day of the Accident was overcast but the roads were dry and clear, and visibility was good. She described traffic at the time of the Accident as light to medium and nothing out of the ordinary for Highway 10.

[27] Ms. Battu said that she had seen the flashing light of the AWF as she approached the intersection, and so she had slowed down and ultimately stopped at the intersection as the traffic signal turned yellow. Her evidence was that she had seen the warning lights flashing and had begun to slow down before she passed under the AWF.

[28] Ms. Battu was in the left of the two through lanes adjacent to the left-turn lane. She was travelling with her sister, Harsimran, who was in the front passenger seat. Sukhjot Battu's evidence was that her sister was on and off her phone at the time.

- [29] Ms. Battu's evidence was that she observed the plaintiff's vehicle next to her. She saw the plaintiff's vehicle doing a slow creep forward while the light was yellow after Ms. Battu had stopped. Her evidence was that the plaintiff's vehicle did not actually start its turn until the traffic signal had turned red and that, although the plaintiff's vehicle started its turn at that point, its speed did not actually change.
- [30] She first saw the defendant's vehicle upon impact. Her impression was that it was going very fast. She described the Accident as the two vehicles just "chipping" off each other's front left corner. After the collision, the other vehicle continued moving down Highway 10 and ended up in the ditch on the right-hand side.
- [31] Ms. Battu put on her hazard lights and got out of her car. She approached the plaintiff who seemed visibly upset, overwhelmed, and emotional, and had her sit in the back of her car while she called 911.
- [32] Ms. Battu said that fire services arrived shortly after the Accident. She understood they were nearby and had seen the Accident. A police officer arrived a short time later. She said that after a short time, the police officer asked her to leave because she was blocking one of the through lanes. She drove away approximately 15-20 minutes after the Accident. Before doing so, she gave her contact information to the plaintiff. She also thought she had given contact information to the police officer but acknowledged in cross-examination that it may have been a firefighter.
- [33] Ms. Battu's evidence was that the police officer called her in the days following and she gave him a statement. She also met subsequently with an investigator about a month after the Accident to provide a further statement.
- [34] At trial, Ms. Battu did not recall seeing a big white vehicle in the opposite turning lane. Although she recalled having mentioned it in her statement a month after the Accident, she did not have a memory of it at trial.

The Defendant

- [35] The defendant was travelling with her son, Mark Barabas, who was in the front passenger seat. They were driving from the defendant's home to pick up snacks at a doughnut shop before the defendant started work at 3:00 p.m. The defendant's evidence is that there was a misty rain at the time, but that visibility was good.
- [36] The defendant said that she was driving at 75 kph but was aware that the speed limit at that area was 80 kph. She said that "just as we went under the AWF", it started to flicker. She could see that the traffic light was still green, so she continued on at a steady 75 kph. Her evidence is that "as we entered the intersection", the light turned yellow. Suddenly, she saw the plaintiff's car "going very fast towards me" making a left turn. At various times, she described the plaintiff's car as gold and silver.

- [37] The defendant said that it was not safe to stop because the plaintiff was going to be crashing into her anyways. She said that, in the split second before impact, she turned her wheel slightly to the right. Upon the collision, the airbags went off, and there was a bunch of powder in the air (from the airbags) that caused her to initially think the car was on fire. They ended up in the ditch on the right.
- [38] Her evidence was that initially she tried to open the door of her vehicle, then someone came and helped her out. She was not sure if it was a fireman or a police officer. She said that she spoke to various firemen and policemen who asked her various questions, including whether she had consumed any alcohol or drugs. After about an hour and a half, the police officer called a taxi which took the defendant and her son back to her home.
- [39] The defendant said that there was a big white van in the westbound left-turn lane.
- [40] On cross-examination, the defendant was asked various questions about evidence she gave at an examination for discovery in September 2021. She acknowledged having said at that time that her speed was between 70 and 75 kph but that she now believed it was 75 kph.
- [41] The following exchange from the defendant's examination for discovery was read in and also put to her on cross-examination:

95 Q Sure. So you are describing that the light had turned yellow just a second or few seconds before you went through the intersection. Are you sure if it was a second or a few seconds? Are you sure about which of those two it is?

A A, a couple of seconds.

96 Q So a couple of seconds elapsed between you seeing the light turn yellow and you entering the intersection; is that right?

A Yeah.

97 Q And just kind of, again, kind of in the reverse order here, going back to the flickering warning light, do you know how many seconds elapsed between when you first saw that warning light flashing and you going under it? Do you know how long that was?

A I think - about four seconds.

99 Q So about four seconds between you first seeing it flashing and when you went underneath that warning sign?

A Yes. It's a very small intersection.

- [42] The defendant explained on cross-examination that she had misunderstood the questions she was being asked in her examination for discovery. She thought that she was being asked about the time from when she passed the AWF sign to when she arrived at the intersection, and that they were actually under the AWF sign when the lights went off and she had caught a glimpse of the flickers. She denied that there were actually four seconds from the time she first saw it flashing and when she went underneath the AWF sign.
- [43] The defendant was initially insistent at trial that it was when she entered the intersection that the light turned yellow, but ultimately allowed that there might have been one second between the time the light turned yellow and the time she entered the intersection.
- [44] The defendant said that she gave statements to multiple police officers at the scene of the Accident. She said the officers took turns speaking to her and asked her similar questions in different ways.
- [45] The defendant was asked about Cst. Ladhar's summary of his interview of her. That summary says that the defendant:

stated that she was driving EB on Highway 10 and was entering the intersection when the light turned yellow. She stated that there was a big truck in making a SB turn on 132nd St which hindered her view and possibly hindered the view of the other driver.

- [46] The defendant disagreed with what is reflected in this statement about a big truck. She was adamant that she could see clearly where she was going and did not need to see over the vehicle that was making a left turn. She also said that it was a big van and not a big truck.

Mark Barabas

- [47] Mark Barabas is the defendant's adult son. He was in the front passenger seat at the time of the Accident. He recalled the weather being overcast, but the roads were not wet, visibility was fine, and traffic was clear.
- [48] Mr. Barabas' evidence was that their vehicle was proceeding westbound on Highway 10. They were just passing under the AWF lights when they went off, and two to three seconds later they went through the intersection which was on a yellow light. He said that when the AWF lights started flashing, the traffic light was still green. He recalled seeing a large Mercedes van in the left-turn lane but nobody else travelling westbound. He said that he estimated they were travelling at about 75 kph.
- [49] On cross-examination, Mr. Barabas was asked whether it could have been five or six seconds between the time they had passed under the AWF sign and the time they went through the intersection. He said that he was fairly certain about the two to three seconds.
- [50] Mr. Barabas did not recall whether he got out of the car himself or if someone helped him. He said that his memory of the time right after the crash is quite fuzzy.

[51] Near the end of Mr. Barabas' cross-examination, the following exchange took place:

Q And would you consider yourself upset at the other driver for their involvement in the Accident?

A Accidents accidents happen, and I don't hold a grudge.

Q So you don't blame them for the accident?

A Well, they she turned on the red light, um, into us, so

Yeah, I don't blame anybody.

[52] Mr. Barabas confirmed that he had brought his own injury claim in respect of the Accident.

Harsimran Battu

[53] Harsimran Battu was called as a witness by the defendant. She was in the front passenger seat of the vehicle driven by her sister, Sukhjot Battu, whose evidence is described above.

[54] Harsimran Battu described the weather conditions as cloudy and dry with good visibility, although she said that it started raining after the Accident.

[55] Her evidence was that as she and her sister approached the intersection the AWF lights were flashing, so they slowed down and came to a stop as the light turned yellow. At that point, the grey car on their left was in the intersection during the yellow, then made the left turn just before the light changed from yellow to red. She said that as the grey car turned, she noticed a red car. She said the red car should have slowed down, but it looked like they were speeding through the intersection. They collided.

[56] Ms. Battu recalled seeing a big semi-truck in the opposite left-turning lane.

[57] Ms. Battu's evidence was that the light was still yellow when the red car went through the intersection. She said that if it had been a red light, she would have said to her sister that it was a red light.

[58] Ms. Battu agreed that she had a telephone conversation with plaintiff's counsel a few days before trial and had told him that it was hard for her to remember the colour of the traffic light. She explained that she had subsequently obtained a copy of her statement and had refreshed her memory from it.

[59] She also agreed on cross-examination that she had been on and off her phone in the moments leading up to the Accident, but said that during the Accident, she was watching the intersection, especially when she noticed there was a car speeding through.

Constable Fateh Ladhar

- [60] Constable Ladhar has been a police officer since late 2016. He was dispatched to deal with the Accident at approximately 1:15 p.m. on the afternoon of January 17, 2018. He was not a witness to the Accident itself, but he did view the aftermath and speak with some of those present. He said that he was the only officer on scene. He could not recall whether the fire department had attended and did not recall any other emergency services being there. He said that he did not speak to any witnesses other than the plaintiff, the defendant, and Mark Barabas.
- [61] Constable Ladhar acknowledged that he did not have any independent memory of the statements he took, although after reviewing his notes, he recalled seeing the defendant's vehicle in the ditch. He agreed that the words he wrote down with respect to each of the witnesses were a summary of a discussion that lasted a few minutes.
- [62] He confirmed that he had checked for CCTV footage and that there were no CCTV cameras at this intersection.
- [63] He also confirmed that, at the conclusion of his investigation, he determined that no violation ticket would be issued.

Positions of the Parties

The Plaintiff

- [64] The plaintiff argued that the defendant should be found 100% responsible for the Accident, submitting that by failing to slow down for the AWF lights, the defendant put herself in an impossible situation and entered the intersection either on a red or a very stale yellow light.
- [65] The plaintiff submits that her evidence and that of Sukhjot Battu are the most reliable reportings of events at the time. The plaintiff argues that the defendant's evidence was uncertain at times and conflicted with her evidence on examination for discovery.
- [66] The plaintiff submits that there are only two potential scenarios that are reasonably supported by the evidence: that the defendant reached the intersection on either a red light or a stale yellow light. The plaintiff submits that both scenarios lead to the defendant being found 100% liable.
- [67] To the extent the light was red, the plaintiff had the presumptive right of way. She was entitled to assume that any straight-through driver would stop. This is particularly so where the plaintiff had not actually seen the defendant approaching before commencing her turn.

[68] The plaintiff submits that even if the defendant entered the intersection on a stale yellow, the defendant should still be 100% liable. On a yellow light, the onus is on the defendant to establish that the stop could not be made in safety. Given the advance warning light and the light itself turning yellow, the defendant could very well have stopped, which is exactly what Sukhjot Battu did in the eastbound through lane.

The Defendant

[69] The defendant argues that the evidence does not establish that she is at fault in any way and, thus, the action should be dismissed. Alternatively, if she is at fault, then the plaintiff is also at fault and should be found to be at a greater level of fault.

[70] The defendant says that based on the conflict between the plaintiff's evidence at trial and the notes of Cst. Ladhar and the ICBC adjuster, both of which made no reference to a red light, the plaintiff should be found to be not credible. The defendant also submits that Sukhjot Battu was "eager to help the plaintiff establish liability," and that her evidence should be doubted. The defendant says that the plaintiff's evidence that her attention was not distracted by the cigarette she was holding should be disbelieved.

[71] The defendant submits that there is no reliable evidence to establish that the defendant was driving at any speed above 75 kph.

[72] The defendant submits that the evidence establishes that the light turned yellow only as she entered the intersection, and that the plaintiff had commenced her left turn on a yellow light as well at a time when her view of oncoming traffic was obstructed, such that the defendant had the right of way, the plaintiff ought to have yielded, and the plaintiff was, in fact, negligent in failing to adequately watch out for oncoming traffic that could constitute an immediate hazard.

[73] Alternatively, if the Court were to conclude that the defendant entered the intersection as the light was turning from yellow to red, the plaintiff is still partially or primarily at fault for the Accident. The Court must consider whether it would have been safe for the defendant to stop their vehicle at the time the light turned red, and s. 174 of the Motor Vehicle Act, RSBC 1996, c. 318, is still applicable where a left-turning plaintiff fails to yield the right of way to a driver who was a hazard because they would not have been able to stop their vehicle in time. While a driver may be entitled to assume that oncoming traffic will stop at a red light, they must also reasonably react to immediate hazards.

Legal Context

Reliability and Credibility

[74] Reliability and credibility are related but distinct concepts. The distinction between them was considered in *R. v. Morrissey* (1995), 22 O.R. (3d) 514 (C.A.) at 526, 1995 CanLII 3498, cited in *United States v. Bennett*, 2014 BCCA 145 at para. 23:

Testimonial evidence can raise veracity and accuracy concerns. The former relate to the witness's sincerity, that is, his or her willingness to speak the truth as the witness believes it to be. The latter concerns relate to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony. Obviously a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The evidence of a credible, that is, honest witness, may, however, still be unreliable. ...

- [75] In considering these matters, the evidence of a witness must be assessed for "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 conditions": *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 357, 1951 CanLII 252 (B.C.C.A.). A frequently cited list of factors in assessing evidence as to both the veracity of a witness and the accuracy of that witness' evidence is found in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, *aff'd* 2012 BCCA 296. A trier of fact may accept none, part, or all of a witness' evidence and may attach different weight to different parts of a witness' evidence: *Gill Tech Framing Ltd. v. Gill*, 2012 BCSC 1913 at para. 28.
- [76] With respect to events leading up to a motor vehicle accident, I note the comments of the Justice Adair in *Vapheas v. Madden*, 2014 BCSC 138 at para. 21:
- [21] In cases of this kind, witnesses (including parties) do their best, in response to questions from counsel, to give detailed evidence about such things as positions and movement of vehicles, the colour of traffic lights, distances and the length of time of events. However, witnesses are attempting to describe events that happened suddenly, and over what is often only a few seconds. Witnesses are not waiting for an accident to happen, ready to capture and recall every relevant detail years later in a trial. There is, therefore, a great deal of room for error and reconstruction, even though a witness is doing his or her best to recall and describe accurately what happened.

Liability

- [77] Justice Jackson provided a helpful summary of the principles applicable in determining liability in cases like the present in *Yang v. Croin*, 2021 BCSC 955 at paras. 4-7:
- [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.
- [78] As noted in this summary, s. 174 deals with the duties of a driver intending to turn left at an intersection. It states:

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.

[79] The obligations of the driver of a vehicle approaching an intersection with a red light are set out in s. 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 the driver is permitted to do so.

[80] Where a driver is approaching an intersection with a yellow light, s. 128(1) provides that:

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,

[81] These statutory rules of the road are supplemented by common-law principles. As noted in *Salaam v. Abramovic*, 2010 BCCA 212 at para. 21:

[21] 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.

[82] As summarized in *Stewart v. Dueck*, 2012 BCSC 1729 at paras. 38-40:

[38] The authorities establish that all motorists have an overarching common law duty to exercise what constitutes, in all 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: *Hmaied v. Wilkinson*, 2010 BCSC 1074 at para. 23.

[39] It is a well-settled proposition that drivers in this province are entitled to assume, within reason, that the other users of the roads in British Columbia will obey the law: *Mills v. Siefred*, 2010 BCCA 404 at para. 26.

- [40] The Court's task is to determine whether each of the parties in an accident met their common law duties of care. The analysis of the standard of care, which is relevant to the particular circumstances, is informed by both the reasonableness of the parties' actions and by the rules of the road; *Salaam v. Abramovic*, 2010 BCCA 212 at para. 21; *Kilian v. Valentin*, 2012 BCSC 1434 at para. 28.
- [83] The interplay between s. 174 and ss. 128(1) and 129(1) has been the subject of a number of judgments over the years. Those judgments are all necessarily fact-specific, and what appear to be comments of general application must always be considered in the context of the facts of the case. In particular, it is important in reviewing each case to keep in mind:
- a) whether the case involved an intersection controlled by a traffic light; and, if so, whether the light was green, yellow, or red when the straight-through driver entered the intersection; and
 - b) whether there was an obstruction that prevented the drivers from seeing each other before it was too late to avoid the collision.
- [84] In *Kokkinis v. Hall* (1996), 19 B.C.L.R. (3d) 273, 1996 CanLII 2404 (C.A.), the plaintiff was turning left from Granville Street onto eastbound King Edward Street in Vancouver, while the defendant was proceeding north on Granville Street in the middle lane. The defendant was found liable on the basis that he had entered the intersection after the traffic light had turned yellow at a time when he could have stopped safely. The plaintiff had been found by the trial judge to be contributorily negligent as a result of her failure to notice the defendant approaching, which was found in the circumstances to have been caused by her diverting her attention momentarily from oncoming traffic to check cross-traffic. Justice Newbury allowed the appeal from the finding of contributory negligence, commenting at para. 10:
- [10] Was this an unreasonable or careless thing to do? I think not, given both the realities of the situation (which of course occurred over only a few seconds) and past decisions of this Court that have imposed on left-turning drivers the duty to be aware not only of oncoming traffic, but also of cross traffic, pedestrians, and whatever else may be present in the intersection. 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. Indeed, as Mr. Justice Esson noted in *Uyeyama*, in a busy city like Vancouver and at a busy intersection like 25th and Granville, an amber is likely the only time one can complete a left turn. Drivers approaching intersections must expect that this will be occurring. Putting a burden on a left-turning driver to wait until he or she sees that all approaching drivers have stopped would, in my view, bring traffic to a standstill. We should not endorse such a result.

- [85] One other appellate authority of note is *Nerval v. Khehra*, 2012 BCCA 436, which involved the apportionment of fault arising from a collision between a left-turning driver and a straight-through driver at an intersection that was not controlled by a traffic light. Justice Harris recognized the significance of this factor as he distinguished some of the judgments to which he was referred, noting at para. 42 that:
- [42] Both Ziani and Henry involved through drivers breaching their obligation to obey traffic signals, in the form of red or amber lights. In my opinion, those cases are factually distinct and do not apply here.
- [86] The Court dismissed the appeal of the left-turning driver, Ms. Nerval, from a finding that she was 60% at fault for the collision. The straight-through driver had been found to have unsafely passed to the right of a stationary left-turning vehicle in her lane of travel, and to have passed through the intersection at an excessive speed, which gave rise to their 40% liability. It appears to have been common ground that neither driver saw the other until the collision because of the other left-turning vehicle.
- [87] Justice Harris referenced the analysis in *Pacheco (Guardian ad litem) v. Robinson* (1993), 75 B.C.L.R. (2d) 273, 1993 CanLII 383 (C.A.), in which a cyclist proceeded straight through an intersection, having entered the intersection on a green light, and was struck by a left-turning vehicle. Justice Harris noted at para. 33 that:
- [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.
- [88] In the present case, the intersection in question had an AWF sign. Such signs are not expressly dealt with in the Motor Vehicle Act provisions I have cited. In *Morgan v. Hauck* (1988), 27 B.C.L.R. (2d) 118, 1988 CanLII 2846 (C.A.), the straight-through driver was found to have speeded up after seeing the flashing lights of an advance warning sign and then reached the intersection as the traffic light facing him was red. The Court upheld the finding of the trial judge that he was, thus, 90% liable. The left-turning driver had been found 10% liable on the basis that he should have seen that the straight-through driver was accelerating

and was not going to stop.

[89] Justice Esson, as he then was, added the following comment at para. 14:

[14] I think it is time, therefore, to emphasize the heavy onus which rests upon drivers approaching signals of this kind to make due allowance for the possibility that there will be a vehicle seeking to make a turn such as the plaintiff was making on this day. Their clear duty is to comply with the warning lights and to not "run the red".

[90] To similar effect are the comments of Justice Butler, as he then was, in *Vukelich v. Vliegenthart*, 2013 BCSC 879 at paras. 39-40:

[39] Ms. Young did not pay proper heed to the circumstances facing her as she approached the intersection. She was not paying sufficient attention to her driving and did not prepare to stop as instructed. As a result, she approached the intersection at or above the speed limit without paying attention to the possibility of a left-turning vehicle. Her failure to obey the AWF, to slow down and prepare to stop at the time of an impending light change was negligent.

[40] I reject Ms. Young's submission that no liability should be found against her given Ms. Vliegenthart's breach of s. 174 of the Act. Such a conclusion would effectively mean that AWFs do not need to be obeyed. I can take judicial notice of the fact that AWFs are now in wide use at busy intersections. They are one of the many traffic control devices which assist in maintaining safe roads and highways. They are a significant tool for controlling traffic at intersections particularly at higher speed limits. When a driver ignores or fails to obey an AWF, her actions are not only in breach of a statutory obligation but also the common law duty to other users of the road.

[91] It is clear from the statute that the colour of the traffic light at the time the straight-through driver entered the intersection is key. If the light is red, as set out in para. 7 of Yang above, the left-turning driver will be entitled to proceed, subject to their duty to react to manifest hazards.

[92] If the light is yellow, then as explained by Justice Watchuk in *Kabir v. Simpson*, 2016 BCSC 1594 at paras. 25-26:

[25] If the light was yellow at the time of the turn, it is in this second step, the analysis of the through driver's actions, where s. 128 of the Act is engaged. As stated by Justice Devlin in *Pirie v. Skantz*, 2015 BCSC 368 at paras. 43-44, *aff'd* 2016 BCCA 70:

[43] I must now turn to consider the Defendant's other statutory obligations arising in this case in order to determine whether the Defendant, as the dominant driver, is nonetheless at fault for contributing to the accident. With respect to the obligations under s. 128(1)(a) of the MVA, the onus of proving that the stop cannot be 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.

- [44] As stated earlier, I find that when the Plaintiff was waiting in the intersection to make her left turn, the traffic light for southbound and northbound traffic was yellow and had likely been yellow for several seconds. I find that the Defendant then entered the intersection on a "stale" yellow, at which point his vehicle and the Plaintiff's vehicle collided. Accordingly, the Defendant's duty was to stop before entering the intersection, unless the stop could not be made in safety.
- [26] In order to assess any negligence on the part of the through driver, it is necessary to determine whether, upon seeing the yellow light, that driver was able to stop safely. If he or she were able to stop and failed to do so, the through driver can be found negligent. Conversely, if he or she was unable to stop safely, and no other factors were at issue, the through driver would not be negligent in failing to stop at the yellow.
- [93] The parties referred to a dozen different trial judgments. In almost all of those judgments, there was no reference to the ability of either driver to see the other being obstructed. Some involved yellow lights, and some involved red lights. I will summarize the judgments briefly.
- a) in *Tejani v. Greenan*, 2001 BCSC 803, the straight-through driver entered the intersection on a red light; however, Justice McEwan concluded that, there being nothing to obstruct their view, the left-turning driver could and should have seen the oncoming driver and delayed the left turn. Liability was shared 50/50;
 - b) in *Ziani v. Thede*, 2011 BCSC 895, the same result obtained in a case where the straight-through driver entered the intersection on a yellow light;
 - c) in *Vukelich*, the court concluded that the light had turned yellow at a point when it was too late for the straight-through driver to stop; however, the driver had failed to notice the AWF and should have slowed down and been in a position to stop when the light turned yellow. The left-turn driver was found to be 75% liable;
 - d) in *Lee v. Tse*, 2013 BCSC 1740, the left-turn driver started their turn very late in the yellow light and completed it while the light was red. The straight-through driver had time to stop for the yellow light, and the court concluded that it was reasonable for the left-turn driver to believe the straight-through driver would stop and, thus, the straight-through driver was 100% liable;
 - e) in *Vapheas*, the straight-through driver entered the intersection on a stale yellow, could have stopped, and was found to be 75% liable;
 - f) in *Pirie v. Skantz*, 2015 BCSC 368, the straight-through driver entered the intersection on a stale yellow light and was found to be 40% liable;
 - g) in *Boyd v. Baldwin*, 2015 BCSC 887, the views of both parties were obstructed, and the straight-through driver was found to have entered the intersection early in a yellow light. The left-turning driver was found to be 100% liable;

- h) in Kabir, the straight-through driver entered the intersection on a late yellow light, but the court found the left-turning driver should have seen the oncoming vehicle. Liability was shared 50/50;
 - i) in Yang, the straight-through driver entered on a red light and was found to be 100% liable; and
 - j) in both *Libera v. Burgoyne*, 2021 BCSC 1028 and *Colonna v. Kienleitner*, 2023 BCSC 1887, the straight-through driver entered on a late yellow light and was found to be 100% liable.
- [94] It appears from these judgments that, where the straight-through driver has entered on a yellow light, there is a continuum such that if the light is freshly yellow, the straight-through driver will be entitled to proceed, and the left-turning driver will be expected to wait, while at some point, when the light is stale or late, the left-turning driver will be entitled to assume that the straight-through driver will stop as required by s. 128(1), subject to the left-turning driver's obligation to avoid manifest hazards that should be apparent to them.

Analysis

- [95] I will deal first with issues of reliability.
- [96] I struggled with the evidence of the defendant. There seemed to be multiple changes between her evidence at trial and what she said at discovery. I had difficulty reconciling her trial evidence that the flashing lights had just commenced as she passed under them with the fact that the Battu vehicle had seen flashing lights that would have started at the same time yet were able to brake and come to a complete stop at the eastbound stop line well in advance of the Accident. By my calculation, if the defendant had been travelling at 70 or 75 kph (or 19.4 to 20.8 metres per second), she would have travelled the 112-metre distance from the AWF sign to the stop line within 5.4 to 5.8 seconds, and would thus have reached the intersection before the Battu vehicle did (given the fact that the AWF lights commenced flashing six seconds before the traffic light turned yellow). I also found the defendant had difficulty dealing with questions that delved into the conflict between the evidence that she had given at various times.
- [97] With respect to the plaintiff's evidence, the lack of any reference to a red light in either Cst. Ladhar's notes or the notes recorded by the ICBC adjuster is of concern. I accept that both sets of notes are very concise summaries of conversations that would have lasted several minutes. I also accept that the plaintiff's evidence at trial describes a process that proceeded in stages, with the plaintiff entering the intersection on a green light, inching forward during the yellow light, and finally beginning to press the gas pedal when the light turned red. Thus, while I am cautious in dealing with the plaintiff's evidence, it is possible to reconcile it with those two written statements.

- [98] In my view, the two independent witnesses, Sukhjot and Harsimran Battu, provided the most reliable evidence. I found each of them spoke directly and neither was challenged with respect to any earlier statements, although they clearly both gave statements within a relatively short time of the Accident. Neither was subject to any influence of interest or any potential desire to reconstruct or to rationalize their own participation in events. Both were observers of the Accident from a short distance away, and not subject to the collision itself.
- [99] There is, of course, a distinction between their respective recollections, in that Sukhjot Battu testified that the light was red before the collision, while Harsimran Battu testified that it was still yellow. In my view, their evidence is reconcilable, based on the fact that neither was steadily watching the traffic light. Rather, each was observing their surroundings, including the plaintiff's vehicle moving forward, while glancing up occasionally at the traffic light. If the light had turned red immediately prior to the Accident, and Sukhjot had been the last to glance up at it, while Harsimran had not looked up for a moment or two prior to that, then the difference in their evidence can be reconciled.
- [100] It is also significant, in my view, that the location of the vehicular damage indicates that the plaintiff was very early in her left turn at the time of contact. Had the plaintiff been fully into her turn, her vehicle would have been struck on the right passenger side. Instead, contact occurred on the left front corners of each vehicle.
- [101] I conclude that the defendant's vehicle arrived at the stop line either immediately prior to or upon the traffic light turning red. To the extent the light was red when the defendant reached the stop line, she was in violation of s. 129(1). However, even if the defendant had crossed the stop line just before the light turned red, it is clear from the signal timing sheet that the light would have been yellow for over four seconds, and it is my view that the defendant should, thus, have been able to stop. This is particularly so given that she had seen the AWF lights flashing. As noted above, the onus is on the defendant to establish that she could not safely stop in advance of the yellow light. The defendant has not done so, and she is at fault for her failure to stop at the stop line.
- [102] I must now consider whether the plaintiff is also at fault. As I read the judgments in which a left-turning driver has been found liable, notwithstanding that the collision occurred on either a red or a very stale yellow light, liability has been based primarily on the assertion that the left-turning driver should have recognized the manifest hazard of the approaching vehicle. In this case, it seems to be common ground that the approaching vehicle was not visible due to the obstruction provided by the large truck or van in the oncoming left-turn lane.

[103] While the defendant has suggested that the plaintiff may have been distracted by the cigarette she was holding in her left hand, it is my view that given that none of the five witnesses I heard from had seen the other vehicle, and all appear to have had their ability to see the other vehicle obstructed by the truck or van, I am unable to conclude that the cigarette in the plaintiff's hand contributed or was a cause of her failure to observe the other vehicle.

[104] I conclude that the point had been reached in the traffic control lighting sequence where it was reasonable for the plaintiff to assume that any further straight-through drivers that might not yet be visible to her at the time she commenced her turn would be expected to come to a stop. It is clear that she had just begun her turn at the time of the collision. In my view, there is no basis to find the plaintiff contributorily negligent.

Conclusion

[105] I conclude that the defendant is 100% liable for the Accident.

[SUBMISSIONS AS TO COSTS]

[106] THE COURT: I do not know that it is appropriate to make any kind of interim order -- you are entitled to your costs in the cause of this trial of liability, but there has to be a determination of the cause.

"Veenstra J."

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