IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Gill v. Siekham,*
2024 BCSC 155

Date: 20240131
Docket: M183904
Registry: Vancouver

Between:

Manpreet Gill and Himmat Singh Gill by their litigation guardian Gurvinder Gill

Plaintiffs

And:

Shangara Siekham, Anju Siekham, Diana Bellefontaine, Korus Tavana, The City of Surrey, and John Does 1-4

Defendants

And:

Hardeep Gill, Harwinder Gill, Shangara Siekham, Anju Siekham, Diana Bellefontaine, Korus Tavana, and John Does 1-4

Third Parties

- and -

Docket: M179945
Registry: Vancouver

Between:

Harwinder Gill

Plaintiff

And

Shangara Siekham, Anju Siekham, Diana Bellefontaine, Korus Tavana, The City of Surrey, and John Does 1-4

Defendants

- and -

Docket: M181750
Registry: Vancouver

Between:

Harwinder Gill

Plaintiff

And:

Xiao Li Lin

Defendant

- and -

Docket: M203178
Registry: Vancouver

Between:

Manpreet Gill by her litigation guardian Gurvinder Gill

Plaintiff

And:

Xiao Li Lin

Defendant

Before: The Honourable Justice Douglas

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Counsel for Harwinder and Hardeep Gill:	S.R. Lerner
Counsel for Shangara and Anju Siekham:	L. Beukman L. Yuan
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Counsel for the City of Surrey:	L. Robinson J.P. Cahan A. Alimadad, Articled Student
Counsel for Xiao Li Lin:	R. Monty

Place and Date of Trial:	Vancouver, B.C. August 8-11, 14-18, and 21-25, 2023
Place and Date of Judgment:	Vancouver, B.C. January 31, 2024

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I. OVERVIEW

[1] This is a trial of the liability issues arising from four separate actions following two accidents: a pedestrian-motor vehicle accident that occurred at a marked crosswalk in Surrey, BC (the "Crosswalk") on February 2, 2016 ("MVA #1"); and a rear-end collision that occurred on Highway 91 near Richmond, BC on May 29, 2017 ("MVA #2"). Plaintiff and third party, Harwinder Gill, was involved in both accidents.

[2] The trial focused predominantly on MVA #1. A central issue in dispute was whether sightlines existed between pedestrians, Mrs. Gill, her husband, and their two children (the "Gill Pedestrians") and the driver of the involved vehicle before impact. A related issue is whether the presence of two parked cars (the "Parked Cars") impaired those sightlines and, if so, whether the defendant, the City of Surrey (the "City"), ought to have installed no-parking signage at the Crosswalk.

[3] For the reasons that follow, I conclude that MVA #1 occurred as a result of driver and pedestrian inattention. I therefore find that the trial evidence regarding the sightlines that might have been available had the involved parties exercised due care and attention is largely academic. By extension, I conclude that the City was not negligent for failing to install no-parking signage at the Crosswalk.

[4] MVA #2 was a comparatively straightforward accident. I conclude that both involved drivers, Mrs. Gill and defendant, Xiao Li Lin, share some responsibility for it.

II. CREDIBILITY AND RELIABILITY OF EVIDENCE

[5] The defendants challenge Mrs. Gill's credibility and the reliability of her evidence.

[6] Mrs. Gill was a poor historian. Much of her trial evidence regarding MVA #1 was unclear. She repeatedly testified that she had a limited recollection of material events related to MVA #1 at trial. I accept that the traumatic nature of MVA #1 may have impaired her memory. Notably, however, Mrs. Gill's recollection of critical details regarding MVA #1 was substantially better at her examination for discovery in 2019 than it was at trial. At trial, she frequently denied any memory of matters about

which she had testified in detail at her examination for discovery with no apparent difficulty. For example, she testified on discovery that she had crossed 76th Avenue without incident hundreds of times before MVA #1; at trial, she denied being able to count or recall the number of times she had done so.

[7] There were multiple significant inconsistencies between Mrs. Gill's evidence given on discovery and at trial. By her own admission, Mrs. Gill's memory of material events was better four years ago, when she was examined for discovery, than it was at trial. Accordingly, I conclude that Mrs. Gill's discovery evidence is more reliable than her trial evidence, and I generally prefer it where there are conflicts.

[8] Mrs. Gill often seemed reluctant to provide unqualified answers to clear questions asked of her in cross-examination, including whether she had given the transcribed answers of her sworn evidence on discovery, variously saying when pressed that she guessed she did, that she must have, and finally that she did. Some of her answers were vague and unresponsive. She occasionally claimed not to understand clear questions asked in cross-examination. Her evidence on some points evolved. Some of Mrs. Gill's trial evidence was surprising. For example, despite having campaigned for the installation of the Crosswalk before MVA #1, she claimed to have no recollection about whether 76th Avenue was a busy street, saying she was not paying close attention to traffic at that location.

[9] The cumulative effect of the inconsistencies, evolution, and lack of clarity in Mrs. Gill's evidence gives rise to concerns about its reliability. Ultimately, I have approached her trial evidence with caution.

[10] Third party, Hardeep Gill, was a substantially more forthright witness than his wife, Mrs. Gill. He provided mostly clear and unqualified answers to the questions he was asked. I conclude that Mr. Gill was a more reliable witness than his wife and, to the extent there are conflicts, I generally prefer his evidence to that of Mrs. Gill.

[11] I found Shangara Siekham, the driver involved in MVA #1, and Diana Bellefontaine and Korus Tavana, the owners of the Parked Cars, to be clear, candid, and credible witnesses.

[12] Davneet Rana, the only non-party lay witness to give evidence about MVA #1, testified in a straightforward manner. She readily conceded occasional lapses in her memory. Ms. Rana has no interest in the outcome of this litigation and no relationship with any of the parties. I generally prefer her evidence to that of the parties, to the extent there are conflicts.

[13] Counsel for the infant plaintiffs suggested that Ms. Rana had engaged in some retrospective reconstruction after their informal pre-trial discussions and that there were inconsistencies in her evidence. I am unable to make this finding. Ms. Rana was confronted with no prior inconsistent statement. I accept her evidence that she saw pedestrians in the Crosswalk shortly before MVA #1.

[14] The experts offered balanced views within their respective areas of expertise, made reasonable concessions as appropriate, and were credible witnesses.

III. MVA #1

A. The Parties

[15] Mrs. Gill was 42 years old at the date of trial. She is a registered nurse. She and Mr. Gill are the parents of the two infant plaintiffs, Manpreet Gill (“Manpreet”) and Himmat Gill (“Himmat”), who were five and seven years old respectively in February 2016 (collectively, the “Children”).

[16] Defendant driver, Mr. Siekham, is a 73-year-old retired machine operator. He was born in India and immigrated to Canada from England in 1975. He has held a valid BC driver’s license since 1976. This license had only one restriction in February 2016: namely, that Mr. Siekham wear his prescription glasses when driving. On Mr. Siekham’s uncontroverted evidence, he was doing so at the time of MVA #1. Defendant, Anju Siekham, is Mr. Siekham’s daughter-in-law; she was the owner of the 2006 Acura sedan he was driving at the time of MVA #1 (the “Acura”).

[17] Ms. Bellefontaine, defendant and owner of one of the Parked Cars, was 81 years old at the date of trial. She has been a licensed driver since she was 35 years old. In 2016, she owned a 2003 Hyundai (the "Hyundai"). At the time of MVA #1, the Hyundai was parked alongside the south curb on 76th Avenue, near the Crosswalk, in front of the house where Ms. Bellefontaine was then renting an apartment.

[18] Mr. Tavana, defendant and owner of the second of the Parked Cars, is a professional truck driver. He was 57 years old at the time of the trial. He has been a licensed driver since the age of 18 and has held a valid BC driver's license since 2005. In February 2016, Mr. Tavana owned a 2008 BMW (the "BMW"). At the time of MVA #1, the BMW was parked on 76th Avenue, alongside the south curb, near the Crosswalk, in front of the house where Mr. Tavana was then renting an apartment.

[19] The City is the municipality responsible for the design and maintenance of the Crosswalk and the adjacent road network.

B. Non-Contentious Facts

[20] Many of the facts concerning events immediately preceding MVA #1 are non-contentious.

[21] MVA #1 occurred shortly before 6 pm on February 2, 2016, at the Crosswalk on 76th Avenue, close to the intersection of 147A Street in Surrey, BC. It was then dark. The Crosswalk was illuminated by streetlights. The weather was not a factor in MVA #1.

[22] The Gill Pedestrians had gone for a walk that evening, stopping to play at the Chimney Hill Elementary School (the "School"), before heading home when it started to get dark. They followed a pathway from the School playground, through a gate, to the Crosswalk. Himmat was riding a small green go-cart. Manpreet dismounted her pink scooter before entering the Crosswalk.

[23] The Crosswalk is located in a residential area. Although it is close to the School, it is not a school crossing. The Crosswalk was installed in November 2015,

about four months before MVA #1. It was identified with clearly visible white zebra markings painted on 76th Avenue and reflective crosswalk signs. The lighting at the Crosswalk has since changed.

[24] Mrs. Gill was instrumental in the installation of the Crosswalk. She made an online request of the City in early 2015 for a crosswalk at 147A Street and 76th Avenue. She agreed that, once the Crosswalk was installed, she and her family tended to cross 76th Avenue at that location. Mrs. Gill took the Children for walks in the area about four to five times a week before MVA #1.

[25] The Crosswalk was familiar to both the Gill Pedestrians and Mr. Siekham in 2016. It was located about half a block (or eight houses) from where the Gill family lived, and about three blocks away from Mr. Siekham's residence. Mr. Siekham had driven through the Crosswalk earlier on February 2, 2016, about two hours before MVA #1, on his way to the local gurdwara (a Hindu temple) with his grandchildren.

[26] 76th Avenue runs east and west, with one lane of travel in each direction; in 2016, both lanes were wide enough to accommodate curb-side parking. At the Crosswalk, 76th Avenue spans 12.2 metres in width (from north to south).

[27] The north side of 76th Avenue intersects with 147A Street and forms a T-intersection. MVA #1 did not occur at this intersection. The Crosswalk is located east of 147A Street and is aligned with a pedestrian pathway on the south side of 76th Avenue. The speed limit on 76th Avenue at the time of MVA #1 was 50 km/h.

[28] There is downhill grade on 76th Avenue of about 2.4–2.5% that steepens to the east, about 150 metres east of the Crosswalk. In other words, if a person travels 100 metres horizontally, the grade will drop 2.4–2.5 metres vertically.

[29] At the time of MVA #1, the Hyundai and the BMW were both parked near the Crosswalk, alongside the south curb on 76th Avenue. The front bumper of the Hyundai was parked about 10 metres from the western edge of the Crosswalk. The BMW was parked behind the Hyundai; its front bumper was about 16 metres from the western edge of the Crosswalk.

[30] At the time of MVA #1, a City bylaw prohibited parking within 15 metres of the Crosswalk, unless otherwise indicated by a traffic control device. There was then no posted signage at the Crosswalk prohibiting parking. The City erected no-parking signage at the Crosswalk after MVA #1.

[31] There were two other City parking bylaws in effect at the time of MVA #1. One prohibited parking in front of, or within 1.5 metres on either side of, a driveway or laneway entrance. The other City bylaw prohibited parking in an intersection, except as permitted by a traffic control device. MVA #1 did not occur in an intersection or as a result of parking in close proximity to a driveway. I conclude that neither of those bylaws is relevant to a determination of the liability issues in MVA #1.

C. Lay Evidence

1. Mrs. Gill

[32] Much of Mrs. Gill's evidence about the events immediately preceding MVA #1 was unclear. She recalled that her family stopped and gathered on the sidewalk on the south side of 76th Avenue, after passing through the gate at the end of the pathway leading to the Crosswalk. She was uncertain of their exact positions.

[33] Mrs. Gill maintains that she looked in both directions for oncoming traffic when she was stopped on the sidewalk. She could not recall if she looked first to her left or her right. She saw the Parked Cars to her left and said that they "were kind of blocking [her] view". She could not remember seeing any other vehicles at that time.

[34] Mrs. Gill was cross-examined about whether she could see past the Parked Cars when she first looked to her left, when on the sidewalk. She agreed that she "initially" could not see clearly behind them, when she did her "initial check". When taken to the transcript of her sworn evidence given at her February 2019 examination for discovery, Mrs. Gill agreed that she must have given those answers. She testified on discovery as follows:

> Q So you got to the beginning of the crosswalk and what did you do?
>
> A So when I got to the beginning of the crosswalk, on the sidewalk, I looked in both directions.

Q Right.

A And I couldn't really see clearly.

Q Say that again, please.

A I couldn't see.

Q Okay.

A Because there was a couple cars parked there.

[35] Mrs. Gill was pressed at trial about the difference between not seeing anything and being unable to see. Her answers were equivocal and did not clarify matters. The following exchange took place:

Q So when you say you saw nothing, was it a situation where you weren't able to see or you looked and you saw there was nothing?

A I looked and I didn't see anything.

Q Okay. But you were able to see?

A I don't know. All I know is I didn't see anything so I don't know.

Q […] you wouldn't have entered into the crosswalk if you weren't able to see anything, would you?

A I would make sure that I didn't see anything before I would enter.

Q I understand. But if you couldn't see anything, you wouldn't have entered the crosswalk?

A If I didn't see anything, I - - I didn't see anything that means there was nothing coming.

Q So you were able to see but you didn't see anything?

A I didn't see anything.

Q But you were able to see?

A I don't know. I looked and I didn't see anything.

[36] Mrs. Gill was also cross-examined at trial about her ability to see to the west from a position on the sidewalk, on the south side of 76th Avenue, beside the Crosswalk sign adjacent to the letdown area, as depicted in a police photograph in evidence. Mrs. Gill denied any recollection of where she and her family members were standing on the sidewalk just before MVA #1. In her sworn evidence given on discovery, she identified the area in this police photograph, right before the letdown, as the place where she would normally stop before entering the Crosswalk:

Q So you would have been -- the [Crosswalk] sign would have been to your left. If you're standing facing 76 Avenue, the sign would have been to your left?

A Yeah.

Q Right?

A Yes.

[37] This police photograph depicts a person wearing a reflective vest and standing in the letdown area on the south sidewalk to the right of the Crosswalk sign. When asked if she would be able to see past the Parked Cars from this position, Mrs. Gill said she did not know. She was then taken again to her sworn evidence given on discovery, at which time she answered as follows:

Q You'll agree with me, looking at this photograph, Mrs. Gill, that if one stands right next to the reflective sign -- right?

A Yes.

Q Assuming this photograph shows what it appears to show, one can see a significant distance down 76 Avenue; right?

A Yes.

Q If this vehicle [the Hyundai] obscured your view, Mrs. Gill, did you take a step forward and take a look again to your left?

A Yes.

Q Okay. And you still saw nothing?

A Yes.

Q And where you got to when you took a step forward and looked to your left this vehicle [the Hyundai] no longer affected or impaired your vision to your left?

A I don't remember that part.

Q Okay. You can't recall this vehicle obscuring your vision at all when you took a step forward.

A I don't remember that.

[…]

Q Okay. But you'll agree with me that those parked cars or in particular this parked car as shown in photograph 0013 did not obstruct or impair your visibility whatsoever once you stood in the letdown area?

A I can't -- I don't remember that part.

Q Okay.

A I can't say.

[38] Mrs. Gill admitted she must have given those answers. At trial, she conceded that she does not now remember these details. It was suggested to Mrs. Gill that, after she took one step out of the letdown area (described as the paved area behind the reflective crosswalk sign), nothing obstructed her view to the west. In response, Mrs. Gill said she could not comment on that matter, saying all she now recalls is seeing the Parked Cars.

[39] At trial, Mrs. Gill testified that, “as we started walking again”, she looked both ways a second time, after she entered the Crosswalk, to make sure nothing was coming. According to Mrs. Gill, “all of a sudden”, the Acura was “coming” and “not stopping”; the next thing she remembers is being on the ground, not knowing what had happened. She recalls trying to grab her daughter and then being on the road. She has no recollection of seeing the Acura strike the Children. She said that she first saw it “split seconds” before impact. She could not recall if she saw its headlights. When asked if she saw it when she looked twice for oncoming traffic, she said “I believe not”.

[40] Mrs. Gill conceded that her memory of events was probably better at the time of her February 2019 examination for discovery than it was at trial. Mrs. Gill testified on discovery that she “stopped and looked again” when in the Crosswalk. When asked if she gave the following transcribed answers at her examination for discovery regarding her actions immediately before entering the Crosswalk, Mrs. Gill said “I guess so”:

> Q And then what happened? Could you see any vehicles or any lights of vehicles approaching from either side?
>
> A No
>
> Q Okay. What did you do next?
>
> A Then I walked in [to the Crosswalk].
>
> Q Okay.
>
> A -- and looked again.
>
> Q Okay. Did you stop to look again or did you just walk and looked at the same time?
>
> A I stopped and looked again.

[41] Additional questions and answers were put to Mrs. Gill in cross-examination at trial. She conceded that she "must have" given the transcribed answers of her sworn examination for discovery evidence as follows:

> Q When you stopped -- once you started to go onto the pedestrian crossing -- You said you stopped before you went in and then you stopped once you got in; correct?
>
> A Yes.
>
> Q -- by that time you stopped for the second time, had you reached the middle of the road or were you still on the first half of the road before getting to the middle?
>
> A No, we were still behind.
>
> Q Behind what? Behind the middle of the road?
>
> A No, so right kind of where the -- in front of the parked cars.

[42] Before trial, Mrs. Gill changed her discovery evidence about stopping before looking for traffic a second time when in the Crosswalk, saying she did not really recall whether she stopped before looking a second time and that she felt she had been "pushed" into this answer. At trial, Mrs. Gill adopted her evidence given on discovery that she could not remember if she saw any approaching vehicles when she looked a second time after entering the Crosswalk.

[43] Mrs. Gill testified at trial that the Parked Cars obstructed her view and that she could not see clearly up 76th Avenue (to the west) from the sidewalk. Mrs. Gill could not recall where she was when she looked for oncoming traffic a second time, after entering the Crosswalk. When pressed on this point and asked again when she first saw the Acura, Mrs. Gill testified as follows:

> A I know initially at the sidewalk [the Parked Cars] did block my view. I don't know about the second time. I don't remember that.

[44] Mrs. Gill maintained that she did not see the Acura until just before impact. She was challenged on this point in cross-examination. When asked if she ever saw the lights of the Acura, between the Parked Cars, even if only briefly, Mrs. Gill said "not that I remember". When asked if she saw the Acura's lights through the windows of the Parked Cars, Mrs. Gill said "I don't think I saw anything, no". When asked if she was certain about her answer, she said "I can't comment on that."

[45] It was suggested to Mrs. Gill in cross-examination at trial that she stepped into the Crosswalk in order to look around the Parked Cars. Her answers were unresponsive. The following exchange took place:

> Q […] But the purpose of walking into the crosswalk before proceeding across the road was to look around those parked vehicles; is that fair to say?
>
> A It was to look in both directions to see if there was any vehicles coming.
>
> Q But specifically because you say you couldn't see around those parked vehicles, you wanted to look around the parked vehicles before proceeding into the crosswalk; correct?
>
> A Yeah, I wanted to look both ways to make sure there was nothing coming.

[46] Mrs. Gill was then taken to the transcript of her sworn evidence given on discovery, at which time she testified as follows:

> Q Yes. And you said that you stopped a second time. On the day of the accident, as you were crossing, just before your family was struck, you said you stopped a second time. How far into the crosswalk were you before you stopped the second time?
>
> A I was, like, right just in - - in it.
>
> Q So how many steps? Do you recall, approximately?
>
> A No.
>
> Q And is it fair to say that you stopped so that you could look past those parked cars?
>
> A Correct.

[47] Mrs. Gill was then asked the following question at trial:

> Q So after you went into the crosswalk and looked around the parked vehicles, you would agree that the [Parked Cars] were no longer obstructing your view of the traffic that was approaching the crosswalk from the west. Do you agree with that?
>
> A I don't remember. All I know is that I looked both ways. I can't remember.

[48] Thereafter, Mrs. Gill was taken again to the February 2019 transcript of her sworn evidence given on discovery. She conceded that she must have given the following transcribed answer:

> Q And so, when you stopped, did you have a complete view of what was down the street to your left?
>
> A Correct.

[49] Mrs. Gill admitted she told the truth at her examination for discovery. She conceded that she received the transcripts of her discovery evidence before trial but she denied having reviewed them fully. Apart from changing one answer before trial (to reflect her current uncertainty about whether or not she stopped when she looked a second time for oncoming traffic once in the Crosswalk), Mrs. Gill admitted her evidence given on discovery was true.

[50] At trial, Mrs. Gill could not recall:

a) Where she was in the Crosswalk when she looked both ways a second time;

b) Whether she had then passed in front of the Hyundai (the easternmost of the Parked Cars and the one closest to the Crosswalk);

c) Whether she looked first to her right or her left;

d) How long she looked to her left;

e) Whether she saw any moving traffic to her right or her left when she looked a second time; or

f) Whether she was then stopped or moving.

2. Mr. Gill

[51] Mr. Gill was a substantially more straightforward witness than his wife. He agreed that the Gill Pedestrians stopped on the sidewalk before entering the Crosswalk. He could not recall precisely where they stopped. He did not remember who left the sidewalk and entered the Crosswalk first. He did not witness the moment of impact. He was not struck by the Acura.

[52] Mr. Gill testified that he looked to his left and right when on the sidewalk before entering the Crosswalk and that he saw nothing coming. He then walked “a little bit into the Crosswalk”, looked left again, saw an approaching car, raised his hand, and immediately heard a big noise (also described as a bang).

[53] On Mr. Gill’s evidence, he was initially unable to see clearly to his left because the Parked Cars blocked his view. He denied seeing headlights from any oncoming traffic when on the sidewalk. Accordingly, he entered the Crosswalk “a little bit”, to assist him in seeing around the Parked Cars. Thereafter, he stopped a second time and looked again for oncoming traffic; he conceded that he does not know whether or not Mrs. Gill and the Children also did this.

[54] Mr. Gill did not dispute the suggestion put to him in cross-examination that he would have looked first to his left once in the Crosswalk, as the most immediate risk to him as a pedestrian would have come from this direction. He admitted he then saw a vehicle approaching from the west. On his evidence, this is the first time he saw the Acura; he denied seeing its headlights through the windows of the Parked Cars, or as it passed between the Parked Cars on 76th Avenue. Mr. Gill admitted he looked to his left when on the sidewalk but maintained that he did not then see the Acura.

[55] Mr. Gill could not estimate the Acura’s distance when he first saw its headlights. When asked if he had an unobstructed view down 76th Avenue to his left over the tops of the Parked Cars, he said “I was able to see as far as I could see”. His answer on this material point was vague and equivocal. Mr. Gill agreed that, after he entered the Crosswalk “a little bit”, he stopped to look around the Parked Cars and that is when he saw the Acura. He suggested that he was then “maybe around one step” into the Crosswalk. He did not proceed further.

[56] Mr. Gill could not explain why Mrs. Gill and the Children entered the Crosswalk in front of the approaching Acura. He confirmed that it was his practice before MVA #1 not to enter a crosswalk until he was satisfied that any approaching vehicles had stopped.

3. The Children

[57] Neither of the Children testified at trial. Himmat's statement to a psychologist during a February 16, 2016 counselling session was admitted into evidence pursuant to the parties' document agreement. This document records the following statement by Himmat:

> Saw the car, thought we cold [sic] cross the cross walk. Car came very fast…

[58] I accept that Himmat made this statement. I have not relied on it for its truth.

4. Mr. Siekham

[59] Shortly before MVA #1, Mr. Siekham had been driving his two grandchildren, then aged five and seven and seated in the backseat of the Acura, home from the local gurdwara where they attended a Punjabi class twice a week. He was driving in the eastbound lane on 76th Avenue. He had driven the Acura on many previous occasions, was familiar with its operation, and confirmed that it was in good working condition.

[60] Mr. Siekham left the gurdwara with his grandchildren at about 5:40 pm on February 2, 2016; he recalled that it was then getting dark and that the streetlights on 76th Avenue were illuminated. He estimated his speed to be about 40–50 km/h just before MVA #1. He admitted he would have been driving closer to the centreline than the curb because there were cars parked on the far-right side of the eastbound lane.

[61] On Mr. Siekham's uncontroverted evidence, the Acura's headlights were illuminated. He admitted he was able to see the Crosswalk without difficulty. He agreed that nothing, including the Parked Cars, interfered with his view of the Crosswalk. He accepted as true his answers given on discovery that it is his practice to slow down as he approaches a crosswalk, if he cannot see the crosswalk or the area adjacent to it. He conceded that he did not do this as he approached the Crosswalk before MVA #1, as nothing was interfering with his view of it.

[62] Mr. Siekham remembers looking straight ahead at the Crosswalk as he approached it the night of MVA #1. He admitted he was not looking to his left or his right to see if there was anyone on the sidewalk waiting to enter the Crosswalk. He agreed he was not looking at the Parked Cars or in that direction.

[63] Mr. Siekham's grandchildren began fighting in the back seat shortly before MVA #1; he recalled that they were punching each other and trying to get out of their car seats. This prompted Mr. Siekham to look in his rear mirror as he approached the Crosswalk. At about the same time, he heard a "bump" and applied his brakes. Mr. Siekham admitted he did not brake until after he heard this bump. He knew that he was then close to the Crosswalk but he did not know exactly where he was in relation to it. Mr. Siekham estimated that he looked in his rear-view mirror for about one second, recalling that his grandchildren were then "half out of their car seats" and that he thought they were having a "full on fistfight".

[64] Thereafter, Mr. Siekham remembered hearing a lot of noise, including people shouting and a woman yelling that her son had been killed. He pulled over, stopped the Acura, and spoke to the police at the scene. He later pled guilty to the offence of driving without due care and attention, contrary to s. 144(1)(a) of the *Motor Vehicle Act,* R.S.B.C. 1996 c. 318 [*MVA*]. He was fined $1,000 plus a surcharge.

[65] Mr. Siekham conceded that his grandchildren had been quarrelling for sometime before MVA #1 and that this had been distracting to him as a driver. However, he denied they had been hitting each other or that anyone was then crying; he maintained he had not paid attention to his quarrelling grandchildren until those things occurred. It did not occur to Mr. Siekham to pull over rather than to take his eyes off the road as he approached the Crosswalk.

5. Ms. Rana

[66] Ms. Rana had been following the Acura for some time before MVA #1. She was then 19 years old. She has held a Class 5 BC driver's license since 2013. Ms. Rana lived in Surrey in 2016 and was then commuting regularly to Simon Fraser University where she was studying business.

[67] Ms. Rana estimated that her vehicle was directly behind the Acura for about one or two minutes before MVA #1. She recalled that there were no vehicles ahead of the Acura for a “decent distance” and no visual distractions within a block or two of the Crosswalk. She remembered seeing people out walking in the neighbourhood at the time.

[68] Ms. Rana recalled that the driver of the Acura initially delayed making a left turn from 144th Street onto 76th Avenue, before turning into the wrong lane and then correcting his mistake. She also recalled that the Acura was periodically slowing down and speeding up; based on a glance at her own speedometer, she estimated its speed to be in the range of 35–55 km/h, an estimate she later adjusted to 45–55 km/h. Ms. Rana admitted she did not know what was going on inside the Acura.

[69] Ms. Rana’s main focus before MVA #1 was the Acura. She testified that she maintained a safe distance (of about one car length) behind the Acura so that she could bring her own vehicle to a stop, as necessary. She recalled seeing the Parked Cars to her right on 76th Avenue, in the vicinity of the Crosswalk. She denied having any difficulty seeing either the sidewalk to her right or the Crosswalk as she approached it that night. She conceded that, depending on where a driver was on 76th Avenue, the Parked Cars might be an obstruction; however, she denied they were an obstruction for her before MVA #1.

[70] Ms. Rana remembered seeing pedestrians in the Crosswalk immediately before MVA #1; she could not recall precisely how many people she saw but she thought it was one or two individuals. She admitted there was nothing obstructing these pedestrians from her vantage point behind the Acura. She estimated that they were about one metre into the Crosswalk when she saw them, and confirmed that they were crossing from her right to her left side of 76th Avenue (i.e., from the south to the north side).

[71] Ms. Rana does not remember seeing any oncoming (westbound) traffic immediately before MVA #1. She recalls hearing a thump but admits she did not see

the impact. She estimated the time that elapsed from when she first noticed pedestrians in the Crosswalk until she heard a thump to be “within five seconds”.

D. Expert Evidence

1. Qualifications

[72] Six experts testified at trial: five professional engineers and one professional animator. Three of these engineers offered opinions about the Acura’s driving speed, the Gill Pedestrians’ walking speed, driver and pedestrian response times, and the sightlines potentially available to Mr. Siekham and the Gill Pedestrians before MVA #1. The animator provided a 3D visual reconstruction of these sightlines.

[73] The infant plaintiffs called professional engineer, Kurt Ising. Mr. Ising was qualified as an engineering expert, able to opine regarding accident reconstruction, human factors, and roadway lighting. He authored two reports: one dated July 29, 2020; and one dated June 20, 2023.

[74] The Siekham defendants called mechanical engineer, Trevor Dinn. Mr. Dinn was qualified as a professional engineer, with expertise in engineering accident reconstruction. He authored a report dated May 12, 2023

[75] Ms. Bellefontaine, owner of the Hyundai, and Mr. Tavana, owner of the BMW, called professional engineer, Jonathan Gough. Mr. Gough was qualified as an engineering expert, able to opine in the areas of accident reconstruction, including nighttime visibility, illumination, and sightlines. Mr. Gough attended at the site of MVA #1 on two occasions: in the daytime on July 6, 2022; and at night on October 7, 2022. He authored a report dated March 20, 2023.

[76] The City called animator, Jakub Pokorny. Mr. Pokorny was qualified as an expert in 3D scanning and computer animation. He prepared computer animations recreating the sightlines that he concluded would have been available to the Gill Pedestrians and to Mr. Siekham immediately before, and at the time of, MVA #1, with the Acura travelling eastward at three different speeds (30, 40, and 50 km/h).

Mr. Pokorny prepared nine animations; four were admitted into evidence at trial (the "Animations"). He also authored a report dated February 27, 2020.

[77] The experts conceded that it is impossible to reconstruct this kind of pedestrian-motor vehicle accident with precision. The Acura was not fitted with a black box data recorder and there is no video evidence of MVA #1. Accordingly, the experts necessarily estimated the Acura's speed immediately before MVA #1. Driver response times are dependent on driving speed. Pedestrian response times are dependent on where the pedestrian is looking at any given time. Pedestrian walking speeds are variable. None of this information is independently verifiable.

[78] I accept that the engineering experts were appropriately qualified to offer the opinions they did and that they estimated driving and walking speeds, driver and pedestrian response times, and available sightlines between Mr. Siekham and the Gill Pedestrians before MVA #1 to the best of their abilities. I accept that Mr. Pokorny is an expert in 3D animation. However, given the impossibility of reconstructing MVA #1 with certainty, I conclude that all of this evidence is necessarily subject to inherent limitations.

[79] I have assessed the expert opinions in light of the evidence as a whole, my overall assessment of the credibility and reliability of the trial evidence, and my findings of fact. Ultimately, I conclude that the expert evidence regarding estimated speeds, corresponding response times, and hypothetically available sightlines, must yield to my findings about what actually transpired immediately before MVA #1.

2. Methodology

[80] The experts employed a variety of methods to estimate driver and pedestrian speeds and response times, and to recreate sightlines between Mr. Siekham and the Gill Pedestrians before MVA #1, based on the assumptions set out in their reports.

[81] Mr. Ising overlaid police photographs taken after MVA #1 onto the scanned environment that he created (using photographs and measurements of the accident

scene) in order to assess sightlines between Mr. Siekham and the Gill Pedestrians. Mr. Dinn used PC Crash software to analyze these sightlines.

[82] Mr. Gough based his opinions about available sightlines on data he compiled using a 2018 Kia Forte 5 (to simulate the Hyundai) and a video camera to record an approaching 2021 Infiniti (to simulate the Acura) at a speed of about 50 km/h.

[83] Mr. Pokorny created 3D computer simulations of sightlines using police photographs from the accident scene and aerial photographs obtained from the City. He is not a professional engineer and does not purport to recreate MVA #1, or to opine on how or why it occurred. His results are set out in writing in his report and demonstrated visually in the Animations.

3. Opinions

a) Lighting

[84] It is common ground that the lighting at the Crosswalk has changed since MVA #1 and cannot be recreated with precision.

[85] Mr. Ising assumed, and I accept, that the street lighting present at the time of MVA #1 was sufficient to allow for detection when pedestrians were in the Crosswalk.

[86] Mr. Dinn simulated sightlines in a daytime environment. His images do not depict what the accident scene would have looked like at night. He conceded that what a camera can detect might be different from what the human eye can see. He agreed that an illuminated object in a nighttime environment is more visible than a non-illuminated object.

[87] According to Mr. Gough, measuring illumination at the accident scene provides limited information about whether sightlines would have been sufficient to allow individuals to see each other. He testified that the sightline to the Acura's headlights would have been the same, regardless of how bright or dark it was at the time of MVA #1. In his opinion, if lighting had any impact, the Gill Pedestrians' ability

to see approaching headlights would have improved as it got darker. He confirmed that visibility is a function of contrast: the greater the contrast, the more likely it is that pedestrians would detect approaching headlights.

[88] Mr. Pokorny admitted he did not intend the Animations to be photorealistic.

b) The Acura's Speed

[89] Mr. Siekham estimated his driving speed before MVA #1 to be in the range of 40–50 km/h. Based on her own speed while following the Acura, Ms. Rana estimated Mr. Siekham's driving speed to be in the range of 45–55 km/h.

[90] Based on measured throw distances for the Children after impact, Mr. Ising estimated Mr. Siekham's impact speed in the range of 37–45 km/h; he assumed an impact speed of 40 km/h. He conceded that, because the Children's rest positions were close to, and possibly slowed by, the sidewalk curb, the Acura's actual speed might have been higher than his assumed speed. Mr. Ising admitted he did not know if Mr. Siekham braked before impact, saying there is no physical evidence of it and that the Acura traveled quite a distance before it stopped. His analysis suggested "no possibility for much braking" before impact.

[91] Based on measured throw distances for the Children, and pedestrian throw distance data summarized in Andrew Happer et al, "Comprehensive Analysis Method for Vehicle/Pedestrian Collisions" (2000) 109:6 SAE Transactions 1288, Mr. Dinn concluded that the Acura's speed likely ranged from 34–60 km/h. He assumed that Mr. Siekham was travelling at 50 km/h immediately before MVA #1. He admitted he had no ability to narrow this range. He conceded that the presence of a curb would have slowed the travel and diminished the throw distances of the Children while noting that, if the curb was present at the end of a throw, it probably would not have affected throw distances that much.

[92] Mr. Gough assumed that the Acura was travelling at a speed of 50–55 km/h before MVA #1. Mr. Pokorny prepared the Animations based on assumed speeds of 30, 40, and 50 km/h for the Acura.

[93] I accept 40–50 km/h as a reasonable estimate of the Acura's speed before MVA #1. This range is consistent with the evidence of both Mr. Siekham and Ms. Rana. It also falls within the range estimated by the experts, based on pedestrian throw distances.

[94] I accept Mr. Gough's uncontroverted evidence that virtually all of the research regarding throw distances is based on front impact collisions and not the kind of glancing blows that occurred in MVA #1. I also accept the uncontroverted evidence of Mr. Ising and Mr. Dinn that the curb on the south side of 76th Avenue could have slowed the distance the Children travelled after impact. Accordingly, I find that the higher end of this range probably more closely approximates the Acura's actual speed immediately before MVA #1.

c) The Gill Pedestrians' Walking Speed

[95] The Gill Pedestrians' walking speed immediately before MVA #1 is unknown and cannot be estimated with certainty. Mr. Ising does not comment on this matter in his report. The walking speeds estimated by Mr. Dinn, Mr. Gough, and Mr. Pokorny fall within a narrow range.

[96] Mr. Dinn analyzed a Youtube video of a 7-year old boy on a go-cart and relied on a research paper by Jeannette Montufar et al, "Pedestrians' Normal Walking Speed and Speed When Crossing a Street" (2007) 2002:1 Transportation Research Record 90, regarding female walking speed of about 1.5 m/s, to estimate the Gill Pedestrians' walking speed as they entered the Crosswalk. Based on this data, Mr. Dinn concluded that it likely took the Gill Pedestrians about two seconds to travel from a position in line with the Parked Cars (a distance of about two metres) to the point of impact. Based on an assumed speed of 50 km/h (or 14 m/s), the Acura would then have been about 28 metres from the point of impact.

[97] Mr. Dinn estimated that it likely took the Gill Pedestrians about five seconds to travel from the curb to the point of impact. He conceded that he does not how long they might have stopped on the sidewalk before entering the Crosswalk. He assumed that their crossing took four seconds; he added one second to account for

possible slowing or stopping. Based on his estimated speed of 50 km/h, the Acura would have been about 70 metres west of the Crosswalk five seconds before impact.

[98] Mr. Dinn agreed that the walking speed study on which he relied excluded pedestrians walking with children and those with bikes, roller skates, skate boards, or other similar devices. Based on this study, he admitted there is quite a bit of variability in pedestrian walking speeds. He assumed that the Gill Pedestrians walked two metres into the road, stopped, and then walked another two metres to the point of impact. He conceded that he does not know what they actually did.

[99] Mr. Gough assumed a crossing speed for the Gill Pedestrians of about 1.5 m/s. He too conceded that the literature regarding average female walking speed excludes pedestrians walking with children and bikes or similar devices. Mr. Pokorny assumed a generic walking speed of 1.4 m/s for the Gill Pedestrians. He admitted he does not know how they actually moved from the sidewalk into the Crosswalk.

[100] Neither Mrs. Gill nor her husband gave clear or convincing evidence about how they actually travelled through the Crosswalk immediately before MVA #1. Contrary to her evidence given on discovery, Mrs. Gill maintained at trial that she could not remember stopping in the Crosswalk to look both ways a second time for oncoming traffic. Notably, Mrs. Gill did not deny stopping to look a second time after leaving the sidewalk at trial; rather, she testified that she could not recall doing so. It is unclear what prompted her to change the unequivocal answer she gave about that matter at her 2019 examination for discovery, almost four years before trial. Mrs. Gill offered no compelling explanation for doing so. In the circumstances, I prefer her evidence given on discovery on this point, at which time she conceded her memory of material events would have been better than it was at trial.

[101] Ultimately, I accept Mr. Dinn’s opinion that it likely took the Gill Pedestrians about five seconds to reach the point of impact, after they left the sidewalk. In my view, the addition of one second to his estimated four second crossing time reasonably accounts for inherent limitations in the walking study that he and Mr.

Gough referenced (which excludes children and pedestrians walking with bikes or similar devices). The Gill Pedestrians included the Children, one of whom was riding a small go-cart. In my view, those factors would likely have slowed the Gill Pedestrians' progress from the sidewalk through the Crosswalk before MVA #1.

[102] I find that it likely took the Gill Pedestrians about two seconds to travel from their position on the sidewalk to one aligned with the driver's side of the Parked Cars, and about two more seconds to move from that position to the point of impact.

d) Mr. Siekham's Response Time

[103] Mr. Ising explained that some time is required before a driver is able to detect a hazard, decide on an appropriate course of action, and execute a response. He opined as follows:

a) An average brake response time to a hazard from the side is about 1.4 seconds;

b) Nearly another full second might be required to achieve full braking (for a total of about 2.4 seconds);

c) Accordingly, it might not have been possible for Mr. Siekham to stop if his sightline to the Gill Pedestrians was only 2.3 seconds;

d) The probability of a driver stopping if his available sightline was only 2.3 seconds (as it would have been if the Parked Cars were present) was about 31%;

e) If the Hyundai (the easternmost car) was not present, the sightline would have been about three seconds, thereby increasing the likelihood that a driver could stop before impact to about 95%; and

f) If neither of the Parked Cars was present, the sightline would have been sufficient for essentially all drivers to stop.

[104] Mr. Ising was asked to assume that Mr. Siekham took his eyes off the road for about one second shortly before impact. The timing and duration of this event is both uncertain and unverifiable. Mr. Ising opined that Mr. Siekham could potentially have looked away just as Himmat was emerging from in front of the Parked Cars. Based on this assumption, he concluded that this would have reduced Mr. Siekham's available sightline to the Gill Pedestrians to about 1.3 seconds (if both of the Parked Cars were present) or about two seconds (if only the BMW, the rear parked car, was present). In his opinion, this would, in turn, reduce the probability that a driver could stop to about 0% and 5%, respectively.

[105] Mr. Ising admitted he does not know when Mr. Siekham actually took his eyes off the road. He agreed that, if Mr. Siekham did so for more than one second, this would have further reduced the possibility of avoidance, even if the Parked Cars were not present. He conceded that:

a) A driver would probably be able to detect a hazard and react to it within 2.3 seconds, but not bring their vehicle to full stop; and

b) The only information he had about the Acura was its rest position, a relatively long distance from the point of impact (about 25–30 metres past the point of impact on his evidence), which suggests to him lighter than maximum braking or a long time to achieve braking.

[106] Mr. Dinn opines, and I have found, that it likely took the Gill Pedestrians about two seconds to travel from a position in line with the Parked Cars to the point of impact. A vehicle moving at 50 km/h will travel about 28 metres in two seconds (i.e., 14 m/s). Mr. Dinn therefore concludes that Mr. Siekham would have been about 28 metres from the point of impact when the Gill Pedestrians left their position in the Crosswalk, in line with the Parked Cars. By extension, he concludes that Mr. Siekham would have had about two seconds to see them, react to their presence in the Crosswalk, and brake before MVA #1.

[107] Citing Jeffrey Muttart, “Path Intrusion Response Times and PRT Charts”, online: Crash Safety Research Centre, Mr. Dinn estimates the perception reaction time for a driver responding to pedestrians walking into his path to be about 1.6 seconds plus or minus 0.6 seconds (i.e., up to 2.2 seconds total). He therefore concludes that Mr. Siekham would have had little time to avoid MVA #1. In his view, MVA #1 was likely unavoidable if Mr. Siekham did not see Gill Pedestrians before they moved beyond their position in line with the Parked Cars.

[108] Mr. Gough does not comment on Mr. Siekham’s response time.

[109] I find that Mr. Siekham would likely have required about 2.2–2.4 seconds to see the Gill Pedestrians in the Crosswalk, react to their presence, and respond by braking before MVA #1.

e) Mr. Siekham’s Lapse in Attention

[110] Mr. Siekham estimated that he glanced away from 76th Avenue for about one second as he approached the Crosswalk. This estimate is necessarily imprecise. The plaintiffs accept it as accurate; the other defendants submit that Mr. Siekham was distracted for substantially more than one second before MVA #1.

[111] I have found that Mr. Siekham would probably have required 2.2–2.4 seconds to see the Gill Pedestrians in the Crosswalk, identify their presence as a hazard, and respond by braking. Mr. Ising agreed that a driver could probably detect and react to such a hazard within 2.3 seconds, but not bring their vehicle to a full stop. On Mr. Siekham’s own evidence, he neither detected nor reacted to the presence of the Gill Pedestrians in the Crosswalk before the Acura struck some of them.

[112] Mr. Siekham neither braked nor slowed the Acura before impact. There was no physical evidence of any hard braking at the accident scene and it took a considerable distance for Mr. Siekham to bring the Acura to a stop after MVA #1. This is consistent with the evidence of Mr. Ising who opined that the Acura came to rest after MVA #1 about 25–30 metres past the point of impact. It is also consistent with the opinion of Mr. Gough who concluded that the front end of the Acura stopped

about 30 metres beyond the mid-point of the Crosswalk, and that of Mr. Dinn who opined that the Acura came to rest with its front bumper about 32 metres to the east of the impact area.

[113] On Mr. Ising's evidence, Mr. Siekham would have had a sightline to the Gill Pedestrians 2.3 seconds before impact, when they moved beyond the driver's side of the Parked Cars. On Mr. Siekham's own evidence, he did not react to the Gill Pedestrians' presence in the Crosswalk until after he struck some of them. Accepting Mr. Ising's opinion, this evidence is consistent with Mr. Siekham taking his eyes off the road for at least two seconds before impact.

[114] Having regard to the trial evidence as a whole, I find that Mr. Siekham's attention was probably diverted from the roadway for more than one second as he approached the Crosswalk. I find that he likely took his eyes off the roadway for at least two seconds immediately before MVA #1.

f) The Point of Impact

[115] Based on his review of post-accident photographs taken of the Acura, Mr. Ising noted:

a) The presence of scuff marks on the front bumper cover;

b) The corner of the right front passenger-side bumper cover was broken;

c) There was a dent on the right half of the front hood; and

d) The right-side mirror was broken and loose.

[116] Given the presence of fresh scuff marks on the tires of Himmat's green go-cart, and police photographs showing green paint transfer on the Acura's front bumper cover (consistent with the colour of Himmat's go-cart), Mr. Ising aligned the Acura and Himmat's go-cart at the point of impact. In his view, it appeared that Mrs. Gill and the Children were all struck within the right half of the Acura's front end. He

concluded that the point of impact was within the normal path for vehicle traffic on 76th Avenue.

[117] Mr. Dinn noted that the Acura had evidence of contact to its right front bumper, hood, fender, right side door, and right mirror. Based on the RCMP information he received, he concluded that the impact occurred about four metres north of the southern road edge of 76th Avenue, near the western edge of the Crosswalk.

[118] Based on evidence of contact to the front of the Acura, Mr. Gough concluded that the Gill Pedestrians had crossed almost to the centre of the Acura before they were struck. Based on his review of RCMP information, he concluded that the impact likely occurred about four metres north of the southern road edge of 76th Avenue, near the western edge of the Crosswalk. In his opinion, all contacts in MVA #1 occurred to the right half of the Acura.

[119] Mr. Pokorny did not attempt to reconstruct MVA #1. Accordingly, the Animations end before the point of impact.

[120] I accept the preponderance of expert evidence that Mrs. Gill likely contacted the Acura's hood on impact and that Himmat's go-cart likely contacted the Acura's front bumper. I conclude that the point of impact probably occurred about four metres north of the sidewalk on the south side of 76th Avenue (i.e., about one-third of the way across 76th Avenue in the Crosswalk) and that Mrs. Gill and the Children likely struck the right half of the Acura's front end.

g) Sightlines

[121] There was a substantial volume of expert evidence at trial, premised on variable assumptions, about the sightlines potentially available to Mr. Siekham and the adult Gill Pedestrians, if they had been looking, before MVA #1. Given my findings of fact, I conclude that much of it is of limited relevance in assessing the liability issues in this case. Mr. Ising conceded in cross-examination that none of the

police documents he received before preparing his report in this matter raised sightline obstructions as a contributing factor in MVA #1.

i. Mr. Siekham's Sightlines

[122] Mr. Ising opines that a sightline existed, over the Parked Cars, between Mr. Siekham and the adult Gill Pedestrians before they entered the Crosswalk. He agreed that their heads, and potentially their shoulders, would have been visible to Mr. Siekham above the hood of the Hyundai. However, it is unclear to Mr. Ising whether or not they would have been detectible. In his opinion:

a) The Children would not have been visible until they moved in front of the Hyundai (the easternmost parked car) about 2.3 seconds before impact; and

b) If the Hyundai had not been present, Himmat would have been visible to Mr. Siekham about three seconds before impact.

[123] Mr. Ising conceded that detecting the Gill Pedestrians would have required an approaching driver to be attentive and actively scanning the Crosswalk area. He admitted it is easier to see big things than small things, that brighter clothing is generally more detectible (than darker clothing), and that moving objects can be more conspicuous than stationary ones. Ultimately, he agreed that, if Mr. Siekham had looked, it is possible he would have seen the heads (and possibly the shoulders) of the adult Gill Pedestrians above the Parked Cars.

[124] Mr. Dinn opines that Mr. Siekham would have had a partial view of Mr. and Mrs. Gill approximately 28 metres before impact (i.e., two seconds at a speed of 50 km/h). He concluded that Mrs. Gill's visibility would have depended on lighting and contrast against her background, factors not addressed in his report. Mr. Dinn offered his views about how Mr. Siekham's sightline would have improved in the absence of the Parked Cars, with a corresponding increased potential for Mr. Siekham to initiate an avoidance response. Mr. Dinn admitted:

a) The closer the Parked Cars are to the Crosswalk, the greater their impact on sightlines;

b) In the absence of the Parked Cars, Mr. Siekham would have had a better opportunity to see the Gill Pedestrians; and

c) Sightlines are less impacted as the Gill Pedestrians move north and start to see around the Parked Cars.

[125] Notably, Mr. Dinn was not asked to assume that Mr. Siekham took his eyes off the road for any length of time as he approached the Crosswalk, or that he did not look for pedestrians standing on the sidewalk on the south side of 76th Avenue. When Mr. Dinn commented on available sightlines, absent the Parked Cars, he assumed that Mr. Siekham was looking forward down 76th Avenue at the Crosswalk and for pedestrians on the sidewalk. He agreed that, if Mr. Siekham was not doing those things, it would have been very difficult for him to avoid a collision.

[126] Mr. Dinn conceded that, if Mr. Siekham was not looking in the direction of either the Crosswalk or the sidewalk where the Gill Pedestrians were standing before MVA #1, the presence of the Parked Cars is immaterial. He admitted his opinions on sightlines assume that Mr. Siekham was looking towards the Crosswalk and that Mrs. Gill was looking towards approaching traffic.

[127] While Mr. Gough conceded that Mr. Siekham might have had a sightline to the adult Gill Pedestrians at 77 metres from the Crosswalk, he admitted this does not mean that Mr. Siekham would have detected them.

[128] Assuming a speed of 50 km/h for the Acura, Mr. Pokorny concluded there was a partial sightline obstruction between Mr. Siekham and Mrs. Gill due to the presence of the Parked Cars:

a) Beginning at 4.10 seconds (or 56.99 metres prior to impact);

b) Ending at 1.77 seconds (or 24.55 metres prior to impact); and

c) Lasting for a total of 2.33 seconds (over a distance of 32.44 metres).

[129] The expert evidence, taken as a whole, persuades me that there was a sightline available between Mr. Siekham and the adult Gill Pedestrians, over the hood of the Hyundai, before MVA #1. This view is reinforced by a police photograph in evidence, taken west of the Crosswalk from an eastward-facing position, behind the BMW, about 25 metres from the Crosswalk, depicting the complete Crosswalk, including the letdown area on the south side of 76th Avenue, at the southern edge of the eastbound lane.

[130] On Mr. Siekham's unchallenged evidence, he would have been driving closer to the centreline of 76th Avenue than the curb on the night in question (given the presence of parked cars in the far-right portion of the eastbound lane); I accept that this might have further improved his sightline to the south side of 76th Avenue as he approached the Crosswalk. The Crosswalk was illuminated. On Mr. Ising's uncontroverted evidence, low beam lights are angled down and to the right and the Acura's headlights were probably illuminated more towards Mrs. Gill's position.

[131] I accept that the presence of a sightline to the adult Gill Pedestrians before MVA #1 does not mean that Mr. Siekham saw them. I consider this question when assessing whether or not Mr. Siekham was negligent. I accept Mr. Ising's evidence that Mr. Siekham had no sightline to the Children until Himmat moved beyond the driver's side of the Hyundai. On Mr. Ising's evidence, this occurred about 2.3 seconds before impact. This evidence is consistent with Mr. Dinn's opinion that the infant plaintiffs would have been partially or fully obscured by the Parked Cars when the Acura was 28 metres away.

[132] Ultimately, I accept Mr. Dinn's admission that the presence of the Parked Cars is immaterial if, as I find, Mr. Siekham was not looking in the direction of the Crosswalk or the Gill Pedestrians immediately before MVA #1.

ii. Mrs. Gill's Sightlines

[133] Mr. Ising offers the following opinions regarding Mrs. Gill's sightlines to the Acura before MVA #1:

a) It is difficult to assess the effect of the Parked Cars from Mrs. Gill's perspective;

b) The Acura's headlights would have been visible to Mrs. Gill if she had looked to her left before the Acura passed behind the BMW**;**

c) Its headlights would have been blocked from about 3.8–3.3 seconds before impact (for 0.5 of one second in total), would have appeared briefly between the Parked Cars, and then been hidden again from about 2.9–2.6 seconds (for 0.3 of one second in total) before impact;

d) The Acura's headlights might have been intermittently visible through the windows of the Parked Cars;

e) The headlights of the Acura would have been entirely clear of the Hyundai (the easternmost parked car) about 2.6 seconds before impact, at which time, based on his estimate of its speed, the Acura would have been about 29 metres west of the Crosswalk, and Mrs. Gill would have been at the curb edge and just entering the Crosswalk;

f) If Mrs. Gill looked left at this time, there was no further blockage between her and the Acura's headlights and they were there to be seen;

g) It is not clear whether Mrs. Gill's leftward glance aligned with the headlights of the approaching Acura;

h) If Mrs. Gill was looking to her right, the Acura's headlights would have had to overpower the streetlights for her to detect them and it is unclear whether this glare would have been detectible;

i) The Acura's headlights would have been moving forward with the car and the brightness of the road would have increased as the Acura moved closer but it is unclear whether this would have been detectible to Mrs. Gill if she was then looking to her right; and

j) As Mrs. Gill moved forward, her view of the Acura would have progressively improved.

[134] Mr. Ising conceded that, although the Acura's headlights would have been less conspicuous through the windows of the Parked Cars, they might then have been visible, depending on tinting. He did not know whether, or to what extent, the windows of the Parked Cars might have been tinted. Ms. Bellefontaine admitted the windows of the Hyundai had no tinting that would have tended to darken them.

[135] Mr. Ising conceded that, if Mrs. Gill never saw the Acura, this could be because she did not look to her left. He agreed that pedestrians at a crosswalk normally look for longer than one-half of a second (when looking left or right for approaching traffic). He conceded that, apart from the 0.5 and 0.3 of one second when the Acura's headlights were temporarily hidden by the Parked Cars, they were always visible (apart from other intervals when they could have been disappeared behind other parked cars, further to the west on 76th Avenue, some distance from the Crosswalk).

[136] Having regard to the downhill grade for eastbound traffic on 76th Avenue, starting about 150 metres from the Crosswalk, Mr. Dinn opines that there was a sightline from a position in the Crosswalk (in line with the Parked Cars) to eastbound traffic for at least 250 metres (i.e., all the way to 146 Street). He admitted this distance could be greater than 250 metres and that, if someone looked, the Acura's headlights would have been visible from this distance, assuming nothing interfered with this sightline (including, for example, other vehicles or light sources).

[137] Using PC Crash software, Mr. Dinn concluded that a person of Mrs. Gill's height, standing at the southern curb edge on 76th Avenue, would have been able to

view at least one of the Acura's headlights for at least 5.5 seconds (i.e., 77 metres) before impact. He opines that this sightline would have increased for positions further north in the Crosswalk. He agreed that a person taller than Mrs. Gill (like her husband) would have had a better sightline than she did. He also conceded that when Mrs. Gill was on the curb, she would have had an added height of about 15 cm. On the assumption that the Parked Cars were about 145 cm and Mrs. Gill was 168 cm tall, Mr. Dinn admitted she would have a clearance of about 23 cm, plus the added height of the curb (i.e., for a total clearance of 38 cm over the Parked Cars).

[138] Mr. Dinn considered sightlines for someone of Mrs. Gill's stature looking to her left, one metre before the roadway, at the curb, and one and two metres from the curb (into the Crosswalk). He reached the following conclusions:

a) The Hyundai (the easternmost of the Parked Cars and the one closest to the Crosswalk) was not relevant to Mrs. Gill's sightline to the Acura;

b) A pedestrian of Mrs. Gill's stature should have been able to see the headlights of the approaching Acura over the Parked Cars before she started onto the road surface;

c) If Mrs. Gill stopped in line with the driver's side of the Parked Cars before proceeding, she would have had unobstructed view of the approaching Acura; and

d) When the Gill Pedestrians proceeded across 76th Avenue, from a position in line with the driver's side of the Parked Cars, the Acura would probably have been less than 30 metres away.

[139] Mr. Gough opined that Mrs. Gill had a sightline to the Acura over top of the Parked Cars. He admitted:

a) The Parked Cars would be less of an obstruction for a person taller than Mrs. Gill;

b) He would expect a pedestrian to look both ways before stepping off the curb; and

c) Once a pedestrian enters the roadway, their focus would typically be on the nearest oncoming traffic which, in this case, would be to the Gill Pedestrians' left, as they started into the Crosswalk, and then to their right as they neared the centreline (i.e., the direction from which the next hazard could be coming), describing this as normal crossing behavior.

[140] Mr. Pokorny concluded that, if the Acura was travelling at 50 km/h, Mrs. Gill would have had a partial sightline obstruction due to the Parked Cars:

a) Beginning at 3.87 seconds or 53.75 metres prior to impact;

b) Ending at 1.73 seconds or 24.09 metres prior to impact; and

c) Lasting for a total of 2.14 seconds.

[141] Mr. Pokorny agreed that, whether sightlines were actually available depends on where the Gill Pedestrians were standing, the location of the Acura, and the way they came together.

[142] I find that Mrs. Gill had a sightline to the Acura over top of the Parked Cars from the sidewalk and a completely unobstructed view of the Acura's headlights from a position in line with the driver's side of the Hyundai, before MVA #1. It follows that Mr. Gill, who is taller than his wife, would have had at least the same (or better) sightlines available to him before MVA #1.

[143] On Mrs. Gill's trial evidence, she is 5'8.5" in height (174 cm). Based on her driver's license, she is 5'6" (168 cm). While I am unable to resolve this discrepancy, I find that a person of either 168 cm or 174 cm, standing at the edge of the south curb on 76th Avenue, would have had a sightline to the Acura over the Parked Cars.

[144] Having regard to their height, their position on the curb, the downhill grade to the east on 76th Avenue, the preponderance of expert evidence, and the police

photographs in evidence, I conclude that both Mr. and Mrs. Gill had sightlines to the Acura before MVA #1, as follows:

a) Before the Acura passed behind the BMW;

b) Possibly through the windows of the Parked Cars;

c) As the Acura passed between the Parked Cars; and

d) An unobstructed view from a position in line with the driver's side of the Hyundai.

[145] I accept that the presence of these sightlines does not mean that the adult Gill Pedestrians saw the Acura before MVA #1. I consider this question in my assessment of contributory negligence.

E. Summary of Findings of Fact

[146] My findings of fact are summarised as follows:

a) Mr. Siekham was probably travelling at about 50 km/h immediately before MVA #1;

b) It likely took the Gill Pedestrians about two seconds to travel from the sidewalk on the south side of 76th Avenue to a position in line with the driver's side of the Parked Cars, and another two seconds to travel from there to the point of impact, for a total travel time of about five seconds (having regard to the Gill Pedestrians' likely walking speed and the fact that Himmat was on a go-cart);

c) Assuming a speed of 50 km/h, the Acura would have been about 70 metres away from the Crosswalk five seconds before impact;

d) Mr. Siekham would have required 2.2–2.4 seconds to see the Gill Pedestrians, recognise their presence in the Crosswalk as a hazard, and respond by braking;

e) Mr. Siekham had a sightline to the adult Gill Pedestrians before MVA #1;

f) The adult Gill Pedestrians had a sightline to the Acura before MVA #1;

g) The Children had no sightline to the Acura until they passed beyond the driver's side of the Parked Cars about two seconds before impact;

h) Mr. Siekham took his eyes off the roadway for at least two seconds just before MVA #1;

i) The impact occurred about four metres north of the sidewalk on the south side of 76th Avenue; and

j) Mrs. Gill and the Children likely contacted the right half of the Acura's front end.

IV. LAW AND ANALYSIS

A. Who had the right of way before MVA #1?

[147] The starting point for an analysis of liability in a motor vehicle action is a determination of who had the right of way under the *MVA*. Section 179 of the *MVA* addresses the duties between motorists and pedestrians at crosswalks:

> **Rights of way between vehicle and pedestrian**
>
> **179** (1) Subject to section 180, the driver of a vehicle must yield the right of way to a pedestrian where traffic control signals are not in place or not in operation when the pedestrian is crossing the highway in a crosswalk and the pedestrian is on the half of the highway on which the vehicle is travelling, or is approaching so closely from the other half of the highway that he or she is in danger.
>
> (2) A pedestrian must not leave a curb or other place of safety and walk or run into the path of a vehicle that is so close it is impracticable for the driver to yield the right of way.
>
> …
>
> **Duty of driver**
>
> **181** Despite sections 178, 179 and 180, a driver of a vehicle must

> (a) exercise due care to avoid colliding with a pedestrian who is on the highway …

[148] A finding that someone is entitled to the right of way does not end the analysis; it is still necessary to consider whether the driver and the pedestrian breached their respective duties of care: *Panganiban v. Sovdat*, 2023 BCSC 650 at para. 48 [*Panganiban*], citing *Pirang v. Kooy* (1993), 76 B.C.L.R. (2d) 396, 1993 CanLII 1206 (C.A.) [*Pirang*] and *Cook v. Teh*, (1990), 45 B.C.L.R. (2d) 194, 1990 CanLII 1077 (C.A.) [*Cook*].

[149] As noted by Justice Elwood in *Panganiban* at para. 28:

> Generally speaking, the party with the right of way is entitled to assume that other users of the road will obey the rules of the road. However, the rights of way in the *MVA* are not an exclusive or exhaustive code. They are not a substitute for the common law duty to exercise due care for the safety of other users as well as one's own safety. Instead, they supplement the duty of care: *Cook v. Teh* (1990), 45 B.C.L.R. (2d) 194, 1990 CanLII 1077 (C.A.) at 203; *Salaam v. Abramovic*, 2010 BCCA 212 at paras. 18–21.

[150] Justice Dickson (then of this Court) summarized the relevant law in *Hmaied v. Wilkinson*, 2010 BCSC 1074 as follows:

> [22] …[D]rivers are ordinarily entitled to expect that adult pedestrians will not jump out directly in front of them as they are proceeding lawfully along their way…
>
> [23] Regardless of who has the right of way, however, there is a duty upon drivers and pedestrians alike to keep a proper lookout and take reasonable precautions in response to apparent potential hazards…
>
> [Footnotes omitted.]

[151] Citing the Court of Appeal in *Cook* at 210–11 and 220, Elwood J. set out the law regarding a pedestrian's right of way in a crosswalk in *Panganiban* at para. 31:

> (1) A pedestrian who desires to cross a highway in a crosswalk must not leave a curb or other place of safety and walk or run into the path of a vehicle that is so close that it is impracticable, i.e. when there is no "time" ("time" being the product of "speed" X "distance") for a driver to yield the right of way and
>
> (2) Having discharged such obligation both to himself and to the drivers of such vehicles, the pedestrian may then commence his act of "crossing" and the drivers of approaching vehicles (none of whom fall into the category of being "so close") must then yield the right of way to the "crossing" pedestrian.

> The result is a rational, reasonable and predictable code of conduct for motorists and pedestrians alike.

[152] The Gill Pedestrians submit that they had the right of way at the time of MVA #1. They argue that when they left the curb, the Acura was sufficiently far away that it was not impracticable for Mr. Siekham to stop. They submit that having looked and observed no traffic approaching, they were entitled to enter the Crosswalk and had a right to be there. Counsel for the adult Gill Pedestrians submits that a pedestrian who looks both ways and then steps off the curb "or other place of safety", having determined that no vehicle is present (with regard to its distance and speed) that is so close it is impracticable for its driver to stop, establishes their right of way in the crosswalk. In my view, this submission overstates the Gills' evidence. I do not accept that either Mrs. Gill or her husband took adequate steps to ensure that there was no oncoming eastbound traffic before leaving the curb and entering the Crosswalk. I do not agree with Mrs. Gill that, because she saw nothing, nothing was coming. On all the trial evidence, Mr. Siekham was then travelling eastbound on 76th Avenue.

[153] I conclude that Mrs. Gill currently has no reliable recollection of the material events immediately preceding MVA #1. She conceded, and I accept, that her recollection of events was likely better at the time of her 2019 examination for discovery than it is now. She admitted her answers given to questions asked on her discovery were true (apart from the one she changed to reflect her current uncertainty about whether or not she stopped before looking a second time for oncoming traffic when in the Crosswalk). Accordingly, as noted, to the extent there are conflicts, I generally prefer Mrs. Gill's discovery evidence to her trial evidence.

[154] Notably, Mrs. Gill neither disputed nor corrected any of the other answers put to her in cross-examination at trial that she gave at her examination for discovery. Based on Mrs. Gill's own undisputed sworn discovery evidence, she:

a) Looked to her left for oncoming eastbound traffic from the curb; and

b) "[C]ouldn't really see clearly" as the Parked Cars were "kind of blocking" her view.

[155] When pressed at trial about whether she saw nothing (because there was nothing there to be seen) or whether she could not see (because something obstructed her view), Mrs. Gill's responses were consistently ambiguous and she denied knowing the answer to this question. On Mrs. Gill's evidence, she then "started walking again" and entered the Crosswalk. Based on her own evidence, I am unable to find that she took reasonable steps to ensure there was no oncoming eastbound traffic before leaving the south curb and entering the Crosswalk.

[156] I conclude that the same is true for Mr. Gill. He too gave vague evidence about whether or not he had an unobstructed view to his left down 76th Avenue over the Parked Cars, saying he was then able to see "as far as [he] could see." He admitted he nonetheless entered the Crosswalk, looked around the Parked Cars, saw the Acura, and then stopped.

[157] The Gill Pedestrians assert they had the legal right of way and that Mr. Siekham was required to yield to them. They submit that, even if Mrs. Gill had looked to her left, seen the Acura, and walked into the roadway on the assumption that it would stop (which she denies), she would have been legally within her rights to do so. They say it is legally irrelevant whether or not Mrs. Gill looked a second time for oncoming traffic while travelling through the Crosswalk with the Children. In their submission, she met her burden to look both ways for oncoming traffic when on the sidewalk, and entered the Crosswalk when it was safe to do so. The Gill Pedestrians submit that, once they had legally entered the Crosswalk, they were entitled to proceed on the basis they had the right of way and that oncoming cars would stop for them.

[158] I do not agree that either Mr. or Mrs. Gill took reasonable steps to determine whether or not there was any approaching traffic from the west before leaving the sidewalk and entering the Crosswalk. I find that they both entered the Crosswalk without knowing for certain whether or not there was any oncoming eastbound traffic. If they had done so, they would have known that any such vehicle(s) would

have continued to travel eastward while they moved through the Crosswalk. The Acura would not have appeared in front of Mrs. Gill suddenly and unexpectedly.

[159] I have found that the Gill Pedestrians likely left the sidewalk about five seconds before impact. Assuming a speed of 50 km/h, the Acura would then have been about 70 metres away. I agree that, if Mr. Siekham had been driving with due care and attention, it would not then have been impracticable for him to have brought the Acura to a stop. However, I do not agree that the Gill Pedestrians took the steps necessary to make this determination before leaving the sidewalk.

[160] The Gill Pedestrians did not cross the Acura's path until after they had passed the driver's side of the Hyundai and entered the travelled portion of the eastbound lane. Accordingly, I next consider whether their position in the Crosswalk, in line with the driver's side of the Parked Cars, was an "other place of safety" within the meaning of s. 179(2) of the *MVA* (which provides that a pedestrian must not leave a curb or other place of safety and enter the path of a vehicle that is so close it is unable to yield).

[161] The Gill Pedestrians deny that a pedestrian who is shielded by a stationary vehicle in a roadway is within an "other place of safety" as contemplated by s. 179(2) of the *MVA*. Collectively, they cite *Hefferland v. Fink*, [1995] B.C.J. No. 107 at para. 16, 1995 CanLII 2047 (S.C.) [*Hefferland*]; *Mate v. Nour*, [1999] B.C.J. No. 754 at para. 32, 1999 CanLII 6638 (S.C.) [*Mate*]; *Miksch v. Hambleton,* [1990] B.C.J. No. 1810, 1990 CanLII 177 (S.C.) [*Miksch*]; *Ho v. Balanecki*, [1990] B.C.J. No. 1747, 1990 CanLII 1020 (S.C.) [*Ho*]; *Garcia v. Charters*, 2006 BCSC 875. Mrs. Gill submits that a place of safety is the curb, referencing *Loewen v. Bernardi* (1994), 93 B.C.L.R. (2d) 242, 1994 CanLII 1147 (C.A.) at para. 10 [*Loewen*]:

> Where, as here, the incautious leaving by a pedestrian of a "place of safety" is found, the question of what is a "place of safety" is open to interpretation pursuant to general principles of language. Briefly stated the principle applicable here is that where particular words are followed by general words the general words are intended to express the same dominant feature as the particular words. Here we find that the particular word "curb" connotes a raised or guarded place such as a safety island, median or boulevard, all of which are restricted as is the curb to use by pedestrians and forbidden to

> vehicular traffic. Accordingly the interpretation of the general words "other place of safety" would not include a place in the middle of a marked crosswalk which is also a portion of the roadway otherwise permitted to travel by motor vehicles. Such an area may be found to be relatively safer for pedestrians than would be the through traffic lanes, but I do not consider such an area to be an "other place of safety".

[162] *Hefferland* and *Mate* both involved pedestrians who were hit by vehicles in a crosswalk after emerging from a position in line with another stationary vehicle. Unlike this case, the plaintiffs in *Hefferland* and *Mate* were shielded by a vehicle that was stopped temporarily in an active lane of traffic. By contrast, the Gill Pedestrians were positioned behind the Parked Cars in what was effectively a parking lane in the vicinity of the Crosswalk.

[163] In *Miksch*, the plaintiff had crossed four and a half lanes of traffic when she was struck in an unmarked crosswalk. Justice Donald found that nothing obscured the view of either the driver or the pedestrian from the other, and that the plaintiff had started to cross the street when it was safe to do so. Unlike *Miksch*, I have found that the Gill Pedestrians failed to take reasonable steps to ensure it was safe to enter the roadway before leaving either the sidewalk or their position in line with the driver's side of the Parked Cars. Unlike the case before me, the plaintiff in *Miksch* was not shielded by parked vehicles before entering the portion of the roadway that was an active lane of travel in the vicinity of the accident.

[164] In *Ho*, Justice Coultas found that the centreline on the roadway where the plaintiff was struck was "not a raised safety zone or a median – it was merely a single yellow line in the road" and not a "place of safety" within the meaning of then s. 181(2) of the *MVA*. A painted centreline in the middle of a roadway is not comparable to the Gill Pedestrians' position while shielded from oncoming traffic by the Parked Cars.

[165] In *Garcia* at para. 41, Justice Slade found that the plaintiff was struck by the defendant driver while in plain view in a crosswalk. He noted at para. 44 that, while there was a median dividing the opposing lanes of traffic in the roadway, the plaintiff was in the crosswalk when struck and that the "presence of a median a short distance to the east could not have constituted a place of safety" (as contemplated by then s. 181(2) of the *MVA*). He found (at para. 44) that Ms. Garcia "would have

had to go out of the crosswalk to avail herself of the relative safety of the median" and (at para. 51) that she had crossed the shoulder, two traffic lanes and one half of a third lane when she was struck. Those facts are not analogous here.

[166] In *Loewen*, the Court of Appeal disagreed with the trial judge's finding that the middle turning lanes within the roadway were a "point of safety in the crosswalk". Unlike *Loewen*, the Gill Pedestrians were not struck while positioned within turning lanes in the middle of a crosswalk; rather, they were shielded by the Parked Cars in the Crosswalk, in a portion of the eastbound lane that was not then an active lane of travel in that location. This distinction is referenced in para. 12 of *Loewen* where the Court stated as follows:

> I find it hard to believe that the Legislature intended by the words "other place of safety" to mean and include the transitory circumstances or pattern of traffic in the roadway which obtained momentarily at a critical time in this case.
>
> [Emphasis added.]

[167] Mr. Siekham submits that he had the right of way at the time of MVA #1, saying the Acura was there to be seen. He underscores that both Mr. Gill and Himmat saw the Acura before impact and that Mr. Gill was able to avoid being struck. Notably, the duty owed under s. 181 of the *MVA* applies regardless of whether or not the driver has the right of way. A defendant cannot escape his statutory or common law duty by assuming he has the right of way: *Funk v. Carter,* 2004 BCSC 866 [*Funk*]; *Larsen v. Doe*, 2010 BCSC 333.

[168] I accept that the far-right side of the eastbound lane, in the vicinity of the Crosswalk, was not an active lane of traffic the night of MVA #1. I also accept that the Parked Cars were not temporarily stopped in traffic but that Ms. Bellefontaine and Mr. Tavana had instead parked the Hyundai and the BMW there overnight. In my view, the Gill Pedestrians were unlikely to be exposed to oncoming traffic from this position. I conclude that the cases on which they rely are distinguishable on their facts.

[169] The Court of Appeal in *Loewen* interpreted s. 179 (then s. 181) of the *MVA* at para. 47 as follows:

> The focus of these subsections is on the *positive* act of "*crossing* in a cross-walk" and upon the *leaving* of a "curb or other place of safety".
>
> [Emphasis added.]

[170] Notably, the Gill Pedestrians' position in line with the driver's side of the Parked Cars was in both the Crosswalk and the roadway, after they had already commenced the "positive act of crossing". I agree that, if Mr. Siekham had been driving with due care and attention, he was not so close (when the Gill Pedestrians stepped off the curb to enter the Crosswalk) that it was impracticable for him to yield the right of way.

[171] In my view, in the context of this case, while a *relative* place of safety, the Gills Pedestrians' position in line with the driver's side of the Parked Cars was not an "other place of safety" within the meaning of s. 179(2) of the *MVA*. Mrs. Gill left this relative place of safety, in line with the driver's side of the Parked Cars, when, on all the expert evidence, her view of oncoming eastbound traffic was completely unobstructed.

[172] I find that the Gill Pedestrians had the right of way before MVA #1.

[173] However, in my view, this determination is of limited assistance in this case. It is still necessary to assess whether Mr. Siekham and the Gill Pedestrians breached their respective duties of care owed to other users of the roadway. Determination of who had the right of way informs but does not dictate the negligence analysis: *Xiang v. Wong*, 2023 BCSC 1984 at para. 17. A finding that the Gill Pedestrians had the right of way when they left the curb (on the basis the Acura was then far enough away that it was not impracticable for Mr. Siekham to have stopped without hitting them), does not absolve them of any responsibility to take reasonable steps to ensure their own safety when in the Crosswalk.

[174] As noted by the Court of Appeal in *Pirang* at 398, the *MVA* places an obligation on both drivers and pedestrians to keep the other under observation. The Court in *Pirang* also referenced the Supreme Court of Canada decision of *British Columbia Electric Railway v. Farrer*, [1955] S.C.R. 757, 1955 CanLII 43, where Justice Estey stated as follows at 763:

> Legislative bodies have, for many years, been enacting provisions intended to facilitate and make safer the movement of pedestrians and vehicular traffic on the highways and public streets. The general rule is that these provisions and regulations are supplementary, or in addition, to the common law duty that rests upon all persons using the highways to exercise due care.

[175] I consider whether the Gill Pedestrians met their common law duty to other users of the roadway to exercise due care when addressing the issue of contributory negligence.

B. Was Mr. Siekham negligent?

[176] A driver owes a duty of care to all other persons using the roads, including to all pedestrians and cyclists using the shoulders, sidewalks, or crosswalks adjacent to and crossing those roads: *Simpson v. Baechler*, 2009 BCCA 13 at para. 29. The statutory provisions set out in the *MVA*, combined with the common law duties of care owed by users of the road, impose a very high standard of care on a driver approaching a crosswalk: *Ng v. Nguyen*, 2008 BCSC 1830 at para. 36.

[177] As noted by Justice Ballance in *Niitamo v. ICBC*, 2003 BCSC 608 at para. 22 [*Niitamo*]:

> … [A] marked crosswalk is precisely the place where a motorist could reasonably expect to encounter another user of the road. In my view, in approaching a marked crosswalk in anticipation of crossing through it, a motorist assumes a heightened duty to take extreme care and maintain a vigilant lookout for those who might be in the crosswalk.

[178] A driver must exercise heightened vigilance when approaching a marked crosswalk: *Dobre v. Langley*, 2011 BCSC 1315 at para. 43. The fact that a driver does not see a pedestrian until the point of impact is not by itself evidence of negligence: *Pinsent v. Brown*, 2013 BCSC 794 at para. 34 [*Pinsent*], citing *Plett v.*

ICBC (1987), 12 B.C.L.R. (2d) 336, 1987 CanLII 2753 (C.A.). A driver must operate his vehicle so that he will be able to avoid striking a pedestrian who is crossing his path in a reasonable manner: *Pinsent* at para. 34, citing *Funk*.

[179] By his own admission, Mr. Siekham was not exercising due care and attention before MVA #1. He did not slow the Acura as he approached the Crosswalk. He was not scanning the adjacent surroundings (including, in particular, the Crosswalk and the sidewalk on the south side of 76th Avenue) for pedestrians. Despite knowing that the Crosswalk was located in a residential area, close to a school and a park, and that he was driving home in the early evening when (on Ms. Rana's unchallenged evidence) people were out walking in the neighbourhood, he did not exercise the heightened level of vigilance expected of a reasonable driver approaching a marked crosswalk.

[180] Instead, at the most inopportune time, Mr. Siekham allowed himself to be distracted by his misbehaving grandchildren. He took his eyes off the road completely when driving required his undivided attention. By doing so, he effectively deprived himself of any reasonable opportunity to avoid MVA #1.

[181] Counsel for the infant plaintiffs suggested in closing that Mr. Siekham's peripheral vision needs to be considered. Notably, there was no trial evidence on this point, either from Mr. Siekham or any appropriately qualified expert. Accordingly, I have not considered what, if any, peripheral view Mr. Siekham might have had of the area adjacent to the Crosswalk before MVA #1. Doing so would be wholly speculative.

[182] I find that Mr. Siekham did not see the adult Gill Pedestrians before impact because, quite simply, he was not looking at the roadway, the Crosswalk, or the adjacent sidewalk for at least two seconds before MVA #1. At a speed of 50 km/h, the Acura would have travelled almost 28 metres in two seconds.

[183] If Mr. Siekham's view of the Crosswalk was in any way obstructed, he had a duty to slow down and not move into the Crosswalk until he could see completely

past any obstruction. However, Mr. Siekham denied that his view of the roadway, the Crosswalk, or the adjacent sidewalk was obstructed before MVA #1.

[184] Mr. Siekham could have pulled over to the side of the road to address any issues related to his grandchildren, as necessary. I agree that, if Mr. Siekham had slowed down on his approach to the Crosswalk, paid attention to his driving, been attentive to his surroundings, and actively scanned for pedestrians at or near the Crosswalk, he would likely have seen Mr. and Mrs. Gill, both before and after they entered the Crosswalk. He had an obligation to drive in a manner that allowed him to bring the Acura to a stop, as necessary, as he approached the Crosswalk.

[185] A driver approaching a crosswalk must maintain an ability to yield the right of way to a pedestrian: *Pirang* at 398. The question is not simply whether the driver had a reasonable opportunity to stop when the pedestrian stepped into the crosswalk, but also whether the driver unreasonably put himself in a position where it was not possible to stop in time: *Panganiban* at para. 50. In my view, that is precisely what occurred here. The Crosswalk was clearly marked with freshly painted white zebra stripes and reflective signage. It was familiar to Mr. Siekham. MVA #1 occurred in the early evening when, on Ms. Rana's uncontroverted evidence, people were out walking in the area. There is no evidence that the Gill Pedestrians ran into the Crosswalk; rather, I have found that they likely stepped into the travelled portion of the eastbound lane on 76th Avenue at a slower than average walking speed given the presence of the Children, one of whom was riding a go-cart.

[186] As in *Panganiban*, I find that Mr. Siekham was driving too fast for the circumstances. He did not react to the Gill Pedestrians' presence in the Crosswalk until after the Acura had struck some of them. He failed to maintain an ongoing lookout for pedestrians as he approached the Crosswalk. He allowed his attention to be diverted from the roadway at a time when heightened vigilance was required. I conclude that Mr. Siekham breached his duty of care by placing himself in a position where he was unable to bring the Acura to a stop in time to avoid MVA #1: *Panganiban* at para. 66.

C. Is Ms. Siekham vicariously liable?

[187] Defendant, Ms. Siekham, owned the Acura in February 2016. There is no dispute that Mr. Siekham was driving it with her knowledge and consent at the time of MVA #1.

[188] Section 86 of the *MVA* provides that owners of motor vehicles can be vicariously liable for others operating the vehicle:

> **86** (1) In the case of a motor vehicle that is in the possession of its owner, in an action to recover for loss or damage to persons or property arising out of the use or operation of the motor vehicle on a highway, a person driving or operating the motor vehicle who
>
> (a) is living with, and as a member of the family of, the owner, or
>
> (b) acquired possession of the motor vehicle with the consent, express or implied, of the owner,
>
> is deemed to be the agent or servant of, and employed as such by, that owner and to be driving or operating the motor vehicle in the course of his or her employment with that owner.

[189] I find that Ms. Siekham is vicariously liable for Mr. Siekham's negligence.

D. Was Mrs. Gill contributorily negligent?

[190] The Court of Appeal addressed contributory negligence in *Bradley v. Bath*, 2010 BCCA 10 at para. 25, citing John G. Fleming, *The Law of Torts*, 9th ed. (Sydney: LBC Information Services, 1998) at 302, as follows:

> Contributory negligence is a plaintiff's failure to meet the standard of care to which he is required to conform for his own protection and which is a legally contributing cause, together with the defendant's default, in bringing about his injury. The term "contributory negligence" is unfortunately not altogether free from ambiguity. In the first place, "negligence" is here used in a sense different from that which it bears in relation to a defendant's conduct. It does not necessarily connote conduct fraught with undue risk to *others*, but rather failure on the part of the person injured to take reasonable care of himself in his *own* interest. ... Secondly, the term "contributory" might misleadingly suggest that the plaintiff's negligence, concurring with the defendant's, must have contributed to the accident in the sense of being instrumental in bringing it about. Actually, it means nothing more than his failure to avoid getting hurt…
>
> [Emphasis in original; footnotes omitted.]

[191] The analysis of contributory negligence involves two questions: whether a plaintiff failed to take reasonable care in their own interests, and if so, whether that failure was causally connected to the loss they sustained: *Wormald v. Chiarot*, 2016 BCCA 415 at para. 14, citing *Enviro West Inc. v. Copper Mountain Mining Corporation*, 2012 BCCA 23 at para. 37.

[192] Although Mrs. Gill could not remember seeing the Acura until just before impact, the Acura was there to be seen. In my view, it was insufficient for her to glance briefly to her left from the sidewalk, see nothing because (on her discovery evidence) her view was then obscured, and proceed into the Crosswalk on the assumption that nothing was coming. On the expert evidence I accept, Mrs. Gill had multiple opportunities to see the Acura before MVA #1. On the evidence of Mr. Ising, her own expert, the Acura's headlights were unobstructed as they approached the Crosswalk, apart from the 0.5 and 0.3 of a second (i.e., less than one second total) the lights were blocked by the Parked Cars and possibly when the Acura was further to the west, a considerable distance from the Crosswalk. In my view, a reasonable pedestrian in Mrs. Gill's position would have looked to her left for more than half a second before concluding that there was no oncoming eastbound traffic and that it was safe to enter the Crosswalk. In my view, this conclusion conforms with common sense; it is also consistent with Mr. Ising's admission that pedestrians at a crosswalk normally look to their left and right for approaching traffic for longer than 0.5 of one second and with Mr. Dinn's description of normal crossing behaviour.

[193] Mrs. Gill had an obligation to ensure that it was safe for her and the Children to leave the sidewalk and enter the Crosswalk. Instead, she failed to follow the safe crossing rules that she gave to the Children: namely, not to enter a roadway without first ensuring that approaching vehicles would stop. Mrs. Gill failed to take adequate steps before entering the roadway to determine whether there were any approaching vehicles and, if so, whether they would stop. There is no dispute that the Acura was then travelling eastbound towards the Crosswalk. Mr. Siekham did not brake until after impact. By extension, Mrs. Gill had no reasonable basis for concluding that the Acura was either slowing or would stop before MVA #1.

[194] If Mrs. Gill was unable to determine whether or not there was any oncoming traffic approaching from the west, she had an obligation to stay on the sidewalk until she could do so.

[195] I have found that Mrs. Gill had sightlines to the Acura before MVA #1. I conclude that she either: 1) did not look to her left, carefully and for long enough to detect oncoming traffic, either before she left the sidewalk or once she was in the Crosswalk; or 2) she saw the Acura and assumed that it would yield to her because she was in the Crosswalk. In either case, I find that she failed to take reasonable steps to ensure her own safety and that of the Children.

[196] I accept that Mrs. Gill was unable to focus exclusively to her left before MVA #1. However, she was with her husband, another responsible adult. Between the two of them, I conclude that they could easily have watched the Children, both of whom were well-behaved, while monitoring two lanes of traffic.

[197] In my view, a reasonable pedestrian in Mrs. Gill's position would have looked to her left, before leaving her shielded position in line with the driver's side of the Parked Cars and entering the travelled portion of the eastbound lane, to ensure that there was no oncoming traffic. This is particularly true if, as I have found, Mrs. Gill took inadequate steps to determine whether there was any oncoming eastbound traffic (which would have continued to travel towards the Gill Pedestrians as they made their way into the Crosswalk) before she left the curb. The expert evidence unequivocally supports the conclusion that, when Mrs. Gill was in line with the driver's side of the Hyundai, the headlights of the Acura were completely unobstructed and there to be seen.

[198] Counsel for the infant plaintiffs relies on the Court of Appeal's statements in *Feng v. Graham* (1988), 25 B.C.L.R. (2d) 116 at 120, 1988 CanLII 3044 (C.A.) regarding a defendant's evidentiary burden:

> The onus is on the defendants to establish that the plaintiff knew, or ought to have known, that the defendant driver was not going to grant her the right of way, and that, at that point in time, the plaintiff could reasonably have avoided the accident…

> [Footnotes omitted.]

[199] I find that the defendants have met this burden. I conclude that Mrs. Gill ought to have known, from her positions on both the sidewalk and in line with the driver's side of the Parked Cars, before entering the travelled portion of the eastbound lane, that Mr. Siekham was not braking and that the Acura was not slowing to come to a stop. At either point, Mrs. Gill could have avoided MVA #1 by simply not proceeding into the Crosswalk. Notably, Mrs. Gill instructed the Children not to enter a roadway before ensuring that oncoming vehicles had completely stopped and that they should stay on the sidewalk if they could not see oncoming traffic. She admitted she had an obligation as a pedestrian to ensure her path was clear before crossing. Mrs. Gill did not do those things just before MVA #1.

[200] I find that Mrs. Gill failed to take the steps required of a reasonable pedestrian, in the company of two young children, to ensure that the Acura was coming to a stop before entering the travelled portion of the eastbound lane. This conclusion is consistent with the recent decision of Elwood J. in *Panganiban*:

> [72] Either the girls did not see the car or they assumed incorrectly that the driver would stop for them. Either way, they failed to take adequate care to ensure that it was safe for them to cross. To paraphrase the language of s. 179(2), they walked into the path of a car. […]
>
> […]
>
> [82] Ms. Panganiban breached her duty of care by failing to ensure it was safe to cross the road. She may have been able to avoid the collision.

[201] Counsel for the infant plaintiffs relies on *Miksch* for the proposition that, once a pedestrian has safely entered a crosswalk, they may, absent any overt negligent act (such as running or gesturing in a way that could mislead motorists into thinking they may proceed safely), assume that the motorist will yield the right of way and they will share no responsibility if struck in the crosswalk. In my view, that statement is inapplicable here. I do not agree that Mrs. Gill entered the Crosswalk safely.

[202] In all the circumstances, I find that Mrs. Gill failed to take reasonable steps to ensure her own safety and that of the Children. She failed to account for the prevailing circumstances when she entered the travelled portion of the eastbound lane: namely, that the driver of an approaching vehicle might be distracted; not focused on the roadway, the Crosswalk, or the adjacent sidewalk; not looking for pedestrians as he approached the Crosswalk; and not slowing his vehicle in order to stop for them. On Mrs. Gill's own evidence, the presence of the Crosswalk that she was instrumental in having installed did not eliminate the need for her to take reasonable steps to ensure her own safety, and that of the Children, when crossing 76th Avenue.

[203] Based on the uncontroverted police photographs in evidence, Mrs. Gill was wearing a dark brown jacket the night of MVA #1; her husband was dressed all in black. There were no reflective markers on any of the Gill Pedestrians' clothing, Himmat's bike, or Manpreet's scooter. While I appreciate that going for a walk, after sunset, in dark clothing, without reflective markers, is not in itself negligent, I conclude that Mrs. Gill failed to consider these facts when assessing the ability of oncoming drivers to see her family. I accept the uncontroverted evidence of: 1) Mr. Dinn, that illuminated objects in a nighttime environment are more visible than non-illuminated ones; 2) Mr. Ising, that large, bright, moving objects are easier to see than smaller, darker, stationary ones (like the Gill Pedestrians); and 3) Mr. Gough, that the Gill Pedestrians' ability to see the Acura likely improved as it got darker since visibility is a function of contrast.

[204] I find that Mrs. Gill was contributorily negligent.

E. Was Mr. Gill contributorily negligent?

[205] In *Laplante (Guardian ad Litem of) v. Laplante* (1995), 8 B.C.L.R. (3d) 119, 1995 CanLII 550 (C.A.), the Court of Appeal held that the relevant test in determining the negligence of a parent has both objective and subjective components. Objectively, the court will consider what the ordinary reasonable parent would do, or not do, in the same circumstances, according to the prevailing

community standards. The "community" refers to the one where the accident occurred. The test is then subjective to the extent that the reasonable parent will be considered in the context that the defendant parent actually found themselves, and with the knowledge they had when making the decision or acting in the way they did.

[206] “A parent has a duty to take reasonable care not to expose their child to unreasonable harm … [and] must act as an ordinarily reasonable parent in the circumstances”: *Faint (Guardian ad litem of) v. Costin*, [1996] B.C.J. No. 613 at para. 19, 1996 CanLII 2788 (S.C.).

[207] The standard of care expected of parents regarding training and supervising their children on the topic of street safety is discussed in *Mitchell (Guardian ad litem of*) *v. James*, 2007 BCSC 878 at para. 60 [*Mitchell*]:

> Insofar as the contributory negligence of parents for training and supervising the street safety of their children is concerned, the standard of care to be expected is that of parents generally in the community in question; *Arnold v. Teno (Next friend of)*, [1978] 2 S.C.R. 287.

[208] I accept that Mr. Gill was not the parent primarily responsible for instructing the Children about road safety. I also accept that Mrs. Gill was the first of the Gill Pedestrians to leave the sidewalk before they entered the Crosswalk the night of MVA #1 and that she moved through the Crosswalk in relatively close proximity to the Children. However, in my view, those facts do not absolve Mr. Gill of all responsibility for ensuring the Children’s safety before and after they entered the Crosswalk. While Mr. Gill agreed that the Crosswalk significantly enhanced pedestrian safety, he conceded that pedestrians must still look for oncoming traffic before entering the Crosswalk.

[209] I conclude that Mr. Gill took reasonable steps before leaving the relative place of safety in line with the driver’s side of the Parked Cars to ensure his own safety: he looked to his left at that point, before entering the travelled portion of the eastbound lane. He then saw the Acura and stopped. Notably, he was not struck.

[210] However, Mr. Gill was not walking alone. In my view, he and Mrs. Gill had a shared obligation to ensure the Children's safety, before and after they entered the Crosswalk. While Mr. Gill apparently relied on his wife for that purpose, I do not accept this was reasonable. Mr. Gill was not simply a passive bystander. I find that he failed to take reasonable steps to ensure that the Acura was coming to a stop before the Children left the sidewalk and their position of relative safety in the Crosswalk, while shielded by the Parked Cars, and entered the travelled portion of the eastbound lane.

[211] I find that Mr. Gill was contributorily negligent.

F. Were the Children contributorily negligent?

[212] The City and the Siekham defendants take the position that the Children were contributorily negligent. The City cites *McEllistrum v. Etches*, [1956] S.C.R. 787, 1956 CanLII 103 and *Carson v. Pruden,* [1990] B.C.J. No. 1226, 1990 CanLII 1156 (C.A.) and submits that a court must consider the following factors when assessing the possible contributory negligence of a child:

a) Whether, having regard to their age, intelligence, experience, general knowledge and alertness, the child is capable of being found negligent at law in the circumstances; and

b) If so, whether the child was, in fact, negligent.

[213] The City denies there is a bright line below which children enjoy total immunity from liability in negligence. The City submits that the test is not the child's age, but rather their capacity to understand and appreciate danger, citing *McIlvenna v. Viebig*, 2012 BCSC 218. The Children did not testify at trial.

[214] The Siekham defendants rely on the trial evidence of the Children's parents that, before MVA #1:

a) Neither of the Children had any learning problems;

b) They were meeting expectations at school;

c) There is no suggestion that either had any behavioural problems;

d) Neither was allowed to cross 76th Avenue by themselves;

e) Mrs. Gill had taught the Children how to cross a road safely in the presence of an adult; and

f) Neither Mrs. Gill nor Mr. Gill was concerned that the Children would not follow the rules they had been given before MVA #1.

[215] The Siekham defendants urge me to draw an adverse inference from the fact that Himmat, a named party who is now 15 years old, did not testify at trial. They note the absence of any evidence to suggest that he lacked the capacity to do so. They submit that Himmat was an eyewitness to the Accident and the person best placed to testify about what he saw, where he looked, where he was, and where his family was in relation to him, immediately before MVA #1.

[216] On Mrs. Gill's uncontroverted evidence, she had taught the Children about road safety before MVA #1. Specifically, she instructed them:

a) To stay with, listen to, and await instructions from the adult accompanying them;

b) To stop and look both ways before crossing;

c) To ensure that oncoming traffic was coming to a stop; and

d) Not to run.

[217] On the trial evidence of both Mrs. and Mr. Gill, the Children did all of those things before entering the Crosswalk the night of MVA #1. Both confirmed that the Children followed directions, listened to their parents, and did not misbehave, run, or dart into the roadway before MVA #1.

[218] At the time of MVA #1, Himmat was seven and Manpreet was five. They were not walking alone; rather, they were with their parents. They had been taught to follow the direction of the adult(s) accompanying them when crossing a roadway. That is precisely what they did. I am not persuaded that it is appropriate to find the Children negligent for following Mrs. Gill's directions. Given this finding, I conclude that I need not consider whether it is appropriate to draw an adverse inference from the fact that Himmat did not testify at trial. I have found that Himmat was struck by the Acura. On the uncontroverted trial evidence, he spoke to a psychologist within two weeks of MVA #1 about this accident. It is unclear to what extent a potentially traumatized child would recall the details of an accident that occurred about eight years ago when he was only seven years old.

[219] I decline to find the Children contributorily negligent.

G. Did the Parked Cars cause or contribute to MVA #1?

[220] While defendants have a duty not to create unreasonable risks to others, it does not follow that they must take steps to avoid any and all risks that could arise out of their actions. If a defendant creates a risk but the plaintiff has opportunities to notice and avoid the risk, then causation may fail: *Lawrence v. Prince Rupert (City) and B.C. Hydro & Power Authority*, 2005 BCCA 567 at para 45 [*Lawrence*].

[221] In *Lawrence*, the plaintiff was injured when she tripped over a hydro pole left on the sidewalk by B.C. Hydro. The Court of Appeal affirmed the decision of the trial judge to dismiss the claim against B.C. Hydro on the basis that causation had not been made out, stating as follows at para. 44:

> As a question of fact for the jury, causation is a question of common sense judgement. In this case, I think the judge applied that approach to the causation issue. He said:
>
> > [40] In my opinion, the failure of BC Hydro to place a barricade around the pole was not an effective cause of the plaintiff's accident. It may be true that, if the pole had not been put there, the accident would never have happened. But in my opinion, that is not sufficient to establish a causal connection. The fact that the plaintiff had an opportunity to avoid the consequences of the defendant's negligence, but failed to do so due to negligence, no longer leads automatically to a

> dismissal of the plaintiff's claim. But in my view, when the plaintiff saw the pole ahead of her, and had the opportunity and ability to easily avoid tripping over it, the risk created by BC Hydro lost its potential to cause the plaintiff to trip and fall as she did. It might be otherwise, if the plaintiff had been proceeding along the sidewalk at night, holding on to the guardrail, and then either failed to see the log ahead of her, or failed to see it in time to avoid tripping over it. But that is not what happened here.
>
> [Emphasis added.]

[222] The owners of the Parked Cars submit that “but for” the negligence of Mr. Siekham and the contributory negligence of the Gill Pedestrians, MVA #1 would not have occurred. They deny that the same can be said for the Parked Cars. They submit that MVA #1 would have happened, even in the absence of the Parked Cars, because: 1) Mr. Siekham was not looking at the roadway as he approached the Crosswalk; and 2) Mrs. Gill failed to take reasonable steps to ensure that the driver of the Acura saw her and her family and that he would bring the Acura to a stop, before proceeding into the Crosswalk. I agree.

[223] Mr. Ising opines that, if neither of the Parked Cars was present, virtually all drivers could have stopped in time to avoid MVA #1. However, Mr. Ising’s opinions are premised on assumptions that are unsupported by the trial evidence. Mr. Siekham was not driving with due care and attention. He was not paying attention to his surroundings. He was not looking to his right or left or scanning the Crosswalk or the adjacent sidewalk for pedestrians waiting to enter the Crosswalk. I have found that Mr. Siekham took his eyes off the roadway for at least two seconds immediately before MVA #1. Even if his sightline to the Gill Pedestrians were increased to three seconds (in the absence of the Hyundai), the expert evidence persuades me that he would still have had insufficient time to avoid MVA #1 in the circumstances that then prevailed.

[224] The BMW was not parked in contravention of the City bylaw in place at the time of MVA #1, prohibiting parking with 15 metres of a crosswalk. The parties agree that the BMW was then parked 16 metres back from the western edge of the Crosswalk.

[225] Notably, Ms. Rana testified that she had no difficulty seeing pedestrians in the Crosswalk immediately before MVA #1, from her position behind the Acura. In my view, this is compelling evidence that, if Mr. Siekham had been driving with due care and attention, he would have seen the Gill Pedestrians in time to stop.

[226] Mr. Dinn admitted the presence of the Parked Cars is immaterial if Mr. Siekham was not looking in the direction of the Crosswalk or the sidewalk where the Gill Pedestrians were standing before MVA #1. On Mr. Siekham's uncontroverted evidence, he was doing neither of those things.

[227] In my view, the expert evidence regarding the enhanced opportunities Mr. Siekham might have had to avoid MVA #1, if he had been driving with the care and attention that the circumstances required, is largely academic. On Mr. Siekham's own admission, he was not paying attention to his driving or surroundings as he approached the Crosswalk. Quite simply, he did not see the Gill Pedestrians before MVA #1 because he was not looking for pedestrians.

[228] This conclusion is supported by the independent testimony of Ms. Rana whose evidence was not undermined in any material way on cross-examination. Unlike all of the other lay witnesses who testified at trial, Ms. Rana has no interest in the outcome of this litigation. I accept her evidence that she had no difficulty seeing the Crosswalk before MVA #1, from her position about one car length behind the Acura. It is consistent with Mr. Siekham's evidence that he too had an unobstructed view of the Crosswalk before MVA #1.

[229] Ms. Rana clearly stated that she saw pedestrians in the Crosswalk before MVA #1 and that she thought the driver of the Acura would stop for them. On her evidence, she had an unobstructed view of the Crosswalk for about five seconds before MVA #1. While I accept that her vantage point was different than Mr. Siekham's, Mr. Siekham's view was unobstructed by any vehicles immediately ahead of him. I therefore conclude that he would have been able to see the Crosswalk at least as well as Ms. Rana, if he had been driving with due care and attention.

[230] I find that MVA #1 occurred as a result of driver and pedestrian inattention, and that MVA #1 would likely have occurred in the absence of the Parked Cars. Accordingly, I conclude that it is unnecessary for me to address the evidence of professional engineers, Gerald Forbes and John Morrall, regarding the design of the Crosswalk and the absence of no-parking signage at the time of MVA #1.

H. Was the absence of no-parking signage a cause of MVA #1?

[231] The City's liability in negligence is contingent on a finding that the presence of the Parked Cars caused or contributed to MVA #1. Given my finding that it did not, it follows that the City is not liable in negligence for failing to install no-parking signage at the Crosswalk before MVA #1.

[232] The plaintiffs urge me to draw an adverse inference from the City's decision to call no evidence at trial. Given my finding that the absence of no-parking signage at the Crosswalk did not cause or contribute to MVA #1, I conclude that I need not address this issue.

I. How is liability to be apportioned?

[233] Apportionment of liability is governed by the *Negligence Act,* R.S.B.C. 1996, c. 333 [*Negligence Act*]. Where there is more than one proximate cause of loss, s. 4 of the *Negligence Act*, provides as follows:

> **4** (1) If damage or loss has been caused by the fault of 2 or more persons, the court must determine the degree to which each person was at fault.
>
> (2) Except as provided in section 5 if 2 or more persons are found at fault
>
> (a) they are jointly and severally liable to the person suffering the damage or loss, and
>
> (b) as between themselves, in the absence of a contract express or implied, they are liable to contribute to and indemnify each other in the degree to which they are respectively found to have been at fault.

[234] In this context, fault means blameworthiness: *Stevens v. Sleeman*, 2023 BCSC 719 at para. 132, citing *Cempel v. Harrison Hot Springs Hotel Ltd.* (1997), 43 B.C.L.R. (3d) 219 at para. 19, 1997 CanLII 2374 (C.A.) [*Cempel*]. Fault acts as a

gauge of the amount by which each proximate and effective causative agent fell short of the required standard of care in all the circumstances: *Cempel* at para. 19.

[235] The Court of Appeal described the range of blameworthiness in *Alberta Wheat Pool v. Northwest Pile,* 2000 BCCA 505 at para. 46:

> Fault may vary from extremely careless conduct, by which the party shows a reckless indifference or disregard for the safety of person or property, whether his own or others, down to a momentary or minor lapse of care in conduct which, nevertheless, carries with it the risk of foreseeable harm.

[236] The relevant factors to consider when apportioning liability are set out in *Aberdeen v. Township of Langley, Zanatta, Cassels***,** 2007 BCSC 993 at paras. 62–63, rev'd on other grounds *Aberdeen v. Zanatta,* 2008 BCCA 420 [*Aberdeen*]:

> Thus, fault is to be determined by assessing the nature and extent of the departure from the standard of care of each of the parties. Relevant factors that courts have considered in assessing relative degrees of fault were summarized by the Alberta Court of Appeal in *Heller v. Martens*, *supra*, at ¶ 34 as follows:
>
> 1. The nature of the duty owed by the tortfeasor to the injured person…
>
> 2. The number of acts of fault or negligence committed by a person at fault…
>
> 3. The timing of the various negligent acts. For example, the party who first commits a negligent act will usually be more at fault than the party whose negligence comes as a result of the initial fault…
>
> 4. The nature of the conduct held to amount to fault. For example, indifference to the results of the conduct may be more blameworthy… Similarly, a deliberate departure from safety rules may be more blameworthy than an imperfect reaction to a crisis…
>
> 5. The extent to which the conduct breaches statutory requirements. For example, in a motor vehicle collision, the driver of the vehicle with the right of way may be less blameworthy…
>
> …
>
> 6. the gravity of the risk created;
>
> 7. the extent of the opportunity to avoid or prevent the accident or the damage;

8. whether the conduct in question was deliberate, or unusual or unexpected; and

9. the knowledge one person had or should have had of the conduct of another person at fault.

[237] In my view, MVA #1 was caused predominantly by the negligence of Mr. Siekham. I conclude that his actions represent a marked departure from what is expected of a reasonable motorist, particularly one approaching a marked crosswalk after dark, in a residential neighborhood, in the vicinity of a school and a park, when heightened vigilance was required. I apportion 75% of the liability for MVA #1 to Mr. Siekham.

[238] I have found that Mrs. Gill was contributorily negligent for failing to take reasonable steps to ensure her own safety and that of the Children, before leaving the sidewalk and the position of relative safety behind the Parked Cars, and entering the travelled portion of the eastbound lane. In my view, it is appropriate to apportion a greater share of liability to Mrs. Gill than Mr. Gill. She was the parent primarily responsible for instructing the Children about road safety and the one who was supervising and directing them immediately before MVA #1. I apportion 20% of the liability for MVA #1 to Mrs. Gill.

[239] I accept that Mr. Gill was not the parent who instructed the Children about road safety and that he was not the one directing the Children before they crossed 76th Avenue just before MVA #1. I also find that Mrs. Gill was the parent who was in closest proximity to the Children just before the Gill Pedestrians entered the Crosswalk that night. Accordingly, I conclude that Mr. Gill bears less responsibility than his wife for failing to ensure the Children's safety. I apportion 5% of the liability for MVA #1 to Mr. Gill.

V. MVA #2

A. Agreed Facts

[240] MVA #2 occurred on May 29, 2019 in the far-left westbound lane of Highway 91 near Richmond, BC. Plaintiff, Mrs. Gill, was then driving with her daughter in a

2015 Nissan Pathfinder SUV (the "SUV"). Defendant, Xiao Li Lin, was driving a 2012 Honda Civic sedan (the "Sedan"). The speed limit was 90 km/h.

[241] The RCMP attended the accident scene and took the police photographs in evidence. The parties admit they accurately depict the scene shortly after MVA #2.

B. Parties' Evidence

1. Mrs. Gill

[242] Mrs. Gill was travelling in the far-left of two westbound lanes, closest to the shoulder, immediately before MVA #2. She described the traffic at the time as "slow and go". She did not know her own speed but accepted as accurate her evidence given on discovery that she was then travelling less than 10 km/h.

[243] According to Mrs. Gill, she had slowed the SUV due to traffic congestion ahead when she was rear-ended by the Sedan. Mrs. Gill recalls that the SUV was moving when she was struck from behind; she has no recollection of hitting her brakes suddenly. She initially said that she braked slowly before saying that she could not recall how she did so.

[244] Mrs. Gill admitted seeing the Sedan in her rear-view mirror before MVA #2. On her evidence, she tried to pull the SUV onto the shoulder to give the driver behind her more space. She knew that the shoulder was available to her in an emergency. Based on the RCMP photos in evidence, the left driver's side of the SUV was just slightly over the yellow line separating the left westbound lane from the adjacent shoulder after MVA #2.

[245] Mrs. Gill admitted there was nothing obstructing the shoulder to her left before MVA #2. However, she denied that she could have sped up and moved the SUV onto the shoulder, saying she would have hit car ahead of her if she had done so. Mrs. Gill denied that she was following this vehicle too closely, saying MVA #2 "happened so suddenly". She did not think that the SUV was pushed forward on impact but she could not recall this detail.

[246] Mrs. Gill admitted in cross-examination that hazard lights signal drivers to proceed cautiously. She did not consider activating her hazard lights before MVA #2 to signal to drivers behind her that there was traffic congestion ahead. She admitted this traffic congestion did not appear suddenly and that it had been present for several minutes before MVA #2. Mrs. Gill denied any other drivers were making use of their hazard lights for this purpose.

[247] Mrs. Gill did not recall the traffic conditions behind her before MVA #2; on her evidence, she was focused on the traffic ahead.

2. Ms. Lin

[248] Ms. Lin testified at trial with the assistance of a Cantonese interpreter. She was travelling in the right westbound lane immediately before MVA #2. She admitted she was periodically checking on her two-year-old child in the backseat by glancing in her rearview mirror about once every six to seven minutes. According to Ms. Lin, she was following both the speed limit and the speed of traffic around her at the time. She estimated her speed to be below 90 km/h just before MVA #2.

[249] On Ms. Lin's evidence, she had been travelling up a slope (described by her as both "quite steep" and "small") shortly before MVA #2. She denied that she could see the traffic conditions on the downhill portion of this slope. She testified that she expected traffic conditions there to be unchanged (explaining this to mean "normal speed").

[250] Ms. Lin maintained that she did not see the SUV until she was right behind it, after she had reached the top of the slope she described and was travelling downhill. She agreed that the only thing blocking her view of the SUV before MVA #2 was the roadway itself. Ms. Lin and Mrs. Gill were then both in the far-left westbound lane. Ms. Lin applied her brakes; her evidence about her speed at that point evolved somewhat. In cross-examination, she said that she was able to slow her vehicle to 70 km/h when she applied her brakes immediately before MVA #2. She later said that her speed was 70 km/h when she applied her brakes, an answer she later adjusted to a range of 70–80 km/h. When confronted with her evidence given on

discovery on this point, Ms. Lin admitted she did not know her exact speed before MVA #2 but she maintained that it was under 90 km/h.

[251] Ms. Lin was unable to stop the Sedan without hitting the SUV. She denied the impact was severe, saying she applied her brakes when the Sedan was about two car lengths away from the SUV.

[252] Ms. Lin admitted she saw the brake lights on the SUV ahead of her before MVA #2; she activated her own brakes in response. She testified that the SUV was big and blocked her view; she said that she first noticed the traffic congestion to the west after MVA #2, once she stopped and got out of the Sedan. Apart from seeing the SUV's brake lights, Ms. Lin denied she had any warning that the SUV was either stopped or nearly stopped before MVA #2.

[253] Ms. Lin initially testified that the right rear bumper of the SUV sustained "light" damage in MVA #2. She later conceded that she does not know precisely what damage the SUV sustained. She denied being charged with any traffic violations as a result of MVA #2.

3. Findings of Fact

[254] Neither Mrs. Gill nor Ms. Lin was a clear historian. I accept that some of the difficulties with their evidence might be attributable to a language barrier. In my view, neither was a wholly reliable witness and I have approached the evidence of both with some caution. Ultimately, I prefer the photographic evidence depicting the topography at the accident scene to the trial evidence of either Mrs. Gill or Ms. Lin on this point.

[255] The parties disagree about whether the slope of Highway 91 was sufficiently steep to impair Ms. Lin's ability to see ahead of her, before she decided to move the Sedan into the passing lane, shortly before MVA #2.

[256] While it would have been helpful to have had photographs further to the east of the accident scene, I conclude that the police photographs comprise the best

evidence on this point. Doing my best on the available evidence, I conclude that these photographs are inconsistent with Ms. Lin's trial evidence that the slope on Highway 91 was so steep that it impaired her ability to gauge the traffic ahead of her before she decided to change lanes.

[257] I make the following findings of fact:

a) The downward slope on Highway 91, in the area of MVA #2, was not steep but, rather, long and gradual;

b) The SUV was travelling at less than 10 km/h at the time of MVA #2;

c) The Sedan was then travelling at less than 90 km/h;

d) Mrs. Gill was focused on the traffic immediately ahead of her before MVA #2;

e) Ms. Lin allowed her attention to be diverted from the roadway, while making a lane change at highway speed on an upward slope shortly before MVA #2; and

f) Neither driver saw the other's vehicle until shortly before MVA #2.

C. Law and Analysis

[258] All drivers have a duty to drive with due care, which includes making reasonable allowance for the possibility of unexpected hazards on the road, including a sudden stop by the vehicle ahead: *Greenway-Brown v. MacKenzie*, 2019 BCCA 137 at para. 56. As part of this duty, drivers are required to maintain a safe distance from any vehicle in front of them; these responsibilities are codified in ss. 144 and 162 of the *MVA*: *Chauhan v. Welock,* 2020 BCSC 1125 at para. 64, aff'd 2021 BCCA 216 at paras. 10–12 [*Chauhan*].

[259] Sections 144 and 162 of the *MVA* provide as follows:

> **Careless driving prohibited**
>
> 144(1) A person must not drive a motor vehicle on a highway

> (a) without due care and attention,
>
> (b) without reasonable consideration for other persons using the highway, or
>
> (c) at a speed that is excessive relative to the road, traffic, visibility or weather conditions.
>
> …
>
> **Following too closely**
>
> 162(1) A driver of a vehicle must not cause or permit the vehicle to follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of the vehicles and the amount and nature of traffic on and the condition of the highway.

[260] Justice Crerar conveniently summarized the legal principles governing rear-end collisions in *Chauhan* as follows:

> [65] In rear-end collisions, the onus is often said to fall upon the rear driver to show that the collision was not their fault: *Barrie v. Marshall*, 2010 BCSC 981 at para. 23; *Cue v. Breitkreuz*, 2010 BCSC 617 at para. 15. This principle should not be taken as reversing the legal burden of proof where the rear driver is the defendant. Rather, it reflects the fact that a rear-end collision is itself prima facie evidence that the rear driver failed to keep a safe distance or drive with due care and attention.
>
> [66] The strength of this presumption varies in accordance with the circumstances of the accident. Where a driver encounters unexpected and unforeseeable conditions, the fact of the accident itself does not necessarily establish negligence on the part of [the] rear driver: *Vo v. Michl*, 2012 BCSC 1417 at para. 14; *Dubitz v. Knoebel*, 2019 BCSC 1706 at para. 242. Instead, the court must consider whether the driver's conduct met the applicable standard of care, in light of the conditions prevailing at the relevant time and any reasonably foreseeable risk of harm inherent in those conditions. In assessing the rear driver's conduct, the court may consider the following factors (*Biggar v. Enns*, 2017 BCSC 2290 at para. 46, citing *Ayers v. Singh* (1997) 85 BCAC 307):
>
> a) the speed of the rear vehicle;
>
> b) the distance between the two vehicles as they were driving along;
>
> c) what the driver of the rear vehicle was doing as they were driving along; and
>
> d) as the emergency arose, how the rear driver responded.

[261] I have applied those principles here.

1. Was Ms. Lin negligent?

[262] Mrs. Gill submits that Ms. Lin is wholly responsible for MVA #2. She says that Ms. Lin's speed, impaired sightline, and decision to change lanes while glancing in her rear mirror at a time when she ought to have been focused on the roadway ahead, are all evidence of negligence.

[263] Ms. Lin admitted she had been travelling in the slow westbound lane on the right side of Highway 91 when she decided to move into the left-hand lane before MVA #2. On her evidence, she thought that the fast lane was completely clear; however, she also said that she could not see past the uphill slope ahead. Ms. Lin admitted she hit the SUV because she was changing lanes while travelling uphill and looking in her rearview mirror to check on her son. By her own admission, she did not see the SUV until she was right behind it. Ms. Lin conceded that she must be on the lookout for traffic ahead of her when changing lanes.

[264] I find that Ms. Lin breached the duty of care she owed to other motorists by:

a) Failing to monitor prevailing traffic conditions;

b) Driving too fast for the prevailing traffic conditions;

c) Changing lanes without first ensuring that she could do so safely; and

d) Allowing herself to be distracted while changing lanes on an uphill slope at a time when driving required her undivided attention.

[265] I conclude that these acts and omissions were a cause of MVA #2.

2. Was Mrs. Gill contributorily negligent?

[266] Ms. Lin submits that Mrs. Gill was contributorily negligent for:

a) Not properly assessing surrounding traffic conditions before MVA #2;

b) Not recognizing that the SUV had become a hazard;

c) Not engaging her hazard lights to warn vehicles behind her that traffic ahead had slowed; and

d) Not taking evasive action by pulling the SUV onto the shoulder.

[267] Ms. Lin argues that Mrs. Gill breached her duty to avoid exposing other drivers to an unnecessary risk of harm, whether in emergencies or ordinary circumstances, by failing to exercise the reasonable care, skill, or self-possession that the attendant circumstances required, citing *Sinclair v. Nyehold* (1973), 29 D.L.R. (3d) 614 at 618, 1972 CanLII 1055 (C.A.) and *Fajardo v. Horianopoulos*, 2006 BCSC 147 at para. 37. She submits that Mrs. Gill had a duty to be aware of all her surroundings on the highway, citing *Sharma v. Kandola*, 2020 BCCA 161 at para. 22.

[268] Ms. Lin submits that a driver has a duty to avoid a collision when they ought reasonably to have seen or appreciated that another driver would not yield the right of way, citing *Bedwell v. McGill*, 2008 BCCA 6 at paras. 25–27. She acknowledges that the duty to avoid a collision in these circumstances requires a finding that the dominant driver (in this case, Mrs. Gill) had a sufficient opportunity (of which a reasonably careful and skilful driver would have availed themselves) to avoid the accident, citing *Walker v. Brownlee and Harmon,* [1952] 2 D.L.R. 450 at 461, 1952 CanLII 328 (S.C.C.); *Brewster (Guardian ad litem of) v. Swain*, 2007 BCCA 347 at para. 23.

[269] Ms. Lin's counsel concedes that the duty to maintain due care and attention is broader than the duty to avoid a collision. He submits that the former flows from the general principles of negligence and requires a motorist to drive in a manner that is objectively reasonable given the surrounding circumstances. He describes this duty as fact-specific, saying it varies based on factors such as weather and traffic conditions and includes and assumes that a driver must be on the lookout for unexpected manoeuvres by other motorists. He submits that the burden imposed on drivers is reasonably high, citing *Power v. White*, 2012 BCCA 197 at para. 28.

[270] Ms. Lin argues that a reasonable driver in Mrs. Gill's position ought to have appreciated that she was in a vulnerable position, given her low speed and the fact that drivers would be following at highway speed. Ms. Lin submits that this is especially true for Mrs. Gill whose large SUV was travelling downhill and was the last vehicle in "slow and go" traffic ahead. In her submission, Mrs. Gill was contributorily negligent for not engaging her hazard lights to warn drivers behind her of the traffic congestion ahead, and for not moving the SUV onto the shoulder once she appreciated that Ms. Lin was not slowing down.

[271] I am not persuaded that Mrs. Gill had an obligation to activate her hazard lights before MVA #2, or that doing so would have avoided MVA #2. On Mrs. Gill's uncontroverted evidence, no other drivers were doing so that day. The authorities on which Ms. Lin relies involve stationary vehicles, positioned either in an active lane of travel or on the side of a highway, that comprised a hazard to other users of the roadway. The SUV was not stopped at the time of MVA #2; rather, it was moving in periodically advancing and slowing traffic. In my view, the authorities on which Ms. Lin relies are distinguishable on their facts. I conclude that activating the SUV's four-way flashers in the circumstances of this case could have been confusing to other drivers. In my view, Mrs. Gill could easily have alerted drivers behind her to traffic congestion ahead by simply tapping her brakes and activating her brake lights.

[272] On Ms. Lin's evidence, she did not see the SUV until she was right behind it. She conceded that she had been looking in her rear mirror when she decided to move into the fast lane, shortly before MVA #2. Ultimately, I am not convinced that Ms. Lin would have seen the SUV's four-way flashers in time to avoid MVA #2, even if Ms. Gill had activated them.

[273] By her own admission, Mrs. Gill's attention was focused on the traffic ahead of her before MVA #2 and she was unaware of traffic conditions behind the SUV. In my view, Mrs. Gill breached the duty of care she owed to other motorists by failing to remain aware of her complete surroundings. Mrs. Gill was travelling in the kind of traffic conditions that exposed her to the risk of a rear-end collision. In my view, if

Mrs. Gill had been monitoring traffic behind her, as well as the traffic congestion ahead, she would likely have appreciated that the Sedan was not slowing down and she could have moved the SUV onto the shoulder to her immediate left. On Mrs. Gill's own evidence, she was then travelling at less than 10 km/h and the shoulder was completely unobstructed.

[274] Mrs. Gill maintains that she would have collided with the vehicle ahead of her if she had moved her slow-moving SUV onto the shoulder to her left before MVA #2. In my view, if that is true, Ms. Gill was following the vehicle ahead of her too closely.

[275] I find that Mrs. Gill was contributorily negligent.

3. How is liability to be apportioned?

[276] Mrs. Gill submits that Ms. Lin is wholly responsible for MVA #2. Ms. Lin takes the position that liability for MVA #2 is appropriately apportioned to Mrs. Gill in the range of 30–50%.

[277] In my view, liability for MVA #2 is appropriately apportioned predominantly to Ms. Lin. She was changing lanes and driving close to the maximum posted speed limit when she allowed her attention to be diverted from the roadway and she was unable to gauge traffic conditions ahead.

[278] I find that Mrs. Gill failed in her duty to monitor traffic conditions behind her before MVA #2 and by following the vehicle ahead of her too closely. She had an obligation when driving to be aware of her complete surroundings. In my view, if she had been monitoring traffic behind the SUV, she would have appreciated that Ms. Lin was not slowing down. I conclude that, if Mrs. Gill had not been following the vehicle ahead of her so closely, she could easily have moved the slow-moving SUV onto the unobstructed shoulder to her immediate left, thereby avoiding MVA #2.

[279] Having regard to the factors in *Aberdeen*, I apportion 80% of the liability for MVA #2 to Ms. Lin and 20% to Mrs. Gill.

VI. DISPOSITION

[280] I apportion liability for MVA #1 as follows:

a) 75% to Mr. Siekham;

b) 20% to Mrs. Gill; and

c) 5% to Mr. Gill.

[281] I apportion liability for MVA #2 as follows:

a) 80% to Ms. Xiao; and

b) 20% to Mrs. Gill.

[282] If the parties are unable to agree on costs, they are at liberty to apply to speak to the matter by contacting Trial Scheduling within thirty days.

"Douglas J."