IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Giller v. Herron,*
2024 BCSC 186

Date: 20240207
Docket: M190406
Registry: Vancouver

Between:

Maygan Carlie Giller

Plaintiff

And

Chelsea Herron

Defendant

- and -

Docket: M220788
Registry: Vancouver

Between:

Amber Cara Knight

Plaintiff

And

Maygan Carlie Giller and Chelsea Dawn Herron

Defendants

- and -

Docket: M222134
Registry: Vancouver

Between:

Dana Rae Macumber

Plaintiff

And

Maygan Carlie Giller and Chelsea Dawn Herron

Defendants

Before: The Honourable Mr Justice Crerar

Reasons for Judgment

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I. INTRODUCTION

[1] On June 15, 2017 at around 7 pm, the northbound 2016 Jeep Wrangler driven by the plaintiff and defendant Maygan Giller[1] hit the side of the southbound 2008 Mazda 3 driven by the defendant Chelsea Herron at the intersection of 200th Street (north-south) and 80th Avenue (east-west) in Langley, just northwest of the Langley Events Centre.

[2] The collision spawned three actions that form the basis of the present trial: one brought by Ms Giller against Ms Heron; and one brought by each of the passengers in Ms Heron's car—Amber Knight and Dana Macumber (the "**passenger plaintiffs**")—against both Ms Heron and Ms Giller.

[3] The actions have been bifurcated. This trial and these reasons will determine liability. Quantum trials are scheduled for later this year.

[4] For the reasons that follow, this Court finds that Ms Giller and Ms Herron were both negligent, and that both contributed to the collision. Ms Heron, who attempted an illegal and unpredictable U-turn from the dedicated left-turning lane, is mostly to blame, and bears 80% liability. Ms Giller, who was driving roughly 18 km/h over the speed limit, and who failed to notice or ignored the flashing "Prepare to Stop" advance warning sign south of the intersection, bears 20% liability.

II. FACTS AND FINDINGS

A. The intersection

[5] The Appendix provides a conceptual overhead view of the intersection. Dark (the Giller Jeep) and light (the Herron Mazda) rectangles mark the rough locations of the pre-collision, collision, and post-collision resting point locations of the two vehicles, based on the expert reports, and the findings of this Court.

[6] The northbound and southbound roadways mirror one another: each has a dedicated left-turn and right-turn lane, with two through lanes in between.[2]

[7] The northbound and southbound lanes were divided by a concrete median, which stops roughly three metres short of the pedestrian crosswalk, which is marked with thick white lines.

[8] The stop line for the dedicated left-turn lane was in line with the concrete median. The stop line for through traffic was located roughly a metre closer to the intersection.

[9] There were two poles on the northeast corner of the intersection. On the corner was the traffic light pole. About seven metres north on 200th Street was a utility pole supported by a guy wire[3] running northwards, connecting to the sidewalk about five metres further north.

[10] Roughly 88 metres south of the northbound intersection stop line was a "Prepare To Stop" yellow advance warning sign, with yellow flashing lights that activate when the intersection light is about to turn yellow or red ("**AWF**"), under which Ms Giller passed as she approached the intersection.

[11] The speed limit approaching the intersection is 70 km/h.

B. Evidentiary sources

[12] Each party provided an expert opinion on the collision from accident reconstruction forensic engineers:

a) Gerald Sdoutz for Ms Giller;

b) Dr Amrit Toor for the passenger plaintiffs;

c) Bradley Heinrichs for Ms Herron.

[13] All three experts arrived at their conclusions by using PC-Crash, a standard software application used for accident reconstruction. The experts were able to generate multiple simulations based on the known information—the Jeep data, the final resting location, and the vehicle damage—combined with an assumed "perception response time" ("**PRT**") and other variables.

[14] As is standard practice, the experts did not seek to customise a PRT based on Ms Giller's individual reaction speed, but rather used human averages derived from various studies, adjusted slightly to reflect the road conditions. Mr Sdoutz used a 1.3 second PRT. Dr Toor used a 1.5 second PRT (adjusted to reflect the rain). Mr Heinrichs used a 1.2 PRT in his first report; in his supplemental report, replacing the first report, he upped the PRT to 2.1 seconds. At trial, it became clear that Mr Heinrichs' use of a 2.1 second PRT did not represent an anomalous outlier employed to force a certain outcome, but rather was used, reasonably, to provide a range of possible results for the Court.

[15] While the experts disagreed on certain points, in the end, as set out below, their opinions were similar, or at least compatible, on key issues. Reflecting this, all counsel relied on the other parties' experts in their final arguments.

[16] In contrast to many collisions at busy intersections, there was no intersection camera footage of the collision, nor independent witnesses providing illuminating evidence. That said, there was a reasonable amount of objective information to allow the engineering experts to advance theories about the collision, and to allow the Court to reach conclusions on sequence and relative liability.

[17] Photographs of the two vehicles reveal substantial damage. The Jeep hit the Mazda perpendicularly, in a proverbial T-bone collision: the passenger doors on the Mazda's right side are crumpled inwards, in a cavity centred on the support bar between the doors. The Jeep fared better, but with significant damage to its front bumper and hood.

[18] Photographs taken soon after the collision show the rest positions of the vehicles: just north of the guy wire. The distances vary slightly, based upon each expert's interpretation of the surrounding features: Dr Toor estimates eight to 14 meters north of the utility pole; Mr Sdoutz and Mr Heinrichs estimate six to ten meters. Ultimately, the issue is of minor importance. If the vehicles were arms on a clock, the Mazda came to a rest at nine o'clock, and the Jeep roughly at eight, with the Mazda's right front touching the Jeep's left front in the clock centre.

[19] The pole and the guy wire locations also provided restraints on the expert opinions. Their presence ruled out any theoretical simulations or models of the collision that would result in either vehicle colliding with or passing through the pole or the guy wire. Specifically, the pole and the guy wire required Mr Heinrichs to modify his preliminary model and report, which was prepared before he was provided with the information about the pole and guy wire, and the vehicle rest positions. That preliminary report was based on the assumption, provided to Mr Heinrichs, that Ms Herron was performing a conventional left turn. That initial theory had to be abandoned as the resulting post-collision simulations generated by PC-Crash would invariably drive the vehicles through the pole or guy wire.

[20] Further, the Jeep was equipped with an "event data recorder" ("**EDR**"); the Mazda was not. The Jeep's EDR records provide various measurements in the five seconds before impact, broken down in one-tenth of a second intervals: speed; percentage the accelerator pedal is depressed; percentage the steering wheel is turned; and whether or not the brake is depressed (the data only provides the binary fact of whether the brake is pushed or not, with no percentage provided).

[21] The Jeep's EDR data allowed the experts and parties to agree on many points:

a. the light turned yellow at some point before impact;

b. Ms Giller applied her brakes 1.1 seconds before impact;

c. Ms Giller was travelling 88 km/h just before applying her brakes; and

d. Ms Giller's Jeep's speed on impact was 68 km/h, and it sustained a speed change of 35 km/h on impact.

[22] Finally, Mr Berg, a traffic technologist and senior signal technologist from the City of Langley, confirmed that the advance warning flashers would illuminate 5.7 seconds before the intersection light turns from green to yellow (and would remain on whilst the light is yellow or red). The timing of the flashers would permit a driver

driving the speed limit of 70 km/h who saw the warning flashers when they first illuminated to enter the intersection on a green light; any driver past that initial moment of flasher activation would encounter a yellow light at the intersection, provided they were driving the speed limit.

[23] Mr Berg also confirmed that the northbound yellow light would remain activated for 4.7 seconds before turning red.

C. The collision

[24] The following summarises the Court's conclusions about the location and sequence of the collision. The next section will provide further analysis of contentious facts.

[25] The collision occurred in the early evening when it was still light out. Visibility was good. It had rained throughout the day, and was lightly raining around the time of the collision. The roads were wet.

[26] Ms Giller was helping her mother move, shuttling household items between a storage locker and her new condominium in Langley. That day she had passed through the intersection multiple times before the collision. Ms Giller lived in Langley and was familiar with the intersection.

[27] Ms Giller testified that traffic driving the stretch of 200th Street approaching the intersection travels swiftly: as it is straight, wide, and flat, and as there are no traffic lights between 72nd and 80th Avenues—a distance of 1.6 kilometres—it is treated somewhat like a highway.

[28] Ms Giller was driving northbound. Her intention was to proceed straight through the intersection in one of the through lanes. She does not recall whether she was in the left fast lane or right slow lane; ultimately this issue is of minor importance.

[29] Although Ms Giller testified that she believed that she was driving 70 to 80 km/h, she accepted, based on the vehicle data, that she was driving closer to 90

km/h. She did not recall going particularly fast, and testified that she was just keeping up with the flow of traffic.

[30] Although Ms Giller testified that she did not know whether the advance warning lights were flashing as she approached the sign and the intersection 88 metres beyond, I have concluded that they were.

[31] Ms Giller did not slow down when she passed under the advance warning sign. Nor did she accelerate to beat the changing light: she remained at a constant speed of around 88 km/h.

[32] Although Ms Giller testified that she believed she entered the intersection on a green light in its last moment before turning yellow, I have concluded that it was in fact yellow when she entered.

[33] Ms Giller proceeded straight through the intersection.

[34] I turn to the southbound perspective of the Herron Mazda and its three occupants, who were at the time, if no longer, all friends. They were heading to a "girl's night" at a friend's house located northeast of the intersection. They had never been to that house before, and were relying on a smart phone mapping app to navigate. They were listening to music, and actively changing songs. They were also running a little late. The occupants, including Ms Herron, were somewhat distracted and confused.

[35] Driving south down 200th Street, Ms Herron missed the left turn to the friend's house. Someone said words to the effect of "we need to turn around." Ms Herron found herself at the intersection, and entered the southbound dedicated left-turn lane.

[36] The Mazda moved forward, into the pedestrian crosswalk, as if inching forward to make a conventional left turn. Ms Herron then suddenly attempted what Ms Knight described as a "fast and tight" U-turn. Ms Knight stated that her last thought before the collision was "wow, that's ballsy: she's ripping a U-turn".[4]

[37] Ms Knight confirmed that when the Mazda first moved forward into the pedestrian crosswalk, the intersection light was green. When Ms Herron started the U-turn, the light had turned from green to yellow; Ms Herron also testified that she started her turn after the light turned yellow.

[38] From Ms Knight's perspective in the passenger seat of the Mazda (that is, the Mazda occupant closest to Ms Giller's oncoming Jeep), she did not see the Jeep at the start of the Mazda's U-turn. She says that view was blocked by a white cube van in the northbound dedicated right-turn lane, opposite (which van Ms Giller also saw).

[39] Ms Knight suddenly saw Ms Giller's jeep heading towards her, moving "very fast". The light at that point was yellow.

[40] As she entered the intersection, Ms Giller saw the Mazda turn into her lane at the north pedestrian crosswalk. There was no time for Ms Giller to react or honk or take evasive action. Her last pre-collision thoughts were, "is this person actually turning?", and, then, "there's going to be an accident." Ms Giller braked as hard as she could and gripped her steering wheel. The tires screeched. The vehicle data shows that she braked 1.1 seconds before impact. She does not recall if she tried to turn: the data shows a slight 25 degree turn to the right.[5]

[41] The Jeep struck the Mazda on the northernmost of the two pedestrian cross lines, with an impact speed of 68 km/h. The Jeep continued forward at roughly 33 km/h, pushing the Mazda northeast. Both vehicles narrowly missed clipping the guy wire, coming to rest just north of it, on the sidewalk.

[42] The airbags deployed in both vehicles. All of the parties were taken to hospital by ambulance.

III. DISCUSSION AND DECISION

A. Positions of the parties

[43] Ms Giller argues that she lawfully entered the intersection with the intention of proceeding straight on a green light pursuant to s. 127(1)(a) of the *Motor Vehicle*

Act, RSBC 1996, c 318 [the ***Act***]. In accordance with s. 127(1)(a)(i), she was entitled to cause her vehicle to proceed straight through the intersection. Alternatively, even if the light was yellow, she was entitled to proceed as it would have been unsafe to stop, under s. 128(1). Ms Giller had the right of way and was the dominant driver, whereas Ms Herron was the servient driver obliged to yield and not turn until it was safe. She argues for a 100% liability finding against Ms Herron, for executing an inherently dangerous and irresponsible U-turn in a busy intersection. She cites *Cooper v. Garrett*, 2009 BCSC 35 and *Ishii v. Wong*, 2015 BCSC 922 (largely applying *Cooper*), where the Court found left-turning drivers 100% liable even though the oncoming drivers were speeding (38 km/h and 10 km/h over the speed limit, respectively).[6]

[44] The passenger plaintiffs argue that Ms Giller and Ms Herron should share equal liability: Ms Giller for speeding and not obeying the advance warning flashers, and Ms Herron for executing an illegal U-turn in the intersection, and not yielding the right of way to Ms Giller.

[45] Ms Herron joins in arguing for a 50-50 apportionment of liability. She argues that both drivers should be considered “substandard drivers” breaching traffic rules and the standard of care. She questions whether the speeding Ms Giller posed an “immediate hazard” requiring Ms Herron to yield. She emphasises that obedience to the advance warning flashers would have allowed Ms Giller to stop at the intersection, and avoid the accident.

B. Law

1. Motor vehicle negligence: the analytical framework

[46] The rules of the road set out in the *Act* are the starting point, but not the end point, for the assessment of whether either party was negligent, and to what extent. In *Boyd v. Baldwin*, 2015 BCSC 887, Fitch J (as he then was) summarises the role of the *Act* in the common law negligence analysis:

> [59] In determining whether, and to what extent, parties to an accident met their common law duties of care, a court will be informed by the rules of the

> road. While the rules of the road provide guidelines for assessing fault in motor vehicle accident cases, they do not, standing alone, provide a complete legal framework. As noted in *Salaam v. Abramovic,* 2010 BCCA 212 at para. 21, "[t]his is both because the rules of the road cannot comprehensively cover all possible scenarios, and because users of the road are expected to exercise reasonable care, even when others have failed to respect their right of way".

[47] *Stewart v. Dueck*, 2012 BCSC 1729 describes the common-law duties of motorists:

> [38] The authorities establish that all motorists have an overarching common law duty to exercise what constitutes, in all the circumstances, reasonable and due care. All motorists have a general duty to keep a proper look-out and to take reasonable precautions in response to apparent potential hazards: *Hmaied v. Wilkinson*, 2010 BCSC 1074 at para. 23.
>
> [39] It is a well-settled proposition that drivers in this province are entitled to assume, within reason, that the other users of the roads in British Columbia will obey the law: *Mills v. Siefred*, 2010 BCCA 404 at para. 26.
>
> [40] The Court's task is to determine whether each of the parties in an accident met their common law duties of care. The analysis of the standard of care, which is relevant to the particular circumstances, is informed by both the reasonableness of the parties' actions and by the rules of the road; *Salaam v. Abramovic*, 2010 BCCA 212 at para. 21; *Kilian v. Valentin*, 2012 BCSC 1434 at para. 28.
>
> [41] While these general propositions are endorsed by the authorities, ultimately, the determination of liability turns on the particular facts of each case.

[48] Section 144 of the *Act* echoes this overarching common-law duty to exercise what constitutes, in all of the circumstances, reasonable and due care:

> **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….

[49] Sections 127-128 set out the rules governing green and yellow (i.e. amber[7]) lights:

Green light

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

(a) the driver of a vehicle facing the green light

(i) may cause the vehicle to proceed straight through the intersection…

Yellow light

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

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

[50] Sections 140 and 146 govern speed signs and limits, the relevant portions of which follow:

Obedience to speed signs

140 Where traffic control devices as indicated in section 138 or 139 are erected or placed on the highway, a person ***must not drive or operate a vehicle at a greater rate of speed than, or in a manner different from, that indicated on the signs.***

…

Speed limits

146 (1) Subject to this section, a person must not drive or operate a motor vehicle on a highway in a municipality…at a greater rate of speed than 50 km/h, and a person must not drive or operate a motor vehicle on a highway outside a municipality… at a greater rate of speed than 80 km/h.

(2) The minister … may, by causing a sign to be erected or placed on a highway limiting the rate of speed of motor vehicles or a category of motor vehicles driven or operated on that portion of the highway, ***increase or decrease the rate of speed at which a person may drive or operate a motor vehicle or a category of motor vehicle on that portion of the highway*.**

(3) If the minister … has caused a sign to be erected or placed on a highway limiting the rate of speed of motor vehicles or a category of motor vehicles driven or operated on that portion of the highway, ***a person must not, when the sign is in place on the highway, drive or operate a vehicle on that portion of the highway at a greater rate of speed than that indicated on the sign for that category of motor vehicle***.…

[emphasis added]

[51] Section 168 governs U-turns (referred to in the title as a "reverse turn"[8]):

> **Reverse turn**
>
> **168** Except as provided by the bylaws of a municipality… a driver ***must not turn a vehicle so as to proceed in the opposite direction***
>
> (a) ***unless the driver can do so without interfering with other traffic***, or,
>
> (b) when the driver is driving
>
> …
>
> (iv) ***at an intersection where a traffic control signal has been erected****…*
>
> [emphasis added]

[52] Section 174 governs left turns:

> **Yielding right of way on left turn**
>
> 174 When a vehicle is in an intersection and its driver intends to turn left, ***the driver must yield the right of way to traffic approaching from the opposite direction that is in the intersection or so close as to constitute an immediate hazard***, but having yielded and given a signal as required by sections 171 and 172, the driver may turn the vehicle to the left, and traffic approaching the intersection from the opposite direction must yield the right of way to the vehicle making the left turn.
>
> [emphasis added]

[53] *Salaam v. Abramovic*, 2010 BCCA 212 confirms that the *Act* does not represent a complete code for assessing fault in motor vehicle cases, but does determine who is the dominant driver in a given situation:

> [21] In the end, a court must determine ***whether, and to what extent, each of the players in an accident met their common law duties of care to other users of the road***. In making that determination, a court will be ***informed by the rules of the road, but those rules do not eliminate the need to consider the reasonableness of the actions of the parties***. This is both because the rules of the road cannot comprehensively cover all possible scenarios, and because users of the road are expected to exercise reasonable care, even when others have failed to respect their right of way. While s. 175 of the *Motor Vehicle Act* and other rules of the road are important in determining whether the standard of care was met, ***they are not the exclusive measures of that standard.***
>
> …
>
> [33] The words "immediate hazard" appear in both ss. 174 and 175 of the *Motor Vehicle Act* and are used to determine when a vehicle may lawfully

> enter an intersection. ***They determine who is the dominant driver, but do not, by themselves, define the standard of care in a negligence action.***
>
> [emphasis added]

[54] *Walker v. Brownlee*, [1952] 2 DLR 450 (SCC) sets out the common law test for the duty of care on dominant and servient users of the highway. A driver is entitled to expect that others will observe that they have the right of way, until such time that the driver ought to be aware that the other party is not yielding the right of way. The individual exercising the right of way is referred to as the "dominant user"; the person without the right of way is referred to as the "servient user." Estey J at 457 describes each driver's duty:

> …The respective positions of these drivers are, however, different in this important respect: the law required [the servient user] to yield the right-of-way, while [the dominant user] had a right to expect, and, therefore to proceed upon that basis, that [the servient user] would stop at the intersection. When, however, he ought to have seen that [the servient user], without stopping, was proceeding into the intersection, then a duty devolved upon him to use due care to avoid a collision.

[55] Where a driver in a servient position disregards his statutory duty to yield the right of way and a collision results, the servient driver must establish that after the dominant driver became aware (or by the exercise of reasonable care should have become aware) of the servient driver's own disregard of the law, the dominant driver had a sufficient opportunity to avoid the accident of which a reasonably careful and skillful driver would have availed himself. As Cartwright J states in *Walker* at 461:

> While the decision of every motor vehicle collision case must depend on its particular facts, I am of opinion that when A, the driver in the servient position, proceeds through an intersection in complete disregard of his statutory duty to yield the right-of-way and a collision results, if he seeks to cast any portion of the blame upon B, the driver having the right-of-way, A must establish that after B became aware, or by the exercise of reasonable care should have become aware, of A's disregard of the law B had in fact a sufficient opportunity to avoid the accident of which a reasonably careful and skillful driver would have availed himself; and I do not think that in such circumstances any doubts should be resolved in favour of A, whose unlawful conduct was *fons et origo mali*.[9]

[56] *Salaam,* accordingly, confirms that a dominant driver will not typically be found liable for an accident:

> [25] A driver like the defendant, who is in a dominant position, will not typically be found to be liable for an accident. Drivers are generally entitled to assume that others will obey the rules of the road. Further, though defensive driving and courteous operation of motor vehicles are to be encouraged, they do not necessarily represent the standard of care for the purposes of a negligence action. A driver will not be held to have breached the standard of care simply because he or she failed to take extraordinary steps to avoid an accident or to show exceptional proficiency in the operation of a motor vehicle.

[57] That said, *Pirie v. Skantz*, 2016 BCCA 70, drawing on *Walker*, confirms that a through driver may still be wholly or substantially at fault for an accident:

> [14] I take no issue with the appellant's submission that a through driver can, in appropriate circumstances, be found wholly at fault for an accident involving a driver who turns left on a stale yellow light. As a practical matter, a driver like the respondent, who is in a dominant position, will not typically be found to be liable for an accident: *Salaam v. Abramovic*, 2010 BCCA 212 at para. 25. Having said that, ***where a through driver: (1) approaches an intersection at an excessive rate of speed or otherwise conducts himself in such a way as to deprive the left-turning driver of the ability to reasonably anticipate he is about to enter the intersection on a stale yellow light; (2) fails to bring his vehicle to a stop in circumstances where other vehicles travelling in the same direction have already done so; or (3) should have become aware of the left-turning driver's own disregard of the law in circumstances that afforded him a sufficient opportunity to avoid the accident through the exercise of reasonable care, the through driver may be found wholly or primarily at fault for the accident***: *Pacheco (Guardian ad litem) v. Robinson* (1993), 75 B.C.L.R. (2d) 273 (B.C.C.A.); *Walker v. Brownlee*, (1952), 2 D.L.R. 450 (S.C.C.).
>
> [emphasis added]

[58] *Nerval v. Khehra*, 2012 BCCA 436 is the leading case on s. 174: left turns. At paras 12–13, Harris JA expressly approves the s. 174 analysis of Armstrong J at trial, including his summary of the relevant law. I paraphrase that summary below:

a) The first question is whether the through driver constituted an immediate hazard before the left-turning driver started their turn. The answer to that question will determine which of the two was the dominant driver before the collision.

b) A motor vehicle is an immediate hazard if its driver must take a sudden or violent action to avoid the threat of collision if a servient vehicle is about to

make a left turn entering or crossing the highway in the path of the approaching vehicle.

c) The time to assess the question of an immediate hazard is when the left-turning vehicle commences the turn.

d) A dominant through driver may still be in breach of their duty of care to the left-turning driver if they failed to take reasonable care when entering into the intersection in hazardous circumstances (such as where they were speeding or had an obscured view).

e) The left-turning driver bears the burden of proving that the negligence of the dominant vehicle caused or contributed to the accident. In other words, that the dominant driver had a sufficient opportunity to avoid the accident of which a reasonably careful and skilful driver would have availed themselves.

f) In such circumstances, any doubt should be resolved in favour of the dominant driver.

g) The obligation imposed on the left-turning driver by s. 174 of the *Act* not to start a turn if there is an immediate hazard has priority over certain other obligations imposed on a through driver (such as by s. 158 not to pass a vehicle on its right unless it is safe to do so).

h) The resulting onus placed on the left-turning driver is not absolute. It may be qualified by the conduct of the through driver.

2. Contributory negligence

[59] The *Negligence Act*, RSBC 1996, c 333, s. 4(1) requires the Court to "determine the degree to which each person was at fault" for the damages claimed by the plaintiffs.

[60] Apportionment is to be determined based on “the degree to which each person was at fault”, not the degree to which the fault of each caused the damage. Fault requires a consideration of blameworthiness which is “a gauge of the amount by which each proximate and effective causative agent fell short of the standard of care that was required... in all the circumstances”: *Cempel v. Harrison Hot Springs Hotel Ltd.* (1997), 43 BCLR (3d) 219 (CA) at para 19. The task of the court is to assess the degree to which each party departed from the norm of reasonable conduct: para 21. Lambert JA provides guidance on that process:

> [24] In the apportionment of fault there must be an assessment of the degree of the risk created by each of the parties, including a consideration of the effect and potential effect of [occurrences] within the risk, and including any increment in the risk brought about by their conduct after the initial risk was created. The fault should then be apportioned on the basis of the nature and extent of the departure from the respective standards of care of each of the parties.…

[61] In *Aberdeen v. Township of Langley, Zanatta, Cassels*, 2007 BCSC 993 at paras 62–63, rev’d on other grounds 2008 BCCA 420, Mr Justice Groves provides a useful list of nine factors to assist in assessing the nature and degree of departure from the standard of care in order to determine an appropriate apportionment of fault:

> 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. [T]he gravity of the risk created;
>
> 7. [T]he extent of the opportunity to avoid or prevent the accident or the damage;

> 8. [W]hether the conduct in question was deliberate, or unusual or unexpected; and
>
> 9. [T]he knowledge one person had or should have had of the conduct of another person at fault.

C. Liability of Ms Herron

[62] While Ms Herron claims that at the time of the collision, she was in the intersection, executing a regular left turn from the dedicated left-turn lane, the evidence overwhelmingly establishes that she must have been attempting an illegal U-turn, to turn around and travel northbound on 200th Street, and then take the turn that they should have taken to their friend's house, to the northeast of the intersection.

[63] At trial, Ms Herron presented reasonably well, albeit with wringing hands and at times seemingly deliberately flat facial and tonal expression. Her credibility was undermined by her rapid removal of her dash camera from the Mazda wreckage just after the collision, and just before she was taken away in an ambulance. She never produced the dash camera footage in the litigation, even though she admitted that it was still in her possession. Her claim that the dash camera, by remarkable coincidence, stopped recording just before the collision does not aid her credibility.

[64] Nor does her acknowledged admission to Ms Knight, whilst they were on vacation together a few months after the collision, that she had in fact done a U-turn. Her explanation at trial—that she only said so out of fear of a bullying "backlash" from Ms Knight, and to preserve their friendship—was unconvincing.

[65] That said, the central issue of U-turn versus left turn can be determined on factors other than credibility.

[66] As set out above, Ms Giller and Ms Knight, both of whose testimony I prefer over that of Ms Herron, confirmed that Ms Herron attempted a U-turn rather than a conventional left turn. Both confirmed that the Mazda attempted the U-turn close to the pedestrian crosswalk, rather than in the middle of the intersection, in the manner of a regular left-turning driver.

[67] Further, Mr Sdoutz and Dr Toor shared the firm opinion that the collision occurred while Ms Herron was partially through an attempted U-turn. There was no way that the two vehicles could have wound up in the resting position north of the pole and guy wire, without clipping those features, any other way.

[68] Mr Sdoutz concluded that the Mazda was travelling at impact at about 4 km/h, likely making a three-point U-turn. The Mazda would have required a further four to five seconds to complete the U-turn and be able to accelerate northward. Dr Toor reached a similar conclusion: the Mazda was likely making a U-turn, with a speed of less than 5 km/h.

[69] At trial, Mr Heinrichs ultimately agreed that an attempted U-turn, with a collision in the pedestrian crosswalk, was entirely possible and indeed likely. He acknowledged that if Ms Giller continued to apply her brakes after the impact, a point of impact in the middle of the intersection would be impossible, and that an impact at the pedestrian crosswalk is more likely.

[70] This was not a begrudging concession. Mr Heinrichs' supplemental report in fact expressly provided a U-turn as the second of two likely scenarios.

[71] In fact, even the first Heinrichs scenario, on which he bases his primary analysis, would not support Ms Herron's claim of a normal left turn. The first Heinrichs scenario only works if the Mazda was attempting an abnormal left turn: not proceeding on a natural trajectory to the eastbound 80th Avenue lanes, but rather arcing towards the oncoming 80th Avenue westbound lane. The first scenario also requires the two vehicles to remain partially locked together, experiencing a series of some 45 micro-collisions as the vehicles repeatedly bounce off each other and rejoin, over the 28 metres to the known rest positions: I accept Mr Sdoutz's opinion that this sequence is improbable, and relies upon an unusually high restitution value (that is, the elasticity or bounce resulting from the collision) and friction value.[10]

[72] In performing a U-turn in an intersection, Ms Herron violated the specific s. 168 prohibition against reverse turns "at an intersection where a traffic control signal

has been erected." In doing so she also violated ss. 144(1)(a)–(b), 168(a), and (as discussed further below) 174 of the *Act*.

[73] Apart from the *Act*, the jurisprudence reiterates that a U-turn, especially when performed illegally, as here, is an "inherently dangerous manoeuvre": *Hough v. Wyatt*, 2010 BCSC 1375 at para 24. As Mr Justice Giaschi states in *Saidy v. Louzado*, 2019 BCSC 281:

> [128] In addition, it is my opinion that a driver performing a reverse turn is in a similar category to a driver backing up a vehicle. ***Reverse turns are inherently more dangerous and pose greater risks than other driving manoeuvres.*** They expose a vehicle to risks of collisions from multiple directions and are unpredictable to other drivers. It is for these reasons that they are regulated and restricted by the *MVA*. ***A driver performing a reverse turn, like a driver backing up, must meet a high standard of care.***
>
> [emphasis added]

[74] Other cases confirm that absent signals or erratic driving or other indications that the defendant would attempt a U-turn, courts have generally ascribed no fault to driver colliding with the U-turning vehicle: see e.g., *Longford v. Tempesta*, 2015 BCSC 309 at para 38; *Faust v. See*, 2018 BCSC 1085 at para 69; *Ferguson v. Yang*, 2013 BCSC 332 paras 38–41. In *Ferguson* at para 41, Justice G.C. Weatherill[11] describes the U-turn in that case as "a maneuver fraught with danger". In each of those cases, the Court apportioned 100% liability to the U-turning driver.

[75] Ascribing significant fault to a person who attempts an inherently risky and unpredictable manoeuvre such as a U-turn accords with general negligence principles of foreseeability. As stated by Southin JA, outside of the context of a U-turn, "a driver is entitled to assume that other drivers will obey the rules of the road", and is required to anticipate, in other drivers, "only those follies which according to the teachings of experience commonly occur": *Tucker (Public Trustee of) v. Asleson* (1993), 78 BCLR (2d) 173 (CA) at para 34. In this, a U-turn contrasts with other traffic breaches that are nonetheless common, predictable, and thus the expected subject of caution amongst drivers, such as speeding and not stopping at a yellow light: among the accusations levelled at Ms Giller, to whom we now turn.

D. Liability of Ms Giller

1. Activated advance warning flashers and yellow light

[76] Ms Giller also bears some liability for the accident. The evidence, read as a whole, indicates that the advance warning lights were flashing as she passed below. Seconds later, she entered the intersection on a yellow light.

[77] The sequence flows from her own evidence. Ms Giller claimed that she entered the intersection on a green light, and that it turned yellow during her path through the intersection.

[78] The traffic technologist Mr Berg confirmed that the northbound advance warning flashers would activate 5.7 seconds before the traffic lights change from green to yellow. The timing of the flashers would permit a driver driving the speed limit of 70 km/h who saw the warning flashers when they first illuminated to enter the intersection on a green light; any driver past that initial moment of flasher illumination would encounter a yellow light at the intersection, provided they were driving the speed limit.

[79] Ms Giller argues that Mr Berg's testimony does not precisely match the Ministry of Transportation and Infrastructure, *Electrical and Traffic Engineering Manual: Section 400 Signal Design* (January 2019), part 402.6.10 ("Advance Warning Flashers") description:

> .1 Advance warning flashers are timed to come on at a pre-determined or calculated number of seconds before the signals at an intersection turn yellow. This time is calculated so that a driver who passes the events flashers as they are activated is afforded time to clear the intersection safely…

[80] I am satisfied that Mr Berg, who was intimately familiar with those provisions, and through whose oral testimony that description was proven, meant what he said: a driver witnessing the activation of the flashers will be able to pass through the intersection safely, on a clear green light, and not under the exception permitting passage through a yellow light where a stop would be unsafe.

[81] Put conversely, had the advance warning flashers not yet activated, Ms Giller, driving some 18 km/h in excess of the speed limit, should have easily cleared the intersection on an uninterrupted green light, with the light remaining green as she passed through the intersection.

[82] Ms Giller's green light testimony is also undermined by more simple direct evidence.

[83] Ms Giller herself told the police that the light was yellow, in her statement provided only one-and-a-half hours after the collision. As noted by Constable Bouffard in her report: "GILLER stated the light was yellow when she went thru".

[84] Ms Giller argues that the statement is ambiguous, and could be consistent with the light only turning yellow as Ms Giller passed through the intersection. In testimony, Constable Bouffard admitted that she had no independent memory of the investigation, but confirmed that it was her practice to keep accurate notes, particularly on a key point such as the colour of the traffic light. Further, and conversely, had Ms Giller reported that the light had turned from green to yellow, or made any reference to a green light, that would likely have made an impression and have been recorded by the officer.

[85] In *Vora v. Adams*, 2022 BCSC 1943, Mr Justice Ball dismissed a similar argument:

> [12] The plaintiff also told a police officer that Mr. Adams "ran the red light", according to the police report, see Tab B, Ex. 2. At the accident scene, her voice was recorded in a video recorded by her son, Om Vora, saying that the defendant's vehicle "ran the light". It was suggested by counsel that the police officer, Cst. Byrnes, misunderstood the plaintiff's statement and that she meant the defendants' vehicle failed to stop. The suggestion of misunderstanding the plaintiff was never put to the police officer, when he testified during cross-examination.
>
> …
>
> [14] The references in her evidence to "the light" or "a red light" is simply inconsistent with that evidence. There is no reliable evidentiary basis to find that the police officer misunderstood or failed to properly record statements made by the plaintiff.

[86] Those words apply equally to the present case. I accept and prefer the accuracy of Ms Giller‘s statement made just after the collision, against her interest, over her statement six-and-a-half years after the collision when she is a defendant at trial.

[87] I also accept and prefer the evidence of Ms Knight, who confirms that the light was yellow when she first saw the Jeep: admittedly, not providing a snapshot of the light at the moment the Jeep entered the intersection, but a split-second after it did so. Ms Herron also testified that she started her turn only after the light turned yellow.

[88] Turning to the status of the advance warning flashers, Ms Giller’s testimony at trial was vague and somewhat subdued. She did not categorically deny that they were illuminated, but rather stated “I did not witness them either flashing or off”. She stated that as she approached the intersection, she was not worried that the light might change from green to yellow.

[89] If Ms Giller had obeyed the advance warning flashers, she could have slowed down and stopped before the intersection. The Ministry Manual calculates that drivers can see the advance warning flashers 21.3 meters back from the sign. A driver can, therefore, see the advance warning flashers at a minimum of 109.3 meters back from the intersection. From a distance of 109.3 meters back from the northbound stop line, it would take a driver traveling at the speed limit of 70 km/h about 5.7 seconds to reach the northbound stop line.

[90] Dr Toor confirms that Ms Giller should have seen the activated advance warning flashers, and that she could have slowed down and stopped:

> As a conservative assessment, the Jeep was approximately 33 metres south of the overhead advanced warning sign when the warning flashers first illuminated. If Ms Giller had responded to the advanced warning flashers, she could have stopped at the northbound stop line, potentially preventing the collision.

[91] In his response report, Mr Heinrichs endorses, applies, and expands on Dr Toor’s conclusion. He calculates that the Jeep was about 160 metres from impact

when it passed the advance warning signal, concluding that "the Jeep would have been about 98 metres from its stop line after Ms Giller had time to respond to the AWF," and noting that based on studies, 90 percent of drivers could have stopped at the intersection over this distance.

[92] Dr Toor's calculation above is, as stated, conservative based on the assumption, favourable to Ms Giller, that the northbound traffic light turned yellow after she entered the intersection.

[93] We also heard a less conservative calculation. In a skilled cross-examination, Ms King had Mr Heinrichs perform calculations based on the light turning yellow before Ms Giller entered the intersection. Mr Heinrichs calculated that the Jeep would have been even further south from the advance warning flashers. He calculated that if the traffic light changed to yellow 4.5 seconds before the collision (calculated from the time it would take the Mazda to move from its stopped position to the point of impact), the advance warning flashers would have activated 10.2 seconds before impact. At that point, Ms Giller was 211 meters south of the northbound stop line and 125 meters south of the advance warning flashers when they activated. This would have provided Ms Giller much more time than the 109.3 meters time allotted by the Ministry Manual for a driver to see and respond to the advance warning flashers.

2. Law: advance warning flashers

[94] There are no British Columbia cases considering the combination of advance warning flashers and a U-turning driver, but there is ample authority for the proposition that an advance warning flasher obliges a driver to slow down and to prepare to stop. As Esson JA (before his appointment as Chief Justice of this Court) states in *Morgan v. Hauck* (1988), 27 BCLR (2d) 118 (CA) at 122–123:

> Because the situation is inherently dangerous, there is also a heavy onus on the traffic proceeding through the intersection. In my view the serious, I would say flagrant, fault was that of the defendant, who, upon seeing the two amber warning lights, speeded up his vehicle, already travelling at the speed limit, and entered the intersection against a red light. That I would describe as gross negligence in the old terminology. I stress this because I think it is

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

[95] As indicated by the last sentence, the facts in *Morgan* do not align perfectly with the present facts: the through driver, who was found 90% at fault, had accelerated after seeing the advance warning flashers, located roughly one-quarter mile before the accident intersection. He ran a red light. At least three other nearby vehicles had slowed in response to the flashing advance warning light, and stopped at the intersection by the time the light turned red. The left-turning driver, performing a legal and regular left turn, and not a U-turn, was found 10% at fault.

[96] The facts in *Pirie* align more closely to those in the present case. The Court of Appeal dismissed the appeal of an order apportioning 60% fault to the appellant (a conventional left-turning driver) and 40% to the respondent (the through driver who failed to notice or heed the advance warning flashing lights, located 103.5 metres before the intersection, and who entered the intersection on a “stale” yellow light). The trial judge found that given the respondent’s “speed and proximity to the intersection when the light turned yellow, his decision to proceed into the intersection was reasonable”: para 5(10). That said:

> [5] … 12. The respondent ought to have seen the AWF lights and prepared to stop, rather than continue to proceed towards the intersection at the speed limit. Although no specific factual finding was made on this point, the uncontradicted expert evidence otherwise relied on by the trial judge established that had the respondent decelerated in response to the AWF lights, he would have been able to stop before entering the intersection with normal braking…

[97] The appellant argued the trial judge erred by failing to appreciate the heavy onus on a driver to obey advance warning lights, amongst other things: para 9. In considering that ground of appeal, Fitch JA notes that the appellant was the servient driver; the respondent’s failure to heed the advance warning light did not alter the

factual finding that the left-turning appellant knew or ought to have known that the respondent was an immediate hazard when she proceeded to left turn: para 36. The respondent's breach of statutory obligations was properly considered by the trial judge in apportioning fault: para 36. Amongst these factors was the respondent's unsafe decision to proceed toward the intersection at the speed limit where the wet road and his 10,000 pound fully-loaded trailer would make stopping difficult.

[98] *Pirie* also addresses the potential ambiguity in the three-word phrase on the advance warning flasher sign: "Prepare To Stop". This could be read as a direction that must be obeyed: to slow down and stop. Or it could be read as a helpful advance caution: the lights are about to change, and you may be obliged to stop if and when the light is either red, or yellow and it would be unsafe to stop. *Pirie* at paras 32–34 makes clear that it is the former: a through driver must obey advance warning lights.

[99] *Vukelich v. Vliegenthart*, 2013 BCSC 879 at paras 38–40, 52, the case factually closest to the present, also makes clear that the through driver has a duty to obey the advance warning flashers by slowing and stopping. There, Butler J (as he then was) apportioned 75% liability to the left-turning driver and 25% to the through driver who ignored the flashing advance warning sign, entered the intersection on a yellow light but considered it unsafe to stop, and was driving slightly over (less than 10 km/h) the speed limit. He concluded:

> [52] When I compare the degree of fault of the through drivers in those cases with that of Ms. Young, I conclude that her degree of blameworthiness is somewhat less. Unlike those drivers, she could not have stopped safely when the light turned yellow and was not travelling at an excessive speed relative to the speed limit. Nevertheless, her failure to notice and obey the AWF was a significant breach of duty falling well short of the standard of care.

[100] In not noticing or obeying the advance warning flashers by slowing and stopping, Ms Giller breached s. 125, by not obeying the instructions of an applicable traffic control device, as well as ss. 140 and 146.

E. Dominance

[101] That all said, as a matter of law and a matter of fact, the fact that Ms Giller was speeding and did not slow down after seeing the illuminated flashers should not attach to her a significant finding of contributory negligence vis-à-vis Ms Herron.

[102] Courts have cautioned against conflating a breach of speed laws with a finding of negligence. As recently confirmed in *D'Amici v. Fahy*, 2020 BCCA 89:

> [44] Trial courts in this province have wrestled with the extent to which the prospect of accident avoidance should be used to determine fault. In part, conflicting statements in judgments cited to us are a result of lack of clarity with respect to the distinction between fault and causation.
>
> [45] Of course, blameworthy conduct does not result in liability in negligence unless it is a cause in fact of damages. Thus, ***excessive speed on the part of a dominant driver, even if blameworthy, does not lead to liability in negligence unless the speed prevented him from taking reasonable steps to avoid the collision***: *Cooper v. Garrett*, 2009 BCSC 35 at para. 42; *Morehouse v. Andrews*, [1987] B.C.J. No. 2670 (S.C.); *Santos (Guardian ad litem of) v. Raes*, [1998] B.C.J. No. 389 at para. 11 (S.C.); and *Schucknecht v. Singh et al.*, 2006 BCSC 1025.
>
> ….
>
> [50] ***The jurisprudence does not, however, and should not go so far as to say that proof of causation in fact establishes fault. The standard of care enquiry should not be conflated with factual causation***. A rule that a driver exceeding the speed limit is liable in negligence if it can be established that speed caused or contributed to a collision would impose strict liability upon drivers exceeding the speed limit. As the appellant acknowledges, and the trial judge correctly observed, while the relevant legislative standards inform the negligence analysis, a breach of a statutory provision does not in and of itself give rise to a cause of action: *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 at para. 29; *The Queen (Can.) v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205 at 226–227.
>
> [emphasis added]

[103] While Ms Giller was speeding, I accept her evidence, supported by the nature and configuration of the roads approaching the intersection, as well as the elevated 70 km/h speed limit itself, that the approach to the intersection resembles, and is treated by drivers, more akin to a highway than an ordinary suburban road. I accept Ms Giller's evidence that she was keeping with the flow of the traffic, or at least driving consistently with traffic on that stretch of the road. Driving 18 km/h over the speed limit on this road was not particularly irresponsible, and certainly not

unpredictable. Her driving speed, while in excess of the limit, did not constitute the inherently dangerous and reckless speeds relative to conditions found in cases such as *McIntyre v. Quitley*, 2023 BCSC 2240; *Mills v. Seifred*, 2009 BCSC 447, aff'd, 2010 BCCA 404; *Penner International Inc. v. Basaraba Estate*, 2013 BCSC 2356; *Dickie Estate v. Dickie,* 1991 CanLII 2109 (BCCA); as well as *Prasad v. Frandsen* (1985), 60 BCLR 343 (SC), relied upon by the passenger plaintiffs, and *Hynna v. Peck*, 2009 BCSC 1057, relied on by Ms Herron.

[104] While the advance warning flashers were illuminated before she reached that sign, and while that sign reads "Prepare to Stop", the average driver does not possess Mr Berg's knowledge of the timing of the flashers. Many drivers will have had the experience, on a fast-moving road, of safely clearing an intersection on a green light after passing under an illuminated advance warning sign.

[105] Upon seeing flashers activate on an advance warning sign, some irresponsible drivers will proverbially "gun it": accelerate in order to clear the intersection. In contrast, the evidence indicates that Ms Giller did not do so to any degree if at all. While the vehicle data indicates that the car very slightly accelerated after she passed under the sign, that acceleration could have been due to the 3.36 degree downhill slope towards the intersection. The vehicle data indicates that her gas pedal pressure in fact went down: from 28% (at five seconds before impact) to 14% (at 3.2 seconds before impact). Dr Toor confirms that her rate of acceleration was only about half the rate of normal acceleration, and a quarter the rate of rapid acceleration. In any case, the Jeep began coasting 3.1 seconds before the collision.

[106] These points address a major argument of the passenger plaintiffs and Ms Herron, who emphasised Dr Toor's opinion that had the Jeep been travelling at 68 km/h or less, Ms Giller's response would have allowed the Jeep to stop before impact. While 68 km/h is below the speed limit, they argue that the wet road, coupled with the advance warning flashers, ought to have prompted Ms Giller to slow down and drive below the speed limit. I agree with Mr Burtini that this after-the-fact formulation represents an ideal rather than a real expectation of a driver on that

swift-flowing stretch of road covered with a modest amount of rain in the damp Lower Mainland.

[107] In this, the more relevant opinion is that advanced by Mr Sdoutz: had the Jeep "been travelling at 70 km/h, it could not have been stopped before reaching the point of impact on the wet roadway after its driver perceived the Mazda as a hazard." In short, even had Ms Giller been driving the speed limit, the accident would have occurred.

[108] Next, even though Ms Giller entered the intersection on a yellow light, this action is mitigated by two factors.

[109] First, she would have likely just seen it turn yellow: it was not a case of the through driver accelerating or running a stale yellow light about to turn red (the scenario in cases such as *Pirie*, *Morgan*, *Peterson v. Ganji*, 2023 BCSC 1543, *Cipllaka v. Albert-Moore*, 2023 BCSC 457, and, seemingly, *Vukelich*, all relied upon by the passenger plaintiffs). She was not guilty of the oft-cited admonition of Newbury JA in *Kokkinis v. Hall* (1996), 19 BCLR (3d) 273 (CA) at para 10:

> … An amber light is not, as the current witticism suggests, a signal to accelerate or to pass traffic that is slowing to a stop. Indeed, as Mr. Justice Esson noted in *Uyeyama*, in a busy city like Vancouver and at a busy intersection like 25th and Granville, an amber is likely the only time one can complete a left turn. Drivers approaching intersections must expect that this will be occurring. Putting a burden on a left-turning driver to wait until he or she *sees* that all approaching drivers have stopped *would*, in my view, bring traffic to a standstill. We should not endorse such a result.
>
> [emphasis in original]

[110] Second, it was raining, and the pavement was wet: while she ought to have prepared to stop upon seeing the advance warning sign, her decision not to attempt to brake at 88 km/h upon seeing the light turn yellow was reasonable. Assessing that decision at the appropriate moment—the immediate approach to the intersection—she could not have safely stopped on the yellow light: *Vukelich* at para 38. In this, I reach a similar factual conclusion to that reached by Justice Butler in *Vukelich* at para 35.

[111] In short, applying *Pirie* at para 14 (where the left-turning driver was a true left-turning driver and not a U-turning driver, and where the yellow light was stale and not fresh), Ms Giller:

a) did not approach the intersection at an excessive rate of speed or otherwise conduct herself in such a way as to deprive a left-turning driver of the ability to reasonably anticipate that she was about to enter the intersection on a stale yellow light;

b) did not fail to bring her vehicle to a stop in circumstances where other vehicles travelling in the same direction had already done so; and

c) had no reason to have become aware of a left-turning driver's own disregard of the law in circumstances that afforded her a sufficient opportunity to avoid the accident through the exercise of reasonable care.

[112] Ms Giller thus entered the intersection as the dominant driver. She was entitled to assume that other drivers in the intersection would obey traffic rules. She was entitled to assume that a servient left-turning driver would ensure that there were no oncoming vehicles before starting a turn. She was specifically entitled to assume that no driver would perform the unpredictable and dangerous manoeuvre of a U-turn in the pedestrian crosswalk of the intersection.

[113] Conversely, Ms Herron should not have attempted any turn, let alone a U-turn, without first fully confirming that no oncoming driver, in or approaching the intersection, posed an "immediate hazard" to Ms Herron such that she should not start her turn. A vehicle is an immediate hazard if it is so close to the intersection that the through driver is required to take sudden or violent action to avoid the threat of a collision when the turning vehicle starts its turn: *Raie v. Thorpe* (1963), 43 WWR 405 (BCCA) at 410.

[114] *Vukelich* applied *Nerval*, in which Harris JA confirms that a left-turning driver must not make that turn unless it is clearly safe to do so, specifically after confirming that no through vehicle is approaching:

> [33] The principles laid down in *Pacheco* lead to the conclusion that the starting point of the analysis is that ***when a left turning driver is assessing making a left turn in an intersection he or she must yield the right of way to oncoming traffic unless it is not an immediate hazard***. Describing a driver as dominant means no more than that driver has the right of way, whereas the servient driver has the obligation to yield the right of way. The obligation imposed by s. 174 on the left turning vehicle is that it ***"must yield the right of way to traffic approaching from the opposite direction that is in the intersection or so close as to constitute an immediate hazard". A left turn must not be commenced unless it is clearly safe to do so. If there are no vehicles in the intersection or sufficiently close to be an imminent hazard, the driver may turn left and approaching traffic must yield the right of way.*** In other words, if a left turning driver complies with his or her obligation only to start the left turn when no other vehicles are in the intersection or constitute an immediate hazard, then the left turning driver assumes the relationship of being the dominant vehicle and approaching vehicles become servient and must yield the right of way.
>
> [emphasis added]

[115] In *Nerval*, Harris JA explains that a pre-existing breach of a statutory duty by the through driver, including, specifically, by speeding, does not mean that the through driver loses their position as the dominant driver:

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

[116] Ms Herron testified that she waited for the light to turn yellow. Seeing no oncoming northbound traffic, she started her left turn.

[117] As set out above, I place light weight on Ms Herron's testimony. She was trying to make a quick U-turn that she knew was illegal and risky. She thought that

she could get away with it, given the yellow light and given her location at the north end of the intersection. At best, she briefly glanced towards the south end of the intersection. I am satisfied that Ms Herron made her left turn without adequately confirming that no oncoming traffic posed an immediate hazard.

[118] Further, Ms Herron, who formerly lived in Langley and confirmed that she was familiar with the intersection, knew or ought to have known that swift-moving through traffic might well enter the intersection on a yellow light, particularly on wet pavement. In any case, it is, as an unfortunate reality, neither unusual nor unpredictable that a through driver will not scrupulously obey a yellow light, even one preceded by an advance warning signal, and will traverse the intersection, regardless of the weather.

[119] Ms Herron also testified that her view of oncoming traffic was impeded by the presence of a white cube van in the northbound left-turning lane opposite. Ms Knight and Ms Giller herself confirmed the presence of the van in that position.

[120] Ms Herron's counsel, sensibly, did not press that point in argument. Simulations generated by her expert, Mr Heinrichs, showed that there would have been no visual impediment posed by the white van: there is a clear sight line of both oncoming lanes of traffic.[12]

[121] In any case, the fact that the turning driver's vision is obscured does not relieve them of their duty to ensure the turn can be made safely: *Ferguson v. Shan*, 2019 BCSC 740 at para 43.

F. Relative liability

[122] To conclude, with a view to relative fault, and the factors set out in *Aberdeen*, both drivers must share some degree of liability.

[123] As set out above, Ms Giller bears fault in not obeying the advance warning sign and exceeding the speed limit by roughly 18 km/h. She had ample opportunity to obey those traffic laws, strict adherence to which would have allowed her to stop

at the intersection, and thereby avoid the collision, or alternatively would have decreased the gravity of the risk created. At the same time, those actions did not markedly depart from the standard of care or practice on that stretch of the road. There is no evidence that her actions were deliberate.

[124] Ms Herron bears a higher degree of fault for the accident. She could have fully avoided the collision: she was fully stopped, and there was no need to make a rash and dangerous U-turn. That decision represented a deliberately dangerous act, and a deliberate breach of traffic rules. As the servient driver, she was obliged to yield to Ms Giller. She was obliged not to attempt to turn until it was clearly safe to do so. This principle would apply if she were making a conventional left turn, from the dedicated left turn lane, visibly waiting in the middle of the intersection for a safe opportunity to complete the turn. Such facts led to a 75-25 apportionment of fault between the left-turning driver and the through driver in *Vukelich*.

[125] Here, Ms Heron's degree of fault, attempting an illegal and unexpected U-turn in a busy intersection, is more pronounced than in *Vukelich*. While a driver making a left-turn in an intersection is legal, predictable, and readily visible, a U-turning driver is none of these. An illegal U-turn in a busy intersection is significantly more dangerous and erratic, and more profoundly departs from the norm of reasonable driving conduct, than driving 18 km/h over the speed limit on this stretch of road.

[126] With a view to these particular factors and all of the evidence, and partly guided by the facts and results in *Vukelich,* the closest case to the present, the Court assigns 80% liability to Ms Heron, and 20% liability to Ms Giller.

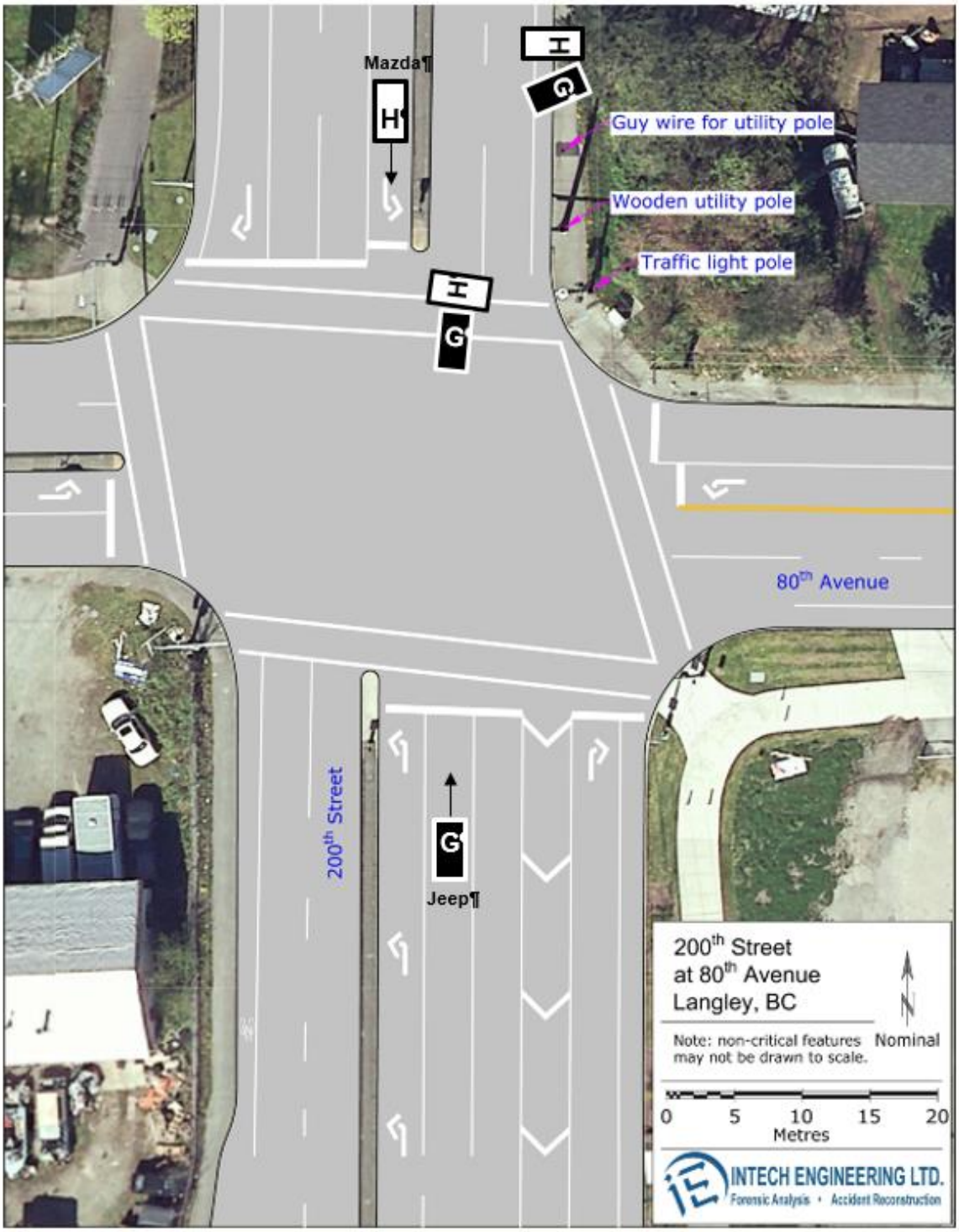
IV. CONCLUSION

[127] Counsel have agreed that they will reserve submissions on costs. If any party wishes to bring a costs application, that party will advise the others within 15 days of these reasons, and schedule with the Registry a date as soon as reasonably practicable to argue the matter. Each party will provide a written argument to the other parties and to the Court at least seven days before the hearing date.

[128] Through their skilled advocacy, the six counsel before the Court provided a compelling display of the effectiveness of the adversarial system. Mr Burtini and Ms King in particular are to be commended for their lengthy and skilled technical cross-examinations of the forensic engineering experts.

"Crerar J"

V. APPENDIX: OVERVIEW OF COLLISION INTERSECTION



Not to scale. Vehicle locations not exact.

[1] Ms Giller has since married and changed her name. For clarity and continuity with the style of proceedings, these reasons will use her maiden name.
[2] The dedicated right-turn lanes play no role in the facts of this case.
[3] Guy wire: from the Dutch nautical term “gei”; the name of the rope or wire used to hold the mast or mainsail steady.
[4] The plaintiff and back-seat passenger, Ms Macumber, also testified. Perhaps because of her injuries and her position in the back seat, she could recall little of the collision, and no material details.
[5] The data indicates that the steering wheel was turned between five to 26 degrees in the 1.1 seconds before impact.
[6] *Cooper* was significantly qualified by the Court of Appeal in *D’Amici v. Fahy*, 2020 BCCA 89 at paras 45–49.
[7] See footnote 3 in *McMullin v. Trelenberg*, 2020 BCSC 49: “While people often take care to use the term ‘amber’ with respect to traffic lights, the British Columbia *Motor Vehicle Act* in its present and past iterations has always use the term ‘yellow.’ The term ‘amber’ does not appear in the MVA itself. The term only appears in its regulations, and then only with respect to the colour of vehicle turn signals and emergency vehicle flashing lights, not traffic lights.”
[8] Although later in that section, s. 168(b)(iii) refers to a “U-turn”.
[9] “The source and origin of the evil.”
[10] A restitution value of 0.8, compared to the 0.15 he used in his initial report, and the 0.1 value used by Mr Sdoutz. A friction value of 1.23, in contrast to the typical PC-Crash value of 0.6.
[11] The case was decided a few months before the appointment of G.P. Weatherill to this Court, marking one of the last Weatherill J decisions bereft of first and middle initials.
[12] Those simulations were based upon Ms Herron’s claim that she was making a regular left turn. Interestingly, Ms Knight’s testimony that the white cube van impeded her view of oncoming traffic would serve as further confirmation that the Mazda was executing a U-turn, back and westward in the pedestrian crosswalk.