

CANADA / JUDGMENT

## Vandendorpel v. Evoy

2015 BCSC 176

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Supreme Court of British Columbia

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2015 BCSC 176 Vandendorpel v. Evoy

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Vandendorpel v. Evoy,

2015 BCSC 176

Date: 20150210

Docket: 12-3074

Registry: Victoria

Between:

Michael Paul Vandendorpel

Plaintiff

And:

Beverly Camillis Evoy and Sheila Louise Evoy

Defendants

Before: The Honourable Mr. Justice G.R.J. Gaul

Reasons for Judgment

Counsel for the Plaintiff:

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Place and Date of Trial:

Victoria, B.C.

May 26 - 30, June 2 - 5, 2014

Place and Date of Judgment:

Victoria, B.C.

February 10, 2015

## Introduction

- [1] On the morning of Saturday, 9 October 2010, the plaintiff Michael Vandendorpel was walking to his place of work in Colwood, B.C. While he was in a pedestrian controlled crosswalk, Mr. Vandendorpel was struck by a vehicle driven by the defendant, Mr. Beverly Evoy.
- [2] In this action for damages, Mr. Vandendorpel says the accident and his resulting injuries were caused by Mr. Evoy's negligent manner of driving. Mr. Evoy denies any negligence on his part and asserts that Mr. Vandendorpel is solely responsible for the accident.

## Issues

- [3] The first issue for me to address is liability. If Mr. Evoy bears any responsibility for the accident, then I will need to consider the nature and quantum of damages Mr. Vandendorpel suffered as a result of the accident. If I conclude Mr. Evoy is not liable for the accident, then there is no need for me to address the question of Mr. Vandendorpel's damages: *Russell v. Wang*, 2000 BCSC 534.

## Summary of the Evidence

- [4] The principal evidence relating to what occurred at and around the time of the accident is the testimony of Mr. Vandendorpel and Mr. Evoy. Supplementing that evidence is the testimony of Constable Brian Lucas, an RCMP officer who attended at the accident scene shortly after the collision, and the testimony of Ms. Helen Lockhart, a City of Colwood employee who explained the sequencing of the relevant traffic control signals and pedestrian control signals. There is also the expert opinion evidence of Mr. Gerald Sdoutz of Forensic Dynamics Inc. and Mr. Kurt Ising of Mea Forensic, as well as documentary evidence, including an Agreed Statement of Facts.

## The Accident Scene

- [5] The accident occurred at the "T" intersection created by the termination of Mount View Avenue at Sooke Road (the "Intersection"). Although Sooke Road at this location is oriented generally southwest-northeast, the parties and witnesses at trial referred to it as being oriented north-south and in order to maintain consistency, I will adopt the same approach.
- [6] Sooke Road has five lanes of travel at the Intersection:
- Two northbound lanes ("Lane One" being the curb lane and "Lane Two" being the center lane);
  - A third northbound lane for traffic turning west onto Mount View Avenue ("Lane Three"); and
  - Two southbound lanes ("Lane Four" being the centre lane and "Lane Five" being the curb lane).
- [7] There is a double yellow line that divides the southbound and northbound traffic on Sooke Road (the "Centre Line"). North of the Intersection, the Centre Line separates Lane Two from Lane Four. Immediately south of the Intersection, the Centre Line divides Lane Three and Lane Four.
- [8] The Intersection has three marked crosswalks: one that traverses Mount View Avenue and two that traverse Sooke Road (one to the north of the Intersection and one to the south of the Intersection). Only the two crosswalks that traverse Sooke Road have pedestrian traffic control signals.
- [9] The distance from the eastern sidewalk of Sooke Road to the Centre Line is approximately 10.9 metres. The width of Lane Four is approximately 3.1 metres and the width of Lane Five is approximately 4 metres, meaning the distance from the Centre Line to the western sidewalk of Sooke Road is approximately 7.1 metres. The total width of Sooke Road is approximately 18 metres.
- [10] The distance between the northern stop line for southbound traffic to the southern crosswalk where Mr. Vandendorpel was struck is approximately 25.4 metres.

## The Traffic Control Signals and Pedestrian Traffic Control Signals

- [11] The traffic control signals at the Intersection, as well as the pedestrian traffic control signals for the southern crosswalk, were operational at the time of the accident. The traffic control signals for northbound and southbound traffic on Sooke Road approaching the Intersection normally flash green. The pedestrian traffic control signals normally display the outline of a raised hand prohibiting pedestrians from crossing Sooke Road.
- [12] According to the documentary evidence at trial and the evidence of Ms. Lockhart that was not inadmissible hearsay, between 6:00 a.m. and 9:00 a.m. seven days per week the signals at the Intersection operate on a 90-second cycle. That is, only once every 90 seconds can the pedestrian control device be activated to change the traffic control signals and pedestrian traffic control signals and allow pedestrians to cross Sooke Road. If the traffic control signals

on Sooke Road have been flashing green uninterrupted for at least 90 seconds, then upon depressing the pedestrian control device, the following occurs:

1. The flashing green traffic control signals change to a solid green light for 5 seconds;
  2. The solid green light then changes to a solid yellow light for 3.5 seconds;
  3. The yellow light then changes to a solid red light, which remains lit for 29 seconds;
  4. Two seconds after the yellow light changes to a solid red, the pedestrian traffic control signal changes from an outline of a raised hand to an outline of a person walking and remains that way for 7 seconds;
  5. The pedestrian traffic control signal then changes back to the outline of a raised hand, which flashes for 17 seconds. The raised hand then ceases flashing;
  6. Three seconds after the pedestrian traffic control signal ceases flashing and returns to the solid outline of a raised hand, the traffic control signals return to flashing green for vehicular traffic on Sooke Road.
- [13] Someone who depresses the pedestrian control device has to wait at least 10.5 seconds before the pedestrian traffic control signal changes to permit them to cross Sooke Road.

## The Plaintiff

- [14] Mr. Vandendorpel is 31 years old. He graduated from high school in St. Catherine's, Ontario in 2001. In late 2001 he relocated to Victoria, B.C. In 2006, he completed a diploma in New Media Design from the Computer Master Institute of Technology in Victoria, B.C. In January 2014, he returned to school and began studying computer science at Camosun College. His goal is to transfer to the University of Victoria and eventually obtain a degree in computer science.
- [15] Mr. Vandendorpel is six feet tall and weighs approximately 280 pounds. For many years he has consumed about  $\frac{3}{4}$  of a pack of cigarettes a day. In his examination-in-chief he described himself as "a bit of a hermit", in that he only has a small circle of friends. He also explained that his favourite hobby is playing video games. Before the accident, Mr. Vandendorpel's physical fitness activities were quite limited. Every couple of weeks he would go for a walk of between  $\frac{1}{2}$  hour and 3 hours with his girlfriend and he also occasionally participated in geocaching, which is a type of outdoor treasure hunting using Global Positioning System devices. On cross-examination Mr. Vandendorpel agreed that prior to the accident he avoided running as he found it too difficult.
- [16] After arriving in Victoria, Mr. Vandendorpel worked at various jobs, including at a Subway restaurant, a Chevron service station and The Home Depot. Although the Agreed Statement of Facts indicates that on 8 September 2010 Mr. Vandendorpel began working as an Assistant Manager at the Shell service station located at the northwest corner of the Intersection, in his testimony before me he said he started on 10 August 2010 and was being trained as an

Assistant Manager. In any event, his hope was to become a manager of another service station in the not too distant future. Mr. Vandendorpel was pleased with his new employment and wished to make a good impression on his employer. This included attempting to regularly arrive 5 or 10 minutes early for work. Mr. Vandendorpel often walked to work and it normally took him around 30 minutes to do so.

- [17] Mr. Vandendorpel's work shift on 9 October 2010 began at 7:00 a.m. Running late that morning, he left his home at approximately 6:25 a.m. Although he testified that he did not feel he was rushing to work, he agreed on cross-examination that he had picked up his pace and was perspiring at 6:52 a.m., the approximate time he reached the eastern end of the Intersection's southern pedestrian crosswalk on Sooke Road.
- [18] Mr. Vandendorpel was completely dressed in dark clothing, including a dark hooded pullover that was zipped up. None of his clothing had any reflective qualities. He was also wearing headphones and listening to music. Given the hour of the day and the time of the year, it was still dark outside. The roadways were also wet as it had rained overnight.
- [19] In his direct examination, Mr. Vandendorpel indicated that he came to a complete stop at the eastern end of the crosswalk. He then depressed the pedestrian control device and "waited a few seconds" as he scanned for traffic on his left and right. Seeing no vehicles he decided to proceed into the crosswalk and across Sooke Road. On cross-examination, Mr. Vandendorpel acknowledged that he could not accurately estimate how long he waited after activating the pedestrian control device before he began his walk across Sooke Road, although he maintained it was "several seconds". He also acknowledged that in a prior statement, he had said he waited from between 5 to 10 seconds and perhaps 15 seconds.
- [20] Mr. Vandendorpel testified that prior to entering the crosswalk he saw no vehicles approaching from any direction. He confirmed on cross-examination that standing at the eastern border of the crosswalk, he could see approximately 100 metres north up Sooke Road.
- [21] Mr. Vandendorpel acknowledged that against the raised hand on the pedestrian traffic control signal facing him, he began walking across Sooke Road towards its western sidewalk. He further testified that after entering Lane Three he noticed that the traffic control signal to his right had changed to yellow for northbound traffic. Based on this evidence along with the evidence about the sequencing of the Intersection's traffic control signals, Mr. Vandendorpel must have depressed the pedestrian control device between 5 and 8.5 seconds prior to noticing the yellow traffic light. Moreover, at the point when he observed the traffic control signal change, the pedestrian traffic control signal in front of him must still have displayed the outline of a raised hand.
- [22] According to Mr. Vandendorpel, when he reached the boundary between Lanes Three and Four, near the Centre Line, he became aware of an approaching southbound vehicle in Lane Five. As he described it, he then put his head down and sprinted towards the western sidewalk of Sooke Road. Before reaching the sidewalk Mr. Vandendorpel's right foot was

struck by the front passenger side of Mr. Evoy's vehicle, causing him to spin and fall onto the roadway. Mr. Vandendorpel was not certain where in the crosswalk he was when he was struck. All he could say was that it was after he had entered one of the southbound lanes, most likely Lane Five. Relying upon Mr. Vandendorpel's evidence and the accepted measurements of the roadway, it would appear that he had travelled an additional 3 to 7 metres across the road after he noticed the vehicle approaching towards him.

## The Defendant

- [23] Mr. Evoy has worked as a paramedic with the BC Ambulance Service for approximately 25 years. At around 6:45 a.m. on 9 October 2010, he was travelling southbound on Sooke Road in a 2003 Chevrolet Malibu that he and his wife (the second named defendant) owned. He had just finished a 12 hour work shift.
- [24] On direct examination, Mr. Evoy testified that he was driving in Lane Four at a speed of between 50 to 55 kilometres per hour. The headlights of his vehicle were operational and turned on. On cross-examination, he remained firm and convincing that his speed was no more than 55 kilometers an hour. He was also steadfast in his evidence that he never changed lanes and was in Lane Four at all material times.
- [25] Mr. Evoy testified that as he approached the Intersection he saw the traffic control signal change from a flashing green light to a solid green light. This prompted him to think that someone was on one of the sidewalks and had depressed the pedestrian control device. Mr. Evoy further explained that his vehicle entered the Intersection as the traffic control signal for southbound vehicles turned to yellow. As he proceeded through the Intersection, still in Lane Four, he scanned the horizon from left to right. He only saw Mr. Vandendorpel to the right side of his vehicle a fraction of a second before the accident. According to Mr. Evoy he applied his vehicle's brakes and attempted to avoid striking Mr. Vandendorpel, but it was too late to avoid a collision. He also testified that after the collision Mr. Vandendorpel was still on the roadway and had not yet made it to the sidewalk.

## Weather / Road Conditions

- [26] Mr. Vandendorpel and Mr. Evoy agree that the roads were wet at the time of the collision.
- [27] Cst. Lucas testified that at 6:54 a.m. he was dispatched to an accident at the Intersection. He arrived at the scene shortly thereafter. According to Cst. Lucas, the weather conditions were cloudy and the ground was very wet. He also noticed that quite a bit of artificial glare was created by the headlights of his police vehicle reflecting off of the wet pavement.

## Lighting

- [28] Given the hour of the day when the collision occurred, there was no natural lighting at the Intersection. Mr. Vandendorpel and Mr. Evoy agree that it was dark outside.

- [29] According to Mr. Vandendorpel, the Intersection was reasonably well lit with an operating street light at the east end of the northern crosswalk as well as the one at the west end of the southern crosswalk. He also testified that there was light emanating from the service station on the northwest corner of the Intersection.
- [30] Mr. Evoy testified that the Intersection was not well lit and that there was no artificial light to the right or west side of the Intersection. Although he agreed that there was some light coming from the service station, he claimed it did not assist in illuminating the Intersection or the southern crosswalk that Mr. Vandendorpel used.
- [31] The digital and video images of the Intersection that were entered into evidence support Mr. Evoy's description of the lighting at the Intersection and I am not persuaded that the street light Mr. Vandendorpel says was in place for the southern crosswalk was operating on 9 October 2010. I also accept Cst. Lucas' evidence that while there was some light emanating from the service station on the northwest corner of the Intersection, the Intersection in general was "very poorly lit", with very little artificial light.

#### Expert Opinion Evidence

#### Forensic Dynamics Expert Report

- [32] Mr. Gerald D. Sdoutz is a professional engineer with Forensic Dynamics Inc. Mr. Sdoutz was retained by the plaintiff and testified at trial as an expert in the area of accident reconstruction. The written report dated 28 February 2014 that contains Mr. Sdoutz's expert opinion was also tendered into evidence (the "Forensic Dynamics Report").
- [33] In preparing his report, Mr. Sdoutz assumed that Mr. Vandendorpel walked at a speed of approximately 1.5 metres per second and calculated that it would have required approximately 7.3 seconds for him to have travelled from the eastern sidewalk of Sooke Road to the Centre Line. Mr. Sdoutz also assumed that Mr. Vandendorpel would have required an additional 1.5 to 3.4 seconds to reach the point of impact with Mr. Evoy's vehicle, depending upon whether that point was close to the dividing line between Lanes Four and Five or was in Lane Five closer to the western sidewalk. Consequently, Mr. Sdoutz concluded that Mr. Vandendorpel was in the crosswalk for between 8.8 to 10.7 seconds.
- [34] Mr. Sdoutz also provided expert opinion evidence about what a vehicle driver experiences when they observe a traffic control signal change from green to yellow. Mr. Sdoutz explained that when a driver observes a traffic signal change to yellow, he or she generally completes a "perception-response process" involving identifying the traffic light changing to yellow, determining the distance to the stop line, and deciding whether there is an opportunity to stop. In Mr. Sdoutz's opinion, when Mr. Evoy observed the traffic light change to yellow it "would not have been an emergency response, but a more typical traffic response" and that 2.5 seconds "would be a conservative estimate of the time required to decide upon whether it is appropriate to stop for the yellow light or not." Mr. Sdoutz calculated that Mr. Evoy's vehicle would have travelled 38.3 metres during the time it would take him to decide

whether or not to stop. Though Mr. Sdoutz did not provide an opinion on how much distance the vehicle would have required to come to a stop, he did say that it would be less than 71 metres.

- [35] Based upon the assumption that Mr. Vandendorpel waited 5 seconds after depressing the pedestrian control device before commencing his trek across Sooke Road, Mr. Sdoutz concluded that "the pedestrian walk sign would have been on and the traffic signals for Sooke Road would have been 'Red' as the collision occurred." He also concluded Mr. Evoy had sufficient time to come to "a normal stop and avoid a collision".

### Mea Forensic Expert Report

- [36] Mr. Kurt W. Ising, is a professional engineer and the principal of Mea Forensic. Mr. Ising was retained by the defendants to provide expert opinion evidence about motor vehicle accidents, including collision sequence, pedestrian impacts, and vehicle speed analysis. Mr. Ising testified at trial and his written report dated 18 March 2014 was tendered into evidence (the "Mea Forensic Report").
- [37] Mr. Ising reviewed the Forensic Dynamics Report and was of the view that Mr. Sdoutz's estimate that on average it would require 2.5 seconds for a driver to decide whether to stop was too conservative. To the advantage of the plaintiff's position, Mr. Ising adopted an average response time of 1.3 seconds for a driver to react to a yellow light.
- [38] In formulating his opinion on the sequence of events that led to the accident, Mr. Ising also took into consideration that Mr. Vandendorpel had told Cst. Lucas at the scene of the accident that he had activated the pedestrian control device and then without waiting for the lights to change, began to cross the roadway. As a result of this, Mr. Ising assumed that Mr. Vandendorpel began his walk across Sooke Road immediately after depressing the pedestrian control device. That differs from the 5 seconds Mr. Sdoutz assumed Mr. Vandendorpel waited before crossing Sooke Road.
- [39] According to Mr. Ising's calculations, Mr. Evoy's vehicle was approximately 134 metres from the southern crosswalk and 109 metres from the northern stop line when Mr. Vandendorpel began to cross Sooke Road. Moreover, the vehicle was 33 metres from the stop line, 5 seconds later, when the traffic control signal changed to yellow. Using the quicker response time, Mr. Ising concluded that Mr. Evoy's vehicle travelled another 20 metres before braking could commence. That left 13 metres in which to stop for the yellow light. In Mr. Ising's opinion, coming to a stop at the stop line was likely unattainable in these circumstances. Mr. Ising observed that had he used Mr. Sdoutz's response time of 2.5 seconds, Mr. Evoy would not have had any room or time to brake. Mr. Ising was of the view that if Mr. Evoy saw the traffic control signal turn yellow from a distance of 62 metres or more from the stop line then he would have been able to safely stop his vehicle before the accident.
- [40] In his report, Mr. Ising concluded:

- 1) If Mr. Vandendorpel started walking across Sooke Road immediately after pressing the pedestrian crossing button, then Mr. Evoy could likely not have stopped prior to entering the intersection.
- 2) The southbound traffic light was likely yellow when Mr. Evoy entered the intersection but red on impact.
- 3) The pedestrian crossing signal likely switched to "Walk" about 1.7 seconds after impact.

#### Findings of Fact

#### The Plaintiff's Actions

- [41] I accept that Mr. Vandendorpel came to a complete stop at the eastern end of the crosswalk and then activated the pedestrian control device. I am not, however, satisfied that he waited any noticeable period of time before commencing his walk across Sooke Road. Mr. Vandendorpel does not have a clear recollection of how long he waited. At one point he said he waited for perhaps as long as 15 seconds. He now says it was only a few seconds. In my view, given the circumstances he was facing at the time, including that he wanted to get to work within a minute or so of arriving at the crosswalk, and what he told Cst. Lucas at the accident scene, I find Mr. Vandendorpel likely only waited a very brief moment, approximately 1.5 seconds, before he started to cross Sooke Road.
- [42] I also accept that Mr. Vandendorpel only noticed that the traffic signals were yellow once he had reached Lane Three. At this point he would have travelled approximately 10 metres. Taking into consideration many factors, including Mr. Vandendorpel's physical size and stature, the time of day, and that he was anxious to get to work on time but was not rushing, I am satisfied that the estimated walking rate of 1.5 metres per second included in the Forensic Dynamics Report is reasonable and appropriate. Consequently, I find that Mr. Vandendorpel had been in the crosswalk for approximately 6.6 seconds before he noticed that the traffic control signals had turned yellow. This means that a total of 8.1 seconds elapsed between the point in time Mr. Vandendorpel pressed the pedestrian control device and the point in time when he was in Lane Three at or around the Centre Line.
- [43] Although in my opinion Mr. Evoy's vehicle would have been clearly visible from a much further distance, I accept that Mr. Vandendorpel did not notice it until it was approximately 30 metres away from him and that this occurred just after Mr. Evoy observed his traffic control signal had turned yellow. I also accept that after noticing Mr. Evoy's vehicle proceeding through the Intersection, Mr. Vandendorpel immediately began to run across Sooke Road towards its western sidewalk. I find that it was approximately 2 seconds later that the collision occurred; approximately 10 seconds after Mr. Vandendorpel first activated the pedestrian control device.

[44] On the evidence before me, I am satisfied that at the time of the accident, the pedestrian traffic control signal for the Intersection's southern crosswalk continued to exhibit the outline of a raised hand.

### **The Defendant's Actions**

[45] There is no dispute that Mr. Vandendorpel was within the crosswalk at the time of the collision. This fact, combined with my findings that Mr. Evoy's vehicle was travelling at approximately 55 km/hr or 15.3 metres per second and that Mr. Evoy did not see Mr. Vandendorpel until moments before the collision, means that I can be satisfied, on the balance of probabilities, of the position of Mr. Evoy's vehicle at the material times.

[46] I find the following in relation to the actions of Mr. Vandendorpel and Mr. Evoy:

- a) When Mr. Vandendorpel activated the pedestrian control device (10 seconds prior to the accident), Mr. Evoy's vehicle was approximately 153 metres from the point of collision;
- b) When Mr. Vandendorpel first stepped off the curb into the crosswalk (1.5 seconds later), Mr. Evoy was 130 metres from the point of collision; and
- c) When Mr. Vandendorpel first saw Mr. Evoy's vehicle, it was approximately 30 metres from the point of collision.

[47] I find the following in relation to the actions of Mr. Evoy and the traffic control signal:

- a) When the traffic control signal first indicated solid green, Mr. Evoy's vehicle was 128 metres from the stop line;
- b) When the traffic control signal first indicated yellow, Mr. Evoy's vehicle was 51.5 metres from the northern stop line;
- c) When Mr. Evoy's vehicle entered the Intersection the traffic control signal was still yellow; and
- d) At the time of collision, the traffic control signal had been red for 1.5 seconds.

### **Discussion - Liability**

[48] In determining who was at fault for the accident, I have considered all of the evidence presented at trial and have, to the greatest extent possible, reconstructed what I believe is the likely sequence of events that led up to the collision.

## The Duty Imposed on Users of the Road

[49] As users of the road both Mr. Vandendorpel and Mr. Evoy had duties imposed on them. These duties include those articulated in the Motor Vehicle Act, R.S.B.C. 1996, c. 318, (the "Act") as well as those imposed by the common law. The duties imposed by the common law include a duty to exercise due care, to keep a proper look out, and to take precautions when there is an apparent hazard: *Hmaied v. Wilkinson*, 2010 BCSC 1074, at paras. 21-23.

### The Plaintiff's Duty

[50] Mr. Vandendorpel's duties under the Act are prescribed in sections 125 and 132. Section 125 provides:

Unless otherwise directed by a peace officer or a person authorized by a peace officer to direct traffic, every driver of a vehicle and every pedestrian must obey the instructions of an applicable traffic control device.

[51] Section 132(3) states:

- (3) When the word "wait", the words "don't walk" or an outline of a raised hand are exhibited at an intersection or at a place other than an intersection by a pedestrian traffic control signal,
  - (a) a pedestrian must not enter the roadway

[52] In my opinion, Mr. Vandendorpel contravened ss. 125 and 132 of the Act when he began crossing Sooke Road despite the pedestrian control signal indicating a raised hand. As such, I find he breached his duty to comply with the provisions of the Act. In my opinion, this breach of his statutory duties is also persuasive evidence that he was in breach of his common law duty to exercise due care. Mr. Vandendorpel's duty to exercise due care was heightened because his violation of the provisions of the Act created a situation that exposed him to greater danger and he should have assumed that his unexpected position in the roadway would surprise an approaching vehicle: *Hadden v. Lynch*, 2008 BCSC 295, at para. 59.

[53] In my respectful opinion, Mr. Vandendorpel failed to exercise the level of care expected of him in the circumstances. I note that the timing for the traffic control signal is obviously not arbitrary, and if Mr. Vandendorpel had waited until the outline of a walking person was displayed on the pedestrian control signal (a wait of at least 10.5 seconds), Mr. Evoy's vehicle would have cleared the Intersection before he entered the crosswalk. Furthermore, if Mr. Vandendorpel had waited for a change in the pedestrian control signal, then a further 10 seconds would have elapsed before he reached the position where he was struck. At that point in time Mr. Evoy's vehicle would have been 150 metres past the point of collision.

[54] Mr. Vandendorpel also had a duty to keep a proper lookout. He says that he did not see Mr. Evoy's vehicle until it was approximately 30 metres away from him and he had been in the crosswalk for more than 6 seconds. I find that Mr. Vandendorpel had the opportunity and ought to have noticed Mr. Evoy's vehicle well before he did. Sooke Road proceeding south

towards its intersection with Mount View Avenue is reasonably flat and straight. Mr. Evoy's vehicle had its headlights on and in my view it was clearly there to be seen. Mr.

Vandendorpel wanted to get to work 5 minutes early. He only had a couple of minutes left to do that. I find he proceeded into the crosswalk intent on getting across Sooke Road quickly and in doing so he failed to keep a proper lookout.

- [55] Mr. Vandendorpel was also subject to a duty to take precautions when there was an apparent hazard. I am satisfied that Mr. Evoy's vehicle constituted an apparent hazard to Mr. Vandendorpel. However, once he noticed the vehicle he did not stop or retreat but rather chose to sprint across its path. There was no other traffic in the vicinity and Mr. Vandendorpel could have remained where he was (in Lane Three) or retreated somewhat to ensure Mr. Evoy's vehicle passed through the Intersection without striking him. In my opinion, running across the path of an oncoming vehicle, given the weather, road and lighting conditions at the time and the clothing he was wearing, was not only an unreasonable choice for Mr. Vandendorpel to make, it was a reckless one. As a result, I find he failed to take appropriate precautions once he noticed Mr. Evoy's vehicle.
- [56] In summary, Mr. Vandendorpel breached his obligations under the Act as well as those imposed on him under the common law. As such, in order for Mr. Evoy to be liable for the collision, Mr. Vandendorpel must prove on the balance of probabilities that Mr. Evoy should have been aware of Mr. Vandendorpel's illegal presence on the road at a time that allowed him, through the exercise of reasonable skill, to avoid the accident: *Lau v. Calderisi* (1998), 55 B.C.L.R. (3d) 368 (S.C.), at para. 19.

### The Defendant's Duty

- [57] Mr. Evoy is also subject to the provisions of the Act, and the common law duty to take care, keep a proper lookout, and take precautions when there is an apparent hazard on the road. If he failed to meet any of the duties, and that failure is found to be causally linked to the accident, then he would be liable for the injuries suffered by Mr. Vandendorpel.
- [58] I have already found that Mr. Evoy entered the Intersection after the traffic control signal indicated a yellow light. The relevant section of the Act in this situation is 128:

#### Yellow light

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

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

- [59] In my view, Mr. Evoy's vehicle was legally in the Intersection at the time of the accident. Under s. 128 of the Act, Mr. Evoy was required to stop "unless the stop [could not] be made in safety." As I have already noted, I find that Mr. Evoy was 51.5 metres from the northern stop line when the yellow light was first exhibited. This distance is less than the average distance referred to in the Mea Forensic Report (62 metres) which assumed both a quicker rate of deceleration and a shorter perception-response time than the Forensic Dynamics Report. In consideration of the specific circumstances of this case, particularly that the roads were wet and the lighting was poor, I conclude that Mr. Evoy could not have stopped in safety and therefore he did not breach s. 128 of the Act when he proceeded through the Intersection.
- [60] The duty of a driver to take care is dependent on the particular circumstances. Generally speaking, the duty is satisfied if a driver is in compliance with the provisions of the Act, but the duty can be heightened if there is a reason for them to take "particular caution." For example, in *Simpson v. Baechler*, 2009 BCCA 13, the court explained that in some situations the duty to take care requires a driver to do more than "simply continue along at the maximum allowable speed, foot on the accelerator, shifting up and assuming that there was no one waiting to cross when he knew or ought to have known that that was not a safe assumption" (para. 44).
- [61] Counsel for Mr. Vandendorpel emphasized the fact that on cross-examination Mr. Evoy agreed with the suggestion that when a traffic control signal changes from a flashing green to a solid green it is a "warning" that a pedestrian was in the area. While I accept Mr. Evoy's evidence on this point, I do not agree that a pedestrian controlled traffic signal turning from flashing green to solid green, without more, constitutes a legal duty for a driver to take the additional precautions contended by the plaintiff in this case.
- [62] Section 131(5) of the Act provides that when a traffic control signal is flashing green the driver of a vehicle must ensure that they approach an intersection at a speed that enables them to stop before reaching the traffic control signal or a crosswalk:
- When rapid intermittent flashes of green light are exhibited at an intersection or at a place other than an intersection by a traffic control signal,
- (a) the driver of a vehicle approaching the intersection or signal and facing the signal must cause it to approach the intersection or signal in such a manner that he or she is able to cause the vehicle to stop before reaching the signal or any crosswalk in the vicinity of the signal if a stop should become necessary, and must yield the right of way to pedestrians lawfully in a crosswalk in the vicinity of the signal or in the intersection, and
  - (b) a pedestrian may proceed across the roadway with caution and at an intersection only in a marked or unmarked crosswalk.
- [63] In contrast, when there is a solid green light s. 127(1) permits a driver to proceed straight though an intersection and does not require them to approach the intersection at a speed that enables them to stop before entering the intersection:

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

- (a) the driver of a vehicle facing the green light
- (i) may cause the vehicle to proceed straight through the intersection, or to turn left or right, subject to a sign or signal prohibiting a left or right turn, or both, or designating the turning movement permitted,
- (ii) must yield the right of way to pedestrians lawfully in the intersection or in an adjacent crosswalk at the time the green light is exhibited, and
- (iii) must yield the right of way to vehicles lawfully in the intersection at the time the green light became exhibited, and
- (b) a pedestrian facing the green light may proceed across the roadway in a marked or unmarked crosswalk, subject to special pedestrian traffic control signals directing him or her otherwise, and has the right of way for that purpose over all vehicles.

[64] The change in the traffic control signal may well mean that a pedestrian is in the area; however that area is the sidewalk or curb where the pedestrian control device is located and not on the road itself. A driver who sees the traffic control signal change from flashing green to solid green is entitled to believe that the pedestrian will obey the rules of the road and will wait for the signals to change to allow for a safe crossing of the roadway. In my view it is reasonable for a driver to assume that if a pedestrian is responsible enough to press the button on a traffic control device that same person will be responsible enough to not begin crossing the road until the pedestrian traffic control signal indicates that they may do so. In reaching this conclusion I have considered the opinions expressed by our Court of Appeal in *Coulter (Guardian ad litem) v. Leduc*, 2005 BCCA 199, where Justices Braidwood and Mackenzie observed that in order for there to be a requirement for particular caution, the possibility of danger emerging must be reasonably apparent to the driver. The court explained at para. 37 that the intersection in issue in that case did not require particular caution even though it was "partiality lit, with snow piled on its sides, and frequented by large trucks." According to the court, these facts alone did not make the intersection an exceptional occurrence on the Trans-Canada Highway in the winter. Moreover, the court found that the prospect of another party disregarding the law did not create a duty of particular caution (para. 37). The court noted that a driver is entitled to proceed with reasonable caution assuming that other users of the road will obey the law and yield the right-of-way.

[65] In my opinion, no special duty is imposed on Mr. Evoy unless he perceived the danger and had the opportunity to avoid the accident. In the circumstances of the present case, I find the possibility of someone being unlawfully in the middle of the crosswalk was not a reasonably apparent danger to Mr. Evoy.

- [66] Mr. Evoy acknowledged in his evidence that he did not see Mr. Vandendorpel until his vehicle had entered the Intersection. Counsel for Mr. Vandendorpel submits this is persuasive evidence that Mr. Evoy failed to keep a proper lookout. However, the simple fact that a driver did not see a pedestrian is not dispositive regarding whether the driver had kept a proper lookout: *Christensen v. Gerber*, 2007 BCSC 1397, at para. 55. Mr. Vandendorpel was wearing dark clothing on the morning in question and this would have made it more difficult to see him. Exacerbating the situation was the sheen from the wet roadway, the darkness of the hour, and the lack of artificial lighting. Taking into consideration the fact that Mr. Evoy believed someone had activated the pedestrian control device, it seems reasonable to me that he would look to both curbs to see if a pedestrian was waiting to cross the Intersection and not expect to see anyone crossing the Intersection in front of him against the pedestrian traffic control signal.
- [67] I accept Mr. Evoy's evidence that he was driving carefully on the morning in question and that his vehicle was travelling in Lane Four and not Lane Five. He was, therefore, not in the position of a driver in a curb lane who must remain aware of the possibility that a pedestrian could suddenly step off the curb directly in front of his or her vehicle. In my opinion it is unreasonable to expect a driver in Mr. Evoy's position and circumstances to anticipate or focus on the possibility that someone could be standing in the middle of the roadway as his or her vehicle proceeds through a controlled intersection on a green or yellow light.
- [68] Finally, once Mr. Evoy became aware of Mr. Vandendorpel's presence, Mr. Evoy had a duty to take precautions to avoid a collision: *Kerr (Litigation Guardian of) v. Crieghton*, 2008 BCCA 75, at para. 32. The precaution that is expected of a defendant in this situation is to "take evasive action": *Simpson*, at paras. 29-30. However, evasive action can be limited to simply applying the brakes once a pedestrian is seen. In *Melgarejo-Gomez v. Sidhu*, 2002 BCCA 19, Justice Braidwood concluded:
- [25] No provision in law requires a driver to exercise a duty such that one could say that Mr. Sidhu ought to have seen the pedestrian earlier. Regardless of whether Mr. Sidhu applied his brakes before or after striking Mr. Melgarejo-Gomez, one can assume he applied them upon first becoming aware of the pedestrian. That is all that was required of Mr. Sidhu, as (according to the jury's finding) he was lawfully within the intersection and Mr. Melgarejo-Gomez was not.
- [69] Counsel for Mr. Vandendorpel emphasizes that "Mr. Evoy would have cleared the entire intersection in approximately 1.66 seconds". The expert opinion of Mr. Sdoutz, a witness tendered by the plaintiff, clearly indicates that the perception-response times in emergency situations are typically 1.1 to 1.3 seconds. On the plaintiff's own evidence I find that Mr. Evoy did not have a sufficient opportunity to avoid the collision.
- [70] In my opinion, Mr. Evoy acted in accordance with the provisions of the Act and met the standard expected of him with regard to his duty to take care and to take precautions to avoid the collision.

## Conclusion

- [71] The burden of proving on a balance of probabilities that Mr. Evoy was responsible for the accident lies with Mr. Vandendorpel. In *F.H. v. McDougall*, 2008 SCC 53, Mr. Justice Rothstein explained:
- [49] in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.
- [72] In my opinion Mr. Vandendorpel has failed to establish that Mr. Evoy was negligent on the morning of 9 October 2010 and responsible for the accident that is the subject of this litigation. Although he suffered a regrettable injury to his right ankle, on the evidence before me I find Mr. Vandendorpel was solely responsible for the collision that resulted in that injury.

## Order

- [73] The plaintiff's action is dismissed.
- [74] The parties have leave to address the issue of costs in the event there is a need to do so.
- "G.R.J. Gaul, J."

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