

CANADA / JUDGMENT

Taylor v. Ellis

2025 BCSC 1321

COURT

Supreme Court of British Columbia

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2025 BCSC 1321 Taylor v. Ellis

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Taylor v. Ellis,

2025 BCSC 1321

Date: 20250711

Docket: M123133

Registry: Kelowna

Between:

Kevin James Taylor

Plaintiff

And

Cheryl Elizabeth Ellis

Defendant

Before: The Honourable Justice Loo

Reasons for Judgment

Counsel for the plaintiff:

B.E. Fitzpatrick

Counsel for the defendant:

J.M. Brown

Place and Date of Trial:

Kelowna, B.C.

May 27-28 2025

Place and Date of Judgment:

Kelowna, B.C.

July 11, 2025

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Introduction

- [1] On April 4, 2017, at approximately 6 p.m., the plaintiff was driving north on Dilworth Drive in Kelowna in a 1994 Chevrolet Blazer towards Baron Road. He was returning home after visiting a construction site at which he intended to work the next day. The defendant was driving south on Dilworth Drive in a 2003 Dodge 3500. She was scheduled to teach a dog training class in a grassy area near the corner of Dilworth Drive and Baron Road.
- [2] The intersection of Dilworth Drive had three lanes in each direction. Northbound, these three lanes included a left-hand turn lane west into Orchard Park Mall. Southbound, the three lanes included a left-hand turn lane east onto Baron Road.
- [3] The defendant turned left at the intersection onto Baron Road and the vehicles collided.
- [4] This two-day trial dealt only with the issue of liability.

Framework of analysis

- [5] Many decisions of this Court and the Court of Appeal have considered the legal principles to be applied to a collision between a left-turning vehicle and a vehicle proceeding through an intersection controlled by traffic lights. A more detailed discussion of the legal principles is found below within the assessment of the issues but, broadly speaking, the framework of analysis to be applied to such a collision is as follows:
 - a) As a first step in determining the rights and obligations of the two drivers, it is necessary to determine the colour of the light at the time of the left turn. If the light was green, the through driver had the right of way. If the light was red, the through driver was required to stop prior to entering the intersection: *Kabir v. Simpson*, 2016 BCSC 1594 at para. 19.
 - b) If the light was yellow when the left-turning vehicle started the turn, it is necessary to identify the dominant and the servient driver. The left-turning driver was the servient driver and was required to yield the right of way unless that driver can establish that when he or she commenced his or her turn, it was safe to do so. In order to establish this condition, the left-turning driver must prove that when he or she commenced his or her turn, no other vehicles constituted an immediate hazard: *Kabir* at paras. 20-21.
 - c) The next step in the analysis is to determine whether one or both parties were at fault. The identification of one driver as the dominant driver and the other as the servient driver determines only which driver has the right of way, not whether either driver was negligent. Although the dominant driver has the right of way, he or she is entitled to exercise that right only in a safe manner. The dominant driver's fault may be greater or less than the servient driver's fault: *Kabir* at paras. 22-23.
 - d) If both parties are determined to be at fault for the accident, the final step is to apportion fault between them: *Kabir* at para. 23; *Vukelich v. Vliegthart*, 2013 BCSC 879 at para. 49.

Issues

- [6] Arising from the framework of analysis set out above, the following issues must be determined in this case:
- a) What colour was the traffic light at the time of the left turn?
 - b) Who was the dominant driver (in other words, who had the right of way)?
 - c) Were either or both parties negligent and at fault for causing or contributing to the accident?
- [7] I will address these issues in turn below.

The Court's approach to fact finding

- [8] In this action, the Court is required to decide how the accident occurred based largely on the testimony of the two drivers. There were no other witnesses to the accident, there were no video recordings, and there was no evidence from accident reconstruction experts.
- [9] A friend of the defendant named Tanya Chmilar, who was attending the dog training class, also testified, as did the police constable who attended at the scene. However, neither saw the accident occur. The constable authenticated photos of the accident scene and explained that statements taken from the parties at the scene had been lost, but she had no independent recollection of the facts at issue.
- [10] It is important to emphasize that the accident occurred almost eight years ago. As stated by Justice Devlin in *Pirie v. Skantz*, 2015 BCSC 368, aff'd 2016 BCCA 70:
- [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.
- [11] Despite the passage of time, I have been able to make findings of fact by considering the evidence of the two drivers and Ms. Chmilar, and by determining what likely occurred, given their evidence. As stated by Justice O'Halloran in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 357, 1951 CanLII 252 (B.C.C.A.):

In short, 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 conditions.

Credibility and evidentiary issues

[12] There are a few contested issues of fact and evidence, apart from those regarding the accident itself, to be determined by the Court. I will address those issues and discuss the parties' credibility generally before undertaking the analysis required to assess fault.

Was the plaintiff rushing to her dog training class?

[13] The theory of the plaintiff's case was that the defendant was in a rush to get to the dog training class which was scheduled to begin at 6 p.m., and that in her rush she was impatient and made the left turn hurriedly and negligently.

[14] However, this theory was repeatedly denied by the defendant and Ms. Chmilar, and the plaintiff was unable to establish even that the defendant was late for the class. Neither party was able to prove the exact time of the accident: the evidence was that it occurred at "approximately" 6 p.m. The class site was less than a block from the intersection at which the accident took place. If the accident occurred even three or four minutes before 6 p.m., there would have been no need for the defendant to be in a hurry.

[15] In my view, the plaintiff has not established that the defendant was in a rush to get to her class, such that she would have driven hurriedly or negligently.

Is the defendant's testimony contradicted by the photos of the accident scene?

[16] The plaintiff argues that the evidence of the defendant ought to be tested against the photographs of the accident scene, and in particular the locations at which the vehicles ended up after the accident as depicted in those photos. The photos show that the defendant's vehicle ended up at the northeast corner of the intersection, facing the corner. The plaintiff's vehicle ended up in the northern half of the intersection, approximately in line with the middle lane northbound on Dilworth Drive, slightly facing the right or east side of the street.

[17] The plaintiff argues that had the defendant pulled into the intersection as she claims, and then turned, the impact would have occurred in the south half of the intersection. He argues that since the plaintiff's vehicle came to rest in the northern half of the intersection, the impact must have occurred there. He submits that the Court can infer that the defendant "cut the corner" -- that is, she turned earlier than she was supposed to and was driving diagonally from the end of her left turn lane towards the eastbound lane on Baron Road when the collision occurred.

[18] These submissions assume that the impact occurred where the plaintiff's vehicle came to rest, but I am unable from the resting positions of the vehicles to determine exactly where the impact happened. It is likely, in my view, that the plaintiff's vehicle continued to move forward for several feet after impact. Particularly without expert evidence on this issue, the Court is not prepared to surmise, simply from the photos, how the vehicles came to rest where they did.

[19] Therefore, I am unable to accept the plaintiff's argument that the defendant must have "cut the corner."

Were there dogs in the defendant's vehicle?

[20] The plaintiff was the first to exit his vehicle after the collision, and approached the defendant's vehicle on the driver's side. He spoke to the defendant briefly. The plaintiff testified that when he approached the driver's side of the defendant's vehicle, he reached in and turned off the vehicle's engine and activated its hazard lights.

[21] He testified that he saw dogs inside the car, either on or beside the defendant. He testified that he believed that there were three dogs, and that when he helped the defendant out of her vehicle, she was trying to keep the dogs inside. When asked what kind of dogs they were, he said that they were "medium to small" dogs and that one was fluffy. He said that he thought one was a "poodle or a cross."

[22] The defendant, however, was adamant that she did not have any dogs in the vehicle and that she did not bring dogs to the training class. She testified that when she transported dogs in her vehicle, they were always kept in crates at the back or in the side of the van. Further, she testified that she only raises collies, and observed that collies are hardly "small or medium" sized dogs.

[23] The defendant's evidence that she did not bring dogs to the training class and that she did not have any dogs with her on the day of the accident was corroborated by Ms. Chmilar, who was attending the defendant's class with her dog. Ms. Chmilar testified that she and her husband drove the defendant home after the class, from a parking lot on the other side of the grassy area in which the class was held. It is clear that Ms. Chmilar was in a position to know whether the defendant had dogs with her that day.

[24] The plaintiff attacked Ms. Chmilar's credibility on the basis that the defendant admitted that Ms. Chmilar was her "friend," while Ms. Chmilar sought to minimize their relationship. But regardless of what word is used to characterize the relationship between the defendant and Ms. Chmilar, the elements of that relationship were reasonably clear. The defendant was a dog breeder from whom Ms. Chmilar obtained a collie and the teacher of the dog handling class to which Ms. Chmilar took her dog. The defendant and her husband attended social gatherings from time to time, with others, at Ms. Chmilar's home.

[25] In my view, these connections are not sufficient to cause the Court to doubt Ms. Chmilar's evidence. It has not been shown that Ms. Chmilar has any personal interest in having the defendant succeed in this lawsuit. Ms. Chmilar gave her evidence in a clear, forthright manner and testified that she never spoke with the defendant about the events of April 4, 2017, after that date.

[26] Given the detailed and forthright evidence on this issue given by both the defendant and Ms. Chmilar, I find that there were no dogs in the defendant's vehicle at the time of the accident.

Alleged inculpatory statements

- [27] Both parties allege that the other made inculpatory statements in the aftermath of the collision.
- [28] The plaintiff alleges that the attending police constable told him that the defendant had admitted fault. However, the plaintiff's evidence in this regard is double hearsay and, in any event, an admission regarding "fault" is of limited assistance to the Court. The issue of fault is a matter for the Court, not the parties, to assess.
- [29] The defendant alleges that the plaintiff apologized for hitting her van, and that he told her that he "swerved" around the vehicles in the curb land and "gunned" his vehicle or accelerated through the yellow light. However, this evidence has very little evidentiary value.
- [30] First, assuming the defendant's evidence regarding the apology is accepted, an apology that the plaintiff hit the defendant's van is of little assistance. The contact between the two vehicles occurred at the front right bumper of the plaintiff's vehicle and behind the front wheel on the driver's side of the defendant's vehicle, and so it is clear that the plaintiff's vehicle hit the defendant's vehicle; acknowledging that fact is not an admission of fault or liability.
- [31] Second, the proposition that the plaintiff told the defendant that he "swerved" around the vehicles in the curb lane and "gunned" his vehicle or accelerated through a yellow light was not put to the plaintiff on cross-examination; therefore, under the rule in *Browne v. Dunn* (1893), 6 R. 67 (U.K.H.L.), 1893 CanLII 65, I can give it little or no weight.
- [32] It is undoubtedly correct, as argued by the plaintiff, that *Browne* does not require "every scrap of evidence on which a party desires to contradict the witness for the opposite party be put to that witness in cross-examination": see *R. v. Quansah*, 2015 ONCA 237 at para. 81. However, these factual admissions alleged by the defendant would form a significant part of the defendant's case if they could be relied upon. In my view, it would be unfair to give any weight to these alleged admissions, as the plaintiff has not had an opportunity to specifically deny making the statements alleged, or to explain what he said.

Credibility of the parties generally

- [33] To the extent that the relative credibility of the parties is important, I have concluded that I prefer the evidence of the defendant over that of the plaintiff.

- [34] The defendant testified in a very straightforward manner and her evidence was not significantly shaken on cross-examination. Where possible, her evidence was corroborated by Ms. Chmilar, whose evidence I also found to be generally reliable. The plaintiff's attempts to impeach the defendant's credibility and reliability using her discovery evidence concerned fairly tangential issues, such as precisely where she was when she spoke to Ms. Chmilar after the accident.
- [35] On the other hand, the plaintiff's testimony regarding dogs in the defendant's vehicle was troubling. In my view, whether there were dogs in the vehicle is not a matter that ought to be difficult to remember.
- [36] Second, the Court has concerns about the plaintiff's testimony because of evidence that he gave regarding the vehicles in the curb lane, which he passed when entering the intersection. Although it appeared extremely unlikely or even impossible for the curb-lane vehicles to have continued straight through the intersection after the accident, he was insistent in cross-examination that they could have done so.
- [37] A third issue that, in my view, gives rise to concerns about the reliability of the plaintiff's evidence involves his testimony regarding an event that allegedly occurred just before the plaintiff left the accident scene. The plaintiff testified while he was still at the scene, a red vehicle pulled up on Baron Road to pick up the defendant. He testified that the red vehicle was parked in the curb lane on Baron Road 30 to 50 metres from the intersection, and that he walked over and asked the defendant, "are you okay?" The plaintiff testified that the defendant said "I think so," and that he replied "I'm sorry that this happened for both of us."
- [38] By contrast, the defendant testified that she stayed for the dog training class that she was supposed to teach, although Ms. Chmilar taught the class, and that Ms. Chmilar or her husband drove her home afterwards. Her testimony in this regard was corroborated by Ms. Chmilar who testified that neither she nor her husband owned a red vehicle, and that, in any event, they did not pick up the defendant on Baron Road. Rather, they left together from a parking lot on the other side of the grassy area on which the class was held, after the class was finished.
- [39] For reasons similar to those described above regarding the plaintiff's claim that there were dogs in the defendant's vehicle, I reject the evidence of the plaintiff and I accept the evidence of the defendant and Ms. Chmilar on this issue.
- [40] The fourth issue which gives rise to concerns about the reliability of the plaintiff's evidence does not involve specific evidence from the plaintiff that the Court has declined to accept. Rather, at several points in his testimony, the plaintiff complained of memory problems, which he said arose at least in part because of the accident. He candidly conceded that his memory was getting "worse and worse."

- [41] As a result of all of these issues, I have serious concerns about the reliability of the plaintiff's evidence. As stated, where the evidence of the parties is directly conflicting, I prefer the defendant's evidence over that of the plaintiff.

Assessment of liability

- [42] In the section below, I will set out the evidence of both parties regarding the moments leading up to the accident, and then I will address the three issues relating to the assessment of fault set out above.

The events immediately prior to the accident

- [43] The next intersection south of Baron Road on Dilworth Drive is at Springfield Road. The plaintiff testified that he turned right onto Dilworth Drive from Springfield Road into the curb lane. His recollection was that, at the time, there were one or two vehicles in front of him in the curb lane. When he was in the curb lane, there were no vehicles in the middle lane. He testified that, in the first half of the block, he changed lanes to the middle lane.
- [44] The defendant testified that she was driving south on Dilworth Drive from Highway 97, which is the next intersection on Dilworth Drive to the north. As she approached the intersection of Dilworth Drive and Baron Road, she saw that the light was green. She testified that she saw vehicles in the curb-side lane heading north, but there were no vehicles in the middle lane "all the way to Springfield" and no vehicles heading north in the left-hand turn lane into the Orchard Park Mall. She entered the intersection on the green light and stopped, preparing to turn.
- [45] Both parties testified that they noticed a disturbance or motion in the curb-side northbound lane on Dilworth Drive as they were approaching the intersection.
- [46] The plaintiff testified that, before the intersection, a vehicle to the right of the plaintiff's vehicle moved over towards the plaintiff's vehicle because there was a cyclist on a three-wheeled bike in the bike lane nearest to the curb, and the vehicle in the curb lane had to move over slightly into the middle lane to pass the cyclist. The plaintiff testified that the vehicle to the right had passed the cyclist by the time that the plaintiff and the other vehicle reached the intersection.
- [47] The defendant testified that as she was making her turn, she noticed a motion in the curb lane at the same time as she noticed a motion and a sound to her right. These motions and the sound caused her to stop a second time, and the impact occurred almost immediately thereafter. The motion and the sound to her right turned out to be from the plaintiff's vehicle. I infer that the motion in the curb lane was related to the cyclist.

What colour was the traffic light at the time of the left turn?

- [48] In Kabir, the Court explained the significance of the colour of the traffic light at the time of the left turn as follows:
- [19] The case law discussing left-turning vehicles engages s. 174 of the Act and the obligations of drivers depending on the colour of the light at the time of the left turn: s. 127 for a green light; s. 128 for a yellow light, and s. 129 for a red light. As stated in *Miller v. Dent*, 2014 BCCA 234 at para. 16, the first stage of the liability analysis should be a determination of the colour of the light. If the light is green, the through driver has the right of way. Conversely, if the light is red, the through driver must stop prior to entering the intersection.
- [20] If the light is yellow when the left-turning vehicle starts the turn, it is necessary to first assess who the dominant driver was, relying on the principles in *Nerval v. Khehra*, 2012 BCCA 436, and *Pacheco (Guardian ad litem) v. Robinson* (1993) 75 B.C.L.R. (2d) 273, 22 B.C.A.C. 185 (C.A.). Harris J.A. in *Nerval* states at paras. 33-35:
- [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.
- [49] The defendant testified that as she approached the intersection, she saw that the light was green and there was no one in the left-turn lane heading south. She entered the intersection on the green light and stopped. When she noticed that the light was yellow, she proceeded to turn.
- [50] The plaintiff testified that as he approached the intersection, he saw that the light was green. When asked where he was when he saw that the light was green, he referred to a photo which was taken approximately one or one and a half vehicle lengths before the stop line for the intersection. He said that he saw the green light "a little further back than the photo." He gave no evidence regarding the colour of the light when he entered the intersection.
- [51] Although it was suggested to the defendant on cross-examination and denied by her that the light was green when she started her turn, the evidence on this point is not conflicting. The defendant's evidence is that the light was yellow when she started her turn, and the plaintiff did not provide any evidence that directly contradicts the defendant's evidence. I find that the light was yellow when the defendant started her turn.

Who was the dominant driver (in other words, who had the right of way?)

- [52] Since the light was yellow when the defendant's left-turning vehicle started its turn, it is necessary to identify the dominant driver and the servient driver, as set out in para. 20 of *Kabir*, above.
- [53] Section 174 of the Motor Vehicle Act, R.S.B.C. 1996, c. 318 is also of relevance here:

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.

[54] As is apparent from s. 174 and the passage from *Nerval v. Khehra*, 2012 BCCA 436 at para. 33, quoted above in *Kabir*, the left turning driver must yield the right of way to oncoming traffic unless that traffic is not an immediate hazard. The question, therefore, is whether the plaintiff's vehicle was an immediate hazard when the defendant began her turn.

[55] The Court in *Kabir* held:

[21] To determine whether the through driver is an immediate hazard, it is necessary to assess what risk the through driver poses if no intervening action is taken. Justice Fitch states in *Boyd v. Baldwin*, 2015 BCSC 887 at para. 65:

[65] The classic statement of law as to when an oncoming vehicle constitutes an "immediate hazard" is found in *Raie v. Thorpe* (1963), 43 W.W.R. 405 (B.C.C.A.) at 410, where Tysoe J.A. held that:

...if an approaching car is so close to the intersection when a driver attempts to make a left turn that a collision threatens unless there be some violent or sudden avoiding action on the part of the driver of the approaching car, the approaching car is an "immediate hazard" within the meaning of sec. 164 [now s. 174].

[56] The burden lies on the defendant to establish that when she started to turn left, it was safe to do so. In *Nerval*, the Court held:

[33] 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.

[]

- [35] The effect of s. 174 is to cast the burden of proving the absence of an immediate hazard at the moment the left turn begins onto the left turning driver. This result flows inevitably from the wording of the section itself, given the nature of the absolute obligation the section creates. If a left turning driver, in the face of this statutory obligation, asserts that he or she started to turn left when it was safe to do so, then the burden of proving that fact rests with them.
- [57] The defendant testified that as she approached the intersection, she saw vehicles in the curb-side lane heading north, but no vehicles in the middle lane and no vehicles heading north in the left-hand turn lane into the mall. As she approached the intersection, the light was green. She testified that she stopped in the intersection. She testified that when she noticed that the light had turned yellow, she could not see any vehicles in the northbound middle lane or the left turn lane into the mall, and the curb-side vehicles had stopped, and so she proceeded to turn.
- [58] As stated in *Kabir*, an approaching car is an "immediate hazard" if it is "so close to the intersection when a driver attempts to make a left turn that a collision threatens unless there be some violent or sudden avoiding action on the part of the driver of the approaching car": para. 21.
- [59] I accept, based on my assessment of the defendant's credibility generally and of the careful and clear way in which she described the steps she took to turn left, that when she saw the light had turned yellow and started to make her turn, there were no vehicles in the northbound middle lane.
- [60] Despite this finding, however, the very fact of the collision indicates that it was not clearly safe to turn when she did. I find that when the light turned yellow and the defendant looked into the middle lane, the plaintiff was just about to change lanes into the middle lane. Keeping in mind that it is the defendant's burden to prove the absence of an immediate hazard at the moment she began her turn, and that when she started her turn it was clearly safe to do so, I find that the defendant has not met that burden.
- [61] On this basis, I conclude that the plaintiff was the dominant driver and the defendant was the servient driver.

Were either or both parties negligent and at fault for causing or contributing to the accident?

- [62] Notwithstanding the framework of analysis described above, the Court's ultimate task is to determine whether either party, or both, was negligent. In *Salaam v. Abramovic*, 2010 BCCA 212, the Court of Appeal held:
- [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.

[63] In *Stewart v. Dueck*, 2012 BCSC 1729, this Court held:

[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.

The negligence and fault of the plaintiff

[64] It is clear on the authorities that simply because one party -- in this case, the plaintiff -- has been identified as the dominant driver, the Court is not precluded from finding him at fault for the accident. In *Kabir*, Justice Watchuk held:

[22] However, even if the through driver is found to be the dominant driver, the dominant driver can still be found negligent. In *Nerval* at paras. 37-38, Harris J.A. states:

[37] The second aspect of the burden relates to proving that despite being the dominant driver, Ms. Khehra nonetheless was negligent and at fault for causing or contributing to the accident. Here, although Ms. Khehra had the right of way, she could exercise that right only in a safe manner. The trial judge correctly relied on the statement of principle from para. 18 of *Pacheco*, quoted above, in assessing the evidence and reaching his conclusions.

[38] Whether a through driver is dominant turns on whether the driver's vehicle is an immediate hazard at the material time, not why it is an immediate hazard. Dominance identifies who must yield the right of way. One consequence of this analysis is that negligence on the part of a through driver does not disqualify that driver as the dominant driver. The through driver remains dominant, even though their conduct may be negligent. Indeed, the through driver's fault may be greater than the servient driver's fault. In other words, a through driver may be an immediate hazard even though that driver is speeding and given her speed would have to take sudden action to avoid the threat of a collision if the left turning driver did not yield the right of way. The correct analysis is to recognize that the through driver is breaching his or her common law and perhaps statutory obligations and to address the issue as one of apportioning fault, not to reclassify the through driver as servient based on the degree to which the through driver is in breach of her obligations.

[23] In other words, negligence on the part of the dominant driver does not change the finding that he or she is the dominant driver. Instead, it goes to the apportionment of fault. This apportionment of fault on the dominant driver can be more than that of the servient driver in certain circumstances. Justice Fleming in *Lee v. Tse*, 2013 BCSC 1740, noted:

[55] The weight of the authorities dealing with left turning drivers who commence their turn on a stale yellow or red light is to find the straight through driver entirely at fault.

- [24] In contrast, in *Boyd*, relied on by the defendant in this case, the left-turning driver was found to be 100% liable after turning on an early yellow with an immediate but unobserved hazard.
- [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.
- [Emphasis added.]
- [65] As discussed above, the plaintiff testified that he saw that the light was green "a little further back" than one or one and a half vehicle lengths before the stop line for the intersection. On the basis of this testimony, I find that he saw that the light was green at least two or three vehicle lengths, and likely more, before the intersection.
- [66] The plaintiff's evidence was that he saw that the light was green as he approached the intersection, after changing lanes. However, the evidence of the plaintiff in this regard cannot be reconciled with that of the defendant. The defendant testified that she did not start her turn until the light was yellow and that there was no vehicle in the middle lane when she commenced her turn. If I accept her evidence in this regard, the light could not have been green after the plaintiff changed lanes into the middle lane.

- [67] For the reasons set out above in the credibility section of these reasons, I prefer the evidence of the defendant over that of the plaintiff. In order to reconcile the plaintiff's narrative with that of the defendant, I find that the plaintiff must have seen that the light was green before he moved into the middle lane, and that he must have moved into the middle lane not in the "first half of the block" as he testified, but rather two or three vehicle lengths before the intersection.
- [68] I find that when the vehicles in the curb lane slowed down, either to turn right or because of the cyclist in the bike lane, the plaintiff changed lanes into the middle lane. The plaintiff admitted that he was "maybe accelerating" at close to 60 km/h while travelling in the middle lane up to the intersection. The speed limit on Dilworth Drive was 50 km/h.
- [69] It is important to the Court's assessment of the plaintiff's liability that after testifying about seeing the light being green before the intersection, the plaintiff did not testify further about the colour of the light. He did not testify that he saw it change to yellow, and he did not testify about its colour when he entered the intersection.
- [70] Rather, the plaintiff testified that as he was driving through the intersection, the next thing that he saw was that the defendant's white van had pulled out in front of him. He said, "I didn't expect anything. I did not notice anything until the impact. It was a very hard impact. I stood on my brakes but it was too late."
- [71] The upshot is that the plaintiff saw the green light when he was in the curb lane, at least two or three vehicle lengths before the stop line at the intersection. He decided to change lanes and to accelerate towards the intersection, but he did not notice the colour of the light again, and he did not notice the defendant's vehicle until the point of impact.
- [72] I find, on the basis of the defendant's evidence, that the light turned yellow before the plaintiff changed lanes, and therefore, well before the plaintiff entered the intersection.
- [73] The points of impact were at the left front bumper of the plaintiff's vehicle and behind the front wheel on the right side of the defendant's vehicle, indicating that the defendant had progressed substantially into her turn before her vehicle was hit. Accordingly, I find that the plaintiff entered the intersection well after the defendant started her turn, and that the plaintiff ought to have seen the defendant's vehicle as he entered the intersection.
- [74] In my view, the plaintiff did not see the colour of the light or the defendant's vehicle because he was not paying attention to the road in front of him. His inattention can be at least partly explained, but not justified, by the fact that the vehicle in the curb lane had moved into his lane temporarily because of the cyclist in the bike lane.
- [75] As stated in Pirie, the onus of proving that the through driver could not have stopped safely is on the driver facing the yellow light. The plaintiff testified that he could have stopped in time if he had applied his brakes when he started passing the vehicle to his right. As stated above, I find that the light had changed before the plaintiff started passing the vehicle to his right, and therefore, the import of his evidence is that he could have stopped safely if he had

noticed that the light had changed. I find that he has not discharged the onus imposed by Pirie.

- [76] On the basis of the foregoing, I conclude that the plaintiff was negligent. Similar to the Court's finding in *Colonna v. Kienleitner*, 2023 BCSC 1887 at para. 103, I find that the plaintiff failed to appropriately assess and react to the amber light even though he had the opportunity, and the legal obligation to do so.

The negligence and fault of the defendant

- [77] As discussed above, the defendant has not proven the absence of an immediate hazard at the moment she began her turn, and she has not proven that when she started her turn it was clearly safe to do so. As a result, I have found the plaintiff to be the dominant driver and the defendant to be the servient driver.
- [78] However, as set out in *Kabir*, the fact that the Court has identified the dominant driver does not indicate who was negligent. As stated in *Nerval* at para. 38, "[w]hether a through driver is dominant turns on whether the driver's vehicle is an immediate hazard at the material time, not why it is an immediate hazard."
- [79] As stated in *Kabir*, the apportionment of fault to the dominant driver can be more than that of the servient driver in certain circumstances. Indeed, as stated by Justice Fleming in *Lee v. Tse*, 2013 BCSC 1740 at para. 55, the "weight of the authorities dealing with left turning drivers who commence their turn on a stale yellow or red light is to find the straight through driver entirely at fault."
- [80] In this case, as stated in *Salaam and Stewart*, this Court is required to consider the reasonableness of the actions of the parties and whether they have exercised due care. I have concluded above that the plaintiff did not exercise due care.
- [81] In my view, the defendant took the steps that any reasonable driver would have taken in the circumstances. She stopped in the intersection until the light turned yellow. She looked into the oncoming lanes and saw that the vehicles in the curb lane had stopped and that there were no vehicles in the northbound middle lane, and so she commenced her turn.
- [82] As indicated above, when the light turned yellow and the defendant looked into the middle lane before turning, the plaintiff was just about to change lanes into the middle lane.
- [83] In my view, it would not be reasonable to expect the defendant to anticipate that a vehicle in the curbside lane would change lanes and accelerate into the intersection before she completed her turn. Further, as discussed above, the plaintiff entered the intersection well after the defendant started her turn, indicating that the defendant could have not reasonably have taken any steps after starting her turn to avoid or mitigate the collision.

[84] The plaintiff bears the onus of proving that the defendant was negligent: Stewart at para 66. In my view, he has failed to discharge this burden of proof, and I am unable to find on a balance of probabilities that the accident was attributable to any want of care on the defendant's part.

Conclusion and costs

[85] For all of these reasons, I have concluded that the plaintiff was 100% at fault for the accident, and his claim is dismissed.

[86] Unless there are settlement offers or other considerations relevant to costs for which I am not aware, costs shall be payable by the plaintiff to the defendant at scale B.

[87] If there are settlement offers or other considerations relevant to costs to be brought to my attention, the parties have leave to contact the registry to arrange for brief written submissions regarding costs to be made.

"The Honourable Justice Loo"

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