IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Vukelich v. Vliegenthart,*
2013 BCSC 879

Date: 20130521
Docket: M104368
Registry: Vancouver

Between:

Shaeanna Vukelich, by her Litigation Guardian, Mike Vukelich

Plaintiff

And

Christine Vliegenthart, Jesse Young, Chrysler Financial Services Canada Inc. and Richard Chad Brooks

Defendants

- and -

Docket: M122424
Registry: Vancouver

Between:

Maxen Vukelich, by his Litigation Guardian, Mike Vukelich

Plaintiff

And

Christine Vliegenthart, Jesse Young, Chrysler Financial Services Canada Inc. and Richard Chad Brooks

Defendants

- and -

Docket: M122425
Registry: Vancouver

Between:

Jaden Vukelich, by her Litigation Guardian, Mike Vukelich

Plaintiff

And

Christine Vliegenthart, Jesse Young, Chrysler Financial Services Canada Inc. and Richard Chad Brooks

Defendants

- and -

Docket: M122426
Registry: Vancouver

Between:

Milan Vukelich, by his Litigation Guardian, Mike Vukelich

Plaintiff

And

Christine Vliegenthart, Jesse Young, Chrysler Financial Services Canada Inc. and Richard Chad Brooks

Defendants

- and -

Docket: M114008
Registry: Vancouver

Between:

Christine Vliegenthart

Plaintiff

And

Jesse Young, Chrysler Financial Services Canada Inc. and Richard Chad Brooks

Defendants

Before: The Honourable Mr. Justice Butler

Reasons for Judgment

Counsel for the Plaintiffs, Shaeanna Vukelich, Maxen Vukelich, Jaden Vukelich and Milan Vukelich:	J. Scott Stanley Tina M. Petrick
Counsel for the Plaintiff, Christine Vliegenthart:	Julie D. Fisher
Counsel for the Defendant, Christine Vliegenthart:	Richard B. Pearce
Counsel for the Defendants, Jesse Young, Chrysler Financial Services Canada Inc. and Richard Chad Brooks:	Kenneth Armstrong
Place and Date of Trial:	Vancouver, B.C. April 15, 16 and 18, 2013
Place and Date of Judgment:	Vancouver, B.C. May 21, 2013

[1] At approximately 6:15 p.m. on May 15, 2010, Christine Vliegenthart was driving westbound on Highway 10 (also called 56th Avenue) in Surrey. It was a sunny day, the visibility was good and the roads were dry. She had four of her children, Shaeanna, Maxen, Jaden and Milan (the "Infant Plaintiffs") in her 2009 Infiniti QX 56 Sport Utility Vehicle (the "SUV"). She entered the left turn lane at the intersection of Highway 10 and 192nd Street in order to turn south. After the car in front of the SUV completed a left turn, Ms. Vliegenthart noticed that the light had turned yellow. She proceeded to make her left turn without noticing the approaching 2007 Dodge Ram 150 pick-up truck (the "Truck").

[2] Jesse Young was driving the Truck on Highway 10 in an easterly direction. She was with her infant son and a friend, Elise Cleland and her young son. As she approached the intersection, she did not take note of the Advance Warning Flasher (the "AWF") which would have been activated 5.6 seconds before the light at the intersection with 192nd Street turned yellow. Ms. Young intended to proceed through the intersection in the right through lane and so she maintained her speed. She noted that the light turned yellow before she entered the intersection and decided it would not be safe to stop. She proceeded into the intersection and did not notice the SUV turning into her path until shortly before the collision. The force of the collision was considerable. The SUV was flipped on its side. The damage to both vehicles was such that neither was repairable.

[3] Ms. Vliegenthart and her four children all suffered injuries in the collision and they each commenced an action against Ms. Young and her husband, Richard Chad Brooks, the registered owner of the Truck, and Chrysler Financial Services Canada Inc., the lessor of the Truck. Ms. Vliegenthart is named as a defendant in the four actions commenced by the Infant Plaintiffs. The five actions were ordered to be tried together for the purpose of determining the issue of liability as between Ms. Young and Ms. Vliegenthart. The issue as to the liability of Mr. Brooks as owner and Chrysler as lessor pursuant to s. 86 of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318 (the "*Act*") was adjourned by consent.

[4] The issues to be determined in this trial are thus:

1. Was the accident caused or contributed to by the negligence of Ms. Vliegenthart?

2. Was the accident caused or contributed to by the negligence of Ms. Young?

3. If the negligence of both Ms. Vliegenthart and Ms. Young contributed to the accident, how should liability be apportioned?

[5] In any case where a collision occurs between a left-turning vehicle and a through vehicle, the court must consider all of the circumstances confronting both drivers as they approached the intersection. Having considered all of the circumstances in this case, I conclude that Ms. Vliegenthart and Ms. Young were both negligent and both are at fault for the accident. In order to explain my reasons for arriving at this conclusion, I have considered the first two issues together. I have set out the position of the parties, the relevant statutory provisions, my findings of fact and my analysis of the liability of the two drivers. Finally, in accordance with the provisions of the *Negligence Act*, R.S.B.C. 1996, c. 333, I have apportioned fault 25% to Ms. Young and 75% to Ms. Vliegenthart.

Liability of the Drivers

Position of the Infant Plaintiffs

[6] The Infant Plaintiffs say Ms. Vliegenthart was negligent because she failed to notice the oncoming Truck and commenced a left turn when it was unsafe to do so. The road and traffic conditions were such that there is no reasonable excuse for her actions. They say Ms. Young was negligent because she failed to see the AWF and thus failed to prepare to stop as she approached the intersection. Having missed that advance warning, she approached the intersection at a high speed and without keeping a sufficient lookout for other vehicles at the intersection.

[7] In the circumstances of this accident, the Infant Plaintiffs say that it is not possible to distinguish the degrees of fault as between the two drivers. Accordingly, they argue that liability should be apportioned equally between the drivers. In support of this position, the Infant Plaintiffs rely on three decisions of this Court: *Mitchell v. ICBC*, 2004 BCSC 983; *Luvera v. Benedict*, 2010 BCSC 1781; and *McPherson v. Lange*, 2012 BCSC 36.

Position of Ms. Vliegenthart

[8] Ms. Vliegenthart argues that the accident was caused because Ms. Young was driving at a speed in excess of the speed limit and failed to heed the AWF. If she had seen that signal and taken the appropriate action, she would have been able to slow down and stop at the intersection and the accident would have been avoided. Ms. Vliegenthart denies any negligence as she entered the intersection on a stale yellow light as she is entitled to do. She says that Ms. Young should be found to be 100% at fault. If Ms. Vliegenthart is found to be at fault, she says that liability should be apportioned at least 80% to Ms. Young.

[9] Ms. Vliegenthart says that courts in British Columbia have found that left-turning drivers have no obligation to wait until all oncoming traffic has stopped at an intersection before proceeding. Rather, a left-turning driver is entitled to assume that the through driver will proceed lawfully and will not breach statutory duties. Ms. Vliegenthart relies on *Morgan v. Hauck* (1988), 27 B.C.L.R. (2d) 118 (C.A.); *Henry v. Bennett*, 2011 BCSC 1254; *Kokkinis v. Hall* (1996), 19 B.C.L.R. (3d) 273 (C.A.); and *Hutchings v. Dow*, 2006 BCSC 629, decisions where through drivers have been found 90% or 100% at fault for collisions with left-turning vehicles.

Position of Ms. Young

[10] Ms. Young argues that she was in the dominant position as the through driver. She says the accident occurred solely because Ms. Vliegenthart started her left turn without paying attention to oncoming traffic. As a left-turning vehicle, she was required to yield the right of way to through traffic and should not have proceeded in the face of an immediate hazard. She says that Ms. Vliegenthart

should be found 100% at fault. If Ms. Young was also negligent, she remained the dominant driver and so if any fault is attributed to her it should be 20% or less.

[11] Ms. Young relies on the decisions in *Nerval v. Khehra*, 2012 BCCA 436 and *Pacheco v. Robinson* (1993), 22 B.C.A.C. 185, as setting out the proper approach for determining liability of a left-turning vehicle. She also cites the decisions in *Miller v. Dent*, 2013 BCSC 489; *Djukic v. Hahn*, 2006 BCSC 154; and *Hall v. Guo*, 2007 BCPC 397, which are similar cases where the left-turning driver was found 100% at fault.

Statutory Provisions

[12] The relevant provisions of the *Act* include the following:

> 119 (1) In this Part:
>
> ...
>
> "traffic control device" means a sign, signal, line, meter, marking, space, barrier or device, not inconsistent with this Part, placed or erected by authority of the minister responsible for the administration of the *Transportation Act*, the council of a municipality or the governing body of a treaty first nation or a person authorized by any of them to exercise that authority;
>
> ...
>
> 125 Unless otherwise directed by a peace officer or a person authorized by a peace officer to direct traffic, every driver of a vehicle and every pedestrian must obey the instructions of an applicable traffic control device.
>
> ...
>
> 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,
>
> ...
>
> 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.
>
> ...
>
> 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.

Findings of Fact

[13] In addition to Ms. Young and Ms. Vliegenthart, I heard evidence from Ms. Cleland, the passenger in the Truck, and three other witnesses: Cecil Erickson, Dominic Levy and Sally Thompson. There was a surprising level of consistency in the witnesses' description of the accident. As counsel noted, the two drivers were excellent witnesses. They gave their evidence frankly without overstating their positions. They both made appropriate concessions to matters they could not recall or explain. I conclude that both are credible witnesses.

[14] My conclusions of fact follow. I do not attribute the evidence to any witness except where there are discrepancies between the witnesses. I commence this review with the evidence regarding the light sequencing at the intersection.

[15] Kenedee Ludwar gave evidence regarding the light sequencing at the intersection and produced a Signal Display Schematic report which describes the signal operation at the relevant time on May 15, 2010. The report notes that the yellow light for traffic travelling east and west on Highway 10 remains activated for 4.5 seconds between the green and red sequences. Following the yellow light, the lights are red for all directions of travel for a short period of time – 1.4 seconds.

[16] Ms. Ludwar also described the AWFs located on Highway 10 for both eastbound and westbound traffic. These were located approximately 80 – 90 metres before the intersection with 192nd Street. An AWF has two amber lights in the upper corners of the sign, an image of a traffic light surrounded by a diamond and the words "Prepare to Stop" in large capital letters across the bottom of the sign. The

amber lights are programmed to begin flashing a calculated number of seconds in advance of the display of a yellow light at the intersection such that a driver travelling the speed limit who passes the AWF a fraction of a second before activation will clear the intersection prior to the change to a yellow light.

[17] The AWF for eastbound traffic on Highway 10 was programmed to start flashing 5.6 seconds before the traffic light facing the eastbound traffic turned yellow. Accordingly, any driver travelling east at, or slightly in excess of, the speed limit who sees the amber lights on the AWF start flashing before he or she passes beneath the AWF would be facing a yellow light as he or she approaches the intersection with 192nd Street. In other words, the driver is given an advance warning that the green light at the intersection is about to change to yellow and will do so before the car reaches the stop line.

[18] A number of facts which are important to the determination of liability were not controversial. Most of the witnesses agreed that the collision occurred when the light for eastbound traffic was yellow. Mr. Levy is the exception but he stated that he was uncertain as to whether the light was red or yellow. I reject his evidence as it is contrary to the evidence of all other witnesses and he was not in as good a position to observe that timing as most of the other witnesses. All of the witnesses agreed that the Truck entered the intersection on a yellow light. There is also no doubt that Ms. Vliegenthart began her left turn on the yellow light. Accordingly, there is a 4.5 second period of time during which Ms. Vliegenthart initiated her left turn, Ms. Young entered the intersection, and the collision took place.

[19] There is also no question that Ms. Vliegenthart did not see the oncoming Truck. She approached the intersection following a number of other left-turning vehicles. Two or three vehicles made their left turns during the advance left turn signal. Ms. Vliegenthart was left behind a single vehicle which had moved into the intersection intending to turn left. Ms. Vliegenthart watched as that vehicle completed its turn all the way through the intersection and onto 192nd Street. At that point she noted that the traffic light had turned to yellow. She says she was in the

intersection at that point in time and had to complete her turn. She did so without seeing the approaching Truck. There was nothing blocking her vision of the oncoming traffic. There were no other vehicles heading eastbound or intending to turn left to go northbound. She simply failed to see the approaching traffic. She assumed she could turn left because the light was yellow.

[20] As I have noted, Ms. Vliegenthart said she followed the preceding car into the intersection and was actually in the intersection waiting before she initiated the actual turn. Her evidence in that regard is supported by the evidence of Mr. Levy but is not consistent with the evidence of Ms. Thompson and Ms. Cleland.

[21] Ms. Thompson was a passenger in a car driven by her husband. They were in the right lane of through traffic heading westbound on Highway 10. In this position, the SUV was on Ms. Thompson's left with one lane in between their vehicles. Ms. Thompson stated that their vehicle was slowing to stop at the yellow light when the SUV accelerated past them and started to turn left. If this is correct, then the SUV must have entered the intersection after the light turned yellow. Ms. Thompson also stated that she could see the approaching Truck very close to the intersection and realized when the SUV began to initiate the left turn that a collision was inevitable.

[22] Mr. Erickson did not give evidence on this issue, but Mr. Levy did. He saw the SUV as it waited behind another vehicle and then saw it move towards the middle of the intersection before commencing its turn. Ms. Young saw the SUV waiting to turn left but did not say if the SUV was in the intersection when she first saw it. Ms. Cleland said that when she first saw the SUV, it was at the stop line for left-turning vehicles and was not in the intersection.

[23] I accept Ms. Vliegenthart's evidence on this issue. She stressed that she was focusing her attention on the vehicle turning left in front of her and she followed it into the intersection before she initiated her turn. She was quite certain of this fact and was in the best position to know where she was before turning. Mr. Levy had a good angle to see the position of the SUV and stated that it was in the intersection. Ms. Cleland was in a poor position to determine if the SUV had crossed the stop line

and moved into the intersection. Ms. Thompson did not state directly that the SUV started its turn from outside of the intersection; this was only implied by her other evidence. In addition, Ms. Thompson did not have a good vantage point and was not focusing on the precise location of the SUV as it started the turn. Rather, her focus was on the fact that by initiating the left turn, the SUV was going to be struck by the oncoming Truck. Ms. Thompson came to that conclusion as soon as she saw the SUV start to turn.

[24] There was also contradictory evidence regarding the speed of Ms. Young's vehicle. Ms. Young was a relatively new driver at the time of the accident. She had been driving for only two years. However, she was very familiar with the road in question and was accustomed to driving the Truck. She indicated that she was travelling at the speed limit as she approached the intersection. She was confident of this fact because she is a cautious driver, particularly when her infant son is in the vehicle with her. Ms. Young says she did not actually look at the speedometer, however it was her practice to never drive knowingly in excess of the speed limit. Accordingly, she says she would not have exceeded the 70 km/hr speed limit as she approached the intersection. In cross-examination she conceded that it is possible she was travelling slightly faster as she drove down the hill towards the intersection. She said that she did not slow down as she approached the intersection until just before the collision when she applied her brakes.

[25] Ms. Cleland's evidence was similar to that of Ms. Young. She agreed that Ms. Young is a cautious driver generally and that she was not exceeding the speed limit just prior to the accident. Mr. Erickson offered no evidence regarding the speed of the Truck. Ms. Thompson said that the Truck's speed did not draw her attention.

[26] Mr. Levy gave contradictory evidence. He was the first car heading north waiting for the red light to change at 192nd Street. He said that he estimated the Truck's speed at 80 – 90 km/hr as it approached the intersection. He made two quick glances to his left as he was waiting for the light to change. When he first glanced to the left, he saw the Truck a little ways up the hill. He turned back towards

the intersection and noticed that the light changed from green to yellow after which the SUV started to turn. He then looked to his left again and the Truck was just about to enter the intersection and knew at that point that the SUV was going to be hit. He concluded that the Truck was travelling faster than the speed limit based on his first observation up the hill. He thought it looked like it was moving at a high rate of speed. He has no training or experience in estimating the speed of moving vehicles.

[27] None of the parties presented accident reconstruction evidence. The other evidence which is relevant to the speed of Ms. Young's vehicle includes:

- she did not brake prior to entering the intersection;
- the light turned yellow before she entered the intersection; and
- according to Ms. Young, the Truck was a bus length away from the intersection when the light turned yellow. She is not good at estimating distances and so she agreed in cross-examination that she may have been further away from the intersection.

[28] I conclude from all of the evidence that Ms. Young was travelling at the speed limit or slightly above it as she approached the AWF, drove down the slight incline and entered the intersection. In other words, she was travelling between 70 and 80 km/hr. As I have already indicated, I found Ms. Young, like Ms. Vliegenthart, to be a truthful witness who was striving to give accurate testimony. The evidence of Ms. Cleland was corroborative. To a lesser extent, so was Ms. Thompson's statement. Mr. Levy's estimate of speed must be given less weight as it was based on a momentary sideways glance. I find that he believed the Truck to be travelling faster than it was as a result of his close proximity to the sudden and violent collision, and because his car was impacted by the SUV after it was flipped.

[29] From the evidence regarding speed and Ms. Ludwar's report, I can also conclude that the AWF was activated before Ms. Young passed beneath it. In other words, she had the opportunity to see the amber flashing lights of the AWF but failed

to notice or take heed of the flashing lights. Of course, given that she did not take notice of the AWF, she did nothing to follow the direction given; she did not “prepare to stop”.

[30] The final factual findings I must make are whether the Truck posed an immediate hazard to Ms. Vliegenthart when she commenced her turn, and whether Ms. Young was in a position to bring her vehicle to a safe stop when the light turned yellow. These findings involve consideration of Ms. Young’s speed as well as the evidence as to the distance of the Truck from the intersection when the light turned yellow and the time available to Ms. Young to stop once the SUV commenced its turn.

[31] In addition to Ms. Young’s estimate that she was about a bus length from the intersection when the light turned yellow, there was considerable evidence as to the passage of time between the yellow light and the collision. The time estimates of the witnesses varied. However, I have concluded that these estimates of time should be regarded with considerable caution. It is extremely difficult to make an accurate estimate after the fact of a very brief time period, especially where the time period ends with a shocking and unexpected collision. The time estimates are really better described as reconstructed guesses and I do not find them to be particularly helpful.

[32] Ms. Vliegenthart thought she waited three seconds after she noticed that the light turned yellow before initiating her turn. I reject this evidence as it would mean more than 4.5 seconds passed from the time the light turned yellow until the collision. That would mean that the Truck entered the intersection on a red light which is contrary to the balance of the evidence. Mr. Erickson thought that “probably three seconds” passed between the change of the light and the collision. He saw the light turn yellow and, of course saw and heard the collision. Ms. Thompson thought that five seconds may have passed from the time her husband started to slow down to the collision but she did not see the light turn yellow. Of course, Mr. Thompson may have been slowing down because he took note of the AWF. As a result, her

evidence is not a good guide to determining the time between the yellow light and the collision.

[33] In chief, Mr. Levy stated that he believed the SUV turned on a late yellow. Mr. Levy gave a time estimate of about four seconds between the light turning yellow and the collision, although this seemed to be a reconstruction based on his knowledge of the light sequence and his belief that it was a late yellow. Ms. Young and Ms. Cleland did not give time estimates but both were certain that Ms. Young did not have time to safely stop the Truck before the intersection when the light turned yellow.

[34] I cannot come to a definite conclusion as to the amount of time that passed between the appearance of the yellow light and the collision. Similarly, I cannot conclude with any precision how far the Truck was from the stop line at the intersection when the light turned yellow. It might have been possible to come to definite conclusions on these issues if accident reconstruction evidence had been presented. However, I do not have the benefit of any such expert evidence.

[35] The best evidence as to whether the Truck was in a position to stop safely when the light turned yellow was that of Ms. Young and Ms. Cleland. I accept their evidence and conclude that Ms. Young's decision to proceed into the intersection was reasonable given the speed she was travelling.

[36] 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 left-turning vehicle commences its turn: *Raie v. Thorpe* (1963), 43 W.W.R. 405 (B.C.C.A.). The best evidence as to whether the Truck posed an immediate hazard to Ms. Vliegenthart when she started her turn was the direct observation of that fact by four witnesses. While I rejected Ms. Thompson's evidence as to Ms. Vliegenthart's position when she initiated her turn, I accept Ms. Thompson's evidence regarding the proximity of the Truck to the intersection when the SUV commenced the left turn. Her evidence is consistent with the evidence of both Ms. Young and Ms. Cleland. It is also consistent with Mr. Levy's observation

that the SUV was “not going to make it”. The gist of the evidence of all four witnesses was that the Truck was so close to the intersection when the SUV began to turn that Ms. Young had no chance to avoid the collision given the speed at which she was travelling. Applying the *Raie* test to the circumstances of this case, I conclude that when Ms. Vliegenthart started to turn left, the Truck was so close to the intersection that it constituted an immediate hazard.

Analysis

[37] The provisions in the *Act* that govern the obligations of a through driver and a left-turning driver are ss. 128(1)(a) and 174. The question as to whether the through vehicle was an immediate hazard when the left-turning vehicle commenced its turn is the starting point for the analysis. I have already concluded that the Truck posed an immediate hazard to Ms. Vliegenthart at the time she commenced her left turn. Given this finding, there is no question that Ms. Vliegenthart drove negligently. Either she failed to look for oncoming traffic or she did so negligently. A failure to look and a failure to see what was clearly there to be seen are equally negligent acts for a driver turning left.

[38] I have concluded that Ms. Young did not breach her statutory obligation under s. 128(1)(a) because when the light turned yellow she was travelling at such a speed and was so close to the intersection that she could not safely bring her vehicle to a stop. However, that finding does not end the analysis. I also must consider Ms. Young’s manner of driving as she approached the intersection. She did not take heed of the AWF, as a result of which she did not obey the sign; she did not “prepare to stop” as required by the warning device. She was thus in breach of the duty under s. 125 to “obey the instructions of an applicable traffic control device”. In arriving at this conclusion I have taken into account the comments of Esson J.A. in *Morgan*, at 122-23, about the importance of AWF signals in intersection safety:

> ... 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”.

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

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

[41] The proper approach to the consideration of liability and fault where both the through driver and the left-turning driver are negligent and in breach of their statutory obligations was recently considered in *Nerval*. The circumstances in *Nerval* have some similarity to those in the present case. The trial judge concluded that the through driver was speeding. In addition, the through driver swerved around a vehicle that had come to a stop at the intersection and passed that vehicle on the right when it was unsafe to do so, contrary to s. 158 of the *Act.* The trial judge found that the left-turning driver breached her obligation by commencing a left turn when she could not see traffic in the lane beside the stopped vehicle; she turned without having sufficient knowledge of oncoming traffic. Having concluded that both drivers breached statutory duties and failed to meet their common law duties, the trial judge apportioned liability 60% to the left-turning vehicle and 40% to the through driver.

[42] The Court of Appeal upheld the trial decision. At para. 29, Harris J.A. found that the trial judge "correctly concluded that the obligation created by s. 174 has

priority over the obligation created by s. 158." He went on to explain the extent of the obligation owed by a left-turning vehicle at para. 33:

> ... 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.

[43] Applying this analysis to the present circumstances, there is no question that Ms. Vliegenthart was the servient driver when she commenced the left turn. The Truck was in close proximity to the intersection and travelling at such a speed that it was an immediate hazard. Accordingly, Ms. Vliegenthart was obliged to yield the right of way. She did not do so because she failed to notice the oncoming Truck. Unlike the situation in *Nerval*, there were no vehicles blocking Ms. Vliegenthart's view. The Truck was in plain view. There is no justification for Ms. Vliegenthart's failure to take notice of the oncoming traffic.

[44] In *Nerval*, Harris J.A. went on to explain at para. 38 that a pre-existing breach of a statutory duty by the through driver does not mean that the through driver loses her position as the dominant driver:

> 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.

[45] Here, I have concluded that Ms. Young drove negligently as she approached the intersection by failing to heed the AWF. Ms. Young's negligence preceded the negligence of Ms. Vliegenthart. However, that does not relieve the latter of responsibility. Ms. Young's proximity to the intersection and her speed should have been evident to Ms. Vliegenthart. Accordingly, at the intersection the obligation imposed by s. 174 had priority over the obligation created by s. 125. Under the *Nerval* analysis, Ms. Young, as the through driver, remained in the dominant position.

[46] As explained in *Nerval*, once a court concludes that both drivers are negligent the issue becomes one of apportionment. This is to be distinguished from the situation where the only negligence alleged on the part of the through driver is that he or she failed to stop when the light turned yellow, but the evidence fails to establish negligence on the part of the driver in the dominant position. In those situations, the oft-quoted passage at para. 18 in *Pacheco* applies:

> In my opinion, when a driver in a servient position disregards his statutory duty to yield the right of way and a collision results, then to fix any blame on the dominant driver, 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 skilful driver would have availed himself. In such circumstance any doubt should be resolved in favour of the dominant driver.

[47] However, I have concluded that both Ms. Vliegenthart and Ms. Young breached their statutory duties and did not meet the standard of care expected of drivers in their circumstances. As a result of that conclusion, the other decisions which the parties relied on where liability was found entirely against either the through or left-turning driver are distinguishable. In *Henry*, the court concluded that the through driver could have safely brought his vehicle to a stop after the light turned yellow. By not doing so he created a situation which was described as extremely unsafe. In *Kokkinis*, the defendant through driver admitted liability. He was speeding as he approached the intersection and the trial judge concluded that he could have stopped safely once the light turned yellow.

[48] In *Miller*, the court found the left-turning driver 100% at fault for the accident. The conclusion is not surprising as the trial judge found no negligence on the part of the through driver. Similarly in both *Hall* and *Djukic*, the courts found no negligence on the part of the through drivers who were travelling at the speed limit and could not have stopped safely when the lights turned yellow.

Apportionment of Liability

[49] Having concluded that both Ms. Young and Ms. Vliegenthart were negligent, I must apportion fault between them in accordance with the provisions of s. 1 of the *Negligence Act*. The leading decision in British Columbia regarding apportionment of liability is *Cempel v. Harrison Hot Springs Hotel Ltd.* (1997), 43 B.C.L.R. (3d) 219 (C.A.). At para. 19, the court notes that 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 the circumstances."

[50] Ms. Vliegenthart's argument that Ms. Young should bear most of the fault is based on a cause analysis rather than a fault analysis. She says that Ms. Young's failure to heed the AWF was the negligent act which put in place the sequence of events which caused the collision, as a result of which Ms. Young should bear the majority of the fault. I reject this argument as it fails to take into account the relative blameworthiness of the two drivers. Here, Ms. Vliegenthart's turn into the path of the oncoming Truck made the accident unavoidable. The day was sunny, the roads were dry, there were no vehicles impeding her vision and she had no reason to expect that the Truck would come to a stop at the intersection. The weight of her fault is certainly greater than that of Ms. Young.

[51] I have considered the cases cited by the Infant Plaintiffs where liability was apportioned equally between the left-turning driver and the through driver. In those cases the court was unable to establish different degrees of fault. In *Mitchell*, the through driver was travelling in excess of the speed limit and had an opportunity to

stop at the intersection after the light turned yellow. Similarly, in *McPherson*, the through driver entered the intersection very late in the amber or after the light turned red. In both cases the left-turning vehicle initiated the left turn in the face of an immediate hazard. Similar findings were also made in *Tejani v. Greenan*, 2001 BCSC 803, and that court apportioned liability equally.

[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.

[53] I conclude that liability should be apportioned 75% to Ms. Vliegenthart and 25% to Ms. Young. Such an apportionment fairly reflects the extent to which their respective breaches of duty fell short of the standard of care required in the circumstances.

[54] If counsel are unable to agree on costs, they may make arrangements with Supreme Court scheduling to appear before me to make submissions.

"Butler J."