IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Dewar v. Finnigan,* 2020 BCSC 1721

Date: 20201113
Docket: M183977
Registry: Vancouver

2020 BCSC 1721 (CanLII)

Between:

Garth Dewar

Plaintiff

And

Lindsay Patricia Finnigan

Defendant

Before: The Honourable Mr. Justice Gomery

Reasons for Judgment

Counsel for the plaintiff:	M. Kazimirski A. Wrona R. Leung, Articled Student
Counsel for the defendant:	B. Devlin J. Cahan C. Catlin, Articled Student O. Obaseki, Articled Student
Place and Dates of Trial:	Vancouver, B.C. October 26-29, 2020
Place and Date of Judgment:	Vancouver, B.C. November 13, 2020

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Introduction

[1] On a rainy Sunday evening late in the month of November, Garth Dewar left his apartment to go to the store. He lived on Wall Street in the Hastings-Sunrise neighbourhood of East Vancouver. Mr. Dewar's car was parked across the street. He went out of the building into the rain, and started across the street.

[2] Lindsay Finnigan lives on a neighbouring street, about a block from Mr. Dewar's apartment building. That evening she was driving her car down Wall Street, past Mr. Dewar's residence, on her way to a local convenience store. She did not see Mr. Dewar. Her car struck him hard, launching him forward into the air and onto the wet pavement. Ms. Finnigan's recollection is that she did not see Mr. Dewar until, as she puts it, her windshield "exploded". Mr. Dewar suffered serious injuries.

[3] Mr. Dewar sues for damages compensating him for his personal injuries. He maintains that Ms. Finnigan drove negligently and that, but for her negligence, she would not have hit him. He says that she was driving without due care and attention, faster than the 30 kph speed limit, and on the wrong side of the road when she struck him. He maintains that the accident would have been avoided had she kept a proper lookout, kept to the speed limit, or driven on the right-hand side of the street.

[4] Ms. Finnigan denies that she was negligent and maintains that the accident was entirely Mr. Dewar's fault. He was not at an intersection or in a cross-walk. She relies on his evidence that he looked and saw Ms. Finnigan's approaching vehicle and stepped out into its path anyway. Ms. Finnigan maintains that Mr. Dewar was dressed in dark clothes, was not wearing a jacket, and was probably hurrying to get into his car and out of the rain. From her point of view, he appeared suddenly out of nowhere, and she could not help hitting him.

[5] Pursuant to an order I made at a trial management conference on October 2, 2020, this trial proceeded on the issue of liability only. There are three issues:

1. Was the accident caused by Ms. Finnigan's negligence?

2. If so, was the accident also caused by Mr. Dewar's contributory negligence?

3. If so, in what proportions are Ms. Finnigan and Mr. Dewar at fault?

[6] Resolving these issues requires careful enquiry into what transpired over the course of several seconds from the time Mr. Dewar stepped into the roadway until impact. Fortunately, there is a good deal of evidence to work with. Immediately following the accident, bystanders called 911. A nurse on her way home from work stopped her car and rendered first aid. Ambulance attendants and police officers attended promptly. While the only people who can describe the accident itself are Mr. Dewar and Ms. Finnigan, there are photographs of the scene and detailed descriptions of the immediate aftermath from disinterested witnesses. Two experts in accident reconstruction have prepared reports.

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The Parties

[7] Mr. Dewar was born in June 1965 and was 51 years old at the time of the accident. He worked as a site superintendent for a local construction company. He was a heavy man, 5' 9" or 5' 10" tall, and weighing approximately 275 lbs. His work kept him physically active and he walked at a normal pace. His vision was good and he did not need glasses.

[8] Mr. Dewar had lived at the same address for approximately 20 years. He had crossed Wall Street by foot thousands of times.

[9] Ms. Finnigan was 56 years old at the time of the accident. She worked as a technician for an engineering firm. She had been driving since she was 16. Her vision was good and she did not require glasses.

[10] Ms. Finnigan had lived in the neighbourhood for five or six years. She drove along Wall Street past Mr. Dewar's residence on her way to and from work every weekday.

[11] It is necessary that I comment briefly on the credibility and reliability of the evidence given by the parties. Both were good witnesses, responsive, straight-

forward, and not at all argumentative. Both were challenged by the obvious difficulty of addressing fraught events that transpired very quickly. Though it seems that Mr. Dewar never lost consciousness, he suffered a head injury and broken bones in the collision, and was in considerable pain afterwards. Though Ms. Finnigan does her best not to show it, she was understandably upset by the experience.

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[12] With some reservations that I will note in the course of these reasons, I accept the parties' evidence. My reservations are largely attributable to the difficulties most people would experience in making sense of and reporting such events.

[13] A point of particular concern is Mr. Dewar's evidence of what he was wearing on the night of the accident. He recalls that he was wearing blue jeans, a T-shirt, and a reflective bomber jacket. He testifies that the jacket was cut off him by first responders at the scene of the accident.

[14] Mr. Dewar's evidence about the jacket is mistaken. An independent witness, Mr. Morris, was on the scene within seconds of the collision. He recalls that Mr. Dewar was lying on his stomach on the road. Mr. Dewar complained that he was unable to move and asked to be rolled onto his back. Mr. Morris and other bystanders refused the request, recognizing the possibility of a spinal injury.

[15] Mr. Dewar was still lying on his stomach when a second independent witness, Ms. McConeghy, arrived. Ms. McConeghy is a registered nurse who stopped her car on her way home from work and began to render first aid. Ms. McConeghy recalls that Mr. Dewar was wearing a dark T-shirt and jeans, but no jacket.

[16] Paramedics arrived and put Mr. Dewar on a spine board and into an ambulance. Ms. McConeghy noticed a jacket on the ground and gave it to a firefighter with a request that he make sure that it got to Mr. Dewar.

[17] I accept Mr. Morris' and Ms. McConeghy's evidence and find that Mr. Dewar was not wearing the jacket after the accident. First responders did not cut it off him. Mr. Dewar's counsel, Mr. Kazimirski, asks me to consider the possibility that

Mr. Dewar was wearing the jacket and it came off him during the collision. I find that difficult to visualize and think it is much more likely that he was not wearing the jacket at all that evening. Rather, he was carrying it when he was struck.

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The Expert Evidence

[18] Dr. Amrit Toor testified for the plaintiff and Mr. Kurt Ising for the defendant. Both are professional engineers qualified in accident reconstruction. Their opinions evolved from those initially provided in their reports through exposure to each other's opinions, further investigations, and cross-examination.

[19] Expert evidence is admitted to assist the trier of fact in drawing inferences that involve the application of specialized knowledge or skill; *White Burgess Langille Inman v. Abbott and Haliburton Co.,* 2015 SCC 23 at para. 15. I find that both experts approached their task appropriately, in a genuine effort to assist the Court. Their opinions are helpful, though I have not accepted either expert's conclusions entirely.

Circumstances of the Accident

[20] The accident occurred just after 7:30 p.m. on November 27, 2016 in the 2100 block of Wall Street.

[21] In the 2100 block, Wall Street runs in a straight line roughly north and south. The street is flanked by parks, houses, and apartment buildings. There are paved sidewalks on both sides. The street is 11.6 m wide, with room for parked cars on either side and two traffic lanes on the travelled part of the roadway. The travelled part of the roadway is approximately 8 m wide. There are no lane markings. The street is a designated bicycle route and there are often cyclists, although there were none at the time of the accident. The posted speed limit is 30 kph.

[22] Mr. Dewar's residence is on the west side of the street. A concrete walkway leads from the building entrance to the street. Based on the evidence of Mr. Dewar and the expert witnesses, I find that Mr. Dewar was struck at a point more than half-way across the street and directly across from the walkway.

[23] Residents in the area park their cars on the roadway and there were parked cars on both sides of the road at the time of the accident.

[24] There is a roundabout to the north of Mr. Dewar's residence, where Eton Street meets Wall Street. The centre of the roundabout is located approximately 45 m from the point of impact. A vehicle clearing the roundabout southbound onto Wall Street would be 35 to 40 m from the point of impact.

[25] There are speed bumps a long block to the south. There are no crosswalks between the roundabout and the speed bumps. When he had parked his car on the east side of the street, it was Mr. Dewar's habit to cross the street directly across from the building rather than make a long detour to the end of the block.

[26] It was raining heavily beneath thick clouds. Several witnesses comment that it was a particularly dark night. There is a streetlight on the east side of the street between Mr. Dewar's residence and the spot where he was struck. The streetlight and lights from within the surrounding residences provided limited, uneven illumination.

[27] Ms. Finnigan's car was a Mazda 3, in good mechanical condition with high intensity headlights and anti-lock brakes. She entered Wall Street from Eton Street through the roundabout and headed south through the 2100 block. I accept her evidence that she circled the roundabout at approximately 10 to 15 kph and accelerated on Wall Street.

[28] Mr. Dewar was wearing a dark T-shirt, jeans, and red leather running shoes with white soles. Viewed from the roundabout, he emerged onto the travelled part of the roadway from behind a parked black SUV. He would not have been visible to a driver approaching from the north until he came onto the roadway from behind the SUV.

[29] Mr. Dewar looked left and right as he stepped out from behind the SUV. He saw Ms. Finnigan's headlights, 35–40 m north of him. He was unable to determine how quickly she was travelling.

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[30] Ms. Finnigan's headlights were sufficient to illuminate Mr. Dewar from the time he emerged from behind the SUV. She was in a position to see him from that point onwards, although her reaction time would have been adversely affected by the conditions, including his dark clothing, the rain, and the generally poor visibility.

[31] Mr. Dewar travelled approximately 5.4 m from the edge of the parked cars to the point at which he was struck. The expert witnesses agree that it is reasonable to assume that Mr. Dewar was walking at approximately 5.8 kph or 1.6 m/s. At that pace, he would have been visible to a motorist in Ms. Finnigan's position for approximately 3.4 seconds.

[32] In that same interval, Ms. Finnigan's vehicle must have covered the 35 to 40 m at an average speed of 10.3 to 11.8 m/s, or 37 to 42 kph. She left the roundabout at 10–15 kph and would have taken some time to accelerate. It follows that her speed at the point of impact was greater than 37 kph.

[33] While the experts disagree in their estimates of how quickly Ms. Finnigan's car was travelling at the point of impact, their differences were narrowed in cross-examination. Comparing the results achieved by three different methods of estimation, Dr. Toor estimated the impact speed at 46 kph, with a likely range of 40 to 48 kph. In re-examination, Mr. Ising estimated the impact speed as lying between 35 and 44 kph, with 41 kph as most likely.

[34] In my view, it would be a mistake to treat the impact speed as a precisely quantifiable number. A vehicle-pedestrian collision is, as Mr. Ising put it, a chaotic event. Both experts' estimates involve chains of reasoning grounded in fuzzy premises and approximations. There were no marks on the roadway to locate the precise point of collision. Mr. Dewar's exact position, when he came to rest on the ground, was not captured in a photograph and must be inferred from photographic evidence of bloodstains on the pavement.

[35] It is unclear exactly when Ms. Finnigan began to brake. Dr. Toor hypothesizes that she began to brake before the collision. Otherwise, he thinks it is likely that her

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vehicle would have run over Mr. Dewar before stopping. This hypothesis is contrary to Ms. Finnigan's evidence and Mr. Ising does not concur. Mr. Ising suggests that, if Ms. Finnigan only began to brake after the collision, the impact speed was probably at the lower end of his range.

[36] Taking everything into account, I find that Ms. Finnigan's vehicle was probably travelling at between 40 and 44 kph when it struck Mr. Dewar.

[37] Ms. Finnigan's vehicle struck Mr. Dewar near the vehicle's midline. He was flipped up onto the hood and struck the windshield before he was launched forward into the air. He landed on the ground face down. Ms. Finnigan's vehicle came to a halt behind him on the road. Mr. Dewar came to rest with his feet towards the vehicle and his head pointed away to the south.

[38] When Ms. Finnigan's vehicle came to rest, it was entirely on the wrong side of the street, that is, southbound but on the east side. The driver's side door was about 1.5 m from the parked cars on the east side of the street and the front wheels were pointed forward. The vehicle was angled very slightly to the east. There is no evidence that Ms. Finnigan swerved while braking and I find that she was travelling south in the northbound lane when she struck Mr. Dewar.

Analysis

Was the accident caused by Ms. Finnigan's negligence?

[39] As the driver of a vehicle, Ms. Finnigan owed other users of the roadway a duty to take reasonable care for their safety. The driver's duty of care is informed but not exhausted by legislated rules of the road; *Cook v. Teh* (1990), 45 B.C.L.R. (2d) 194 (C.A.) at paras. 17–19; *Salaam v. Abramovic,* 2010 BCCA 212 at paras. 18–21. The duty extends to anticipating the reasonably foreseeable actions of a pedestrian who is creating a hazardous situation, even disregarding the law; *Hmaied v. Wilkinson,* 2010 BCSC 1074 at para. 23.

[40] While Mr. Dewar was not in a cross-walk, neither was he crossing illegally. Section 12(2) of City of Vancouver Street and Traffic By-Law No. 2849 [By-Law

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2849] prohibits jaywalking, but not where the street in question is a "Minor Street" without lane markings.

[41] The following legislated rules bear on an assessment of Ms. Finnigan's conduct:

a) Wall Street is a highway as defined in s. 1 of the *Motor Vehicle Act,* R.S.B.C. 1996, c. 318 [*MVA*];

b) A person must not drive a motor vehicle on a highway without due care and attention, without reasonable consideration for other persons using the highway, or at a speed which is excessive relative to the road, traffic, visibility, or weather conditions; *MVA* s. 144(1);

c) A person must not drive on a highway at a speed in excess of the posted speed; *MVA* s. 146(7);

d) A driver on a highway without marked lanes must confine the course of the vehicle to the right-hand half of the roadway if the roadway is of sufficient width and it is practicable to do so, subject to certain exceptions that do not apply in this case; *MVA* ss. 150, 151;

e) While there are circumstances set out in ss. 179 and 180 of the *MVA* in which a pedestrian on the highway must yield the right of way over a driver, in these cases the driver must still exercise due care to avoid colliding with the pedestrian and give warning by sounding the horn when necessary; s. 181(a) and (b).

[42] At the time of the collision, Ms. Finnigan was breaching these rules. She was driving at 40 to 44 kph, well in excess of the posted speed limit of 30 kph. She was driving on the left-hand half of the roadway when there was room for her to drive on the right.

[43] Ms. Finnigan was also driving without due care and attention. While the poor visibility and Mr. Dewar's dark clothing would inhibit her reaction time, once he was

on the travelled part of the roadway, he was there to be seen, illuminated by her headlights. Ms. Finnigan testifies that it is her habit to check her mirrors on entering a new street and this may be the reason she failed to see Mr. Dewar as she approached him. If this is what occurred, she should not have been travelling so quickly on a residential street, under conditions of poor visibility, that she could not check her mirrors without leaving herself time to spot and react to a pedestrian crossing the street directly in front of her.

[44] I find that Ms. Finnigan was driving negligently, without taking reasonable care for the safety of Mr. Dewar or any other pedestrian who might have been crossing the street.

[45] The collision occurred because of Ms. Finnigan's negligence. Had she been driving more slowly, at the speed limit, I find that Mr. Dewar would have reached the other side of the travelled roadway before Ms. Finnigan's vehicle reached him. Had Ms. Finnigan kept to the right-hand side of the road, Ms. Finnigan's vehicle would have passed behind Mr. Dewar as he crossed the road.

[46] Ms. Finnigan's failure to drive with due care and attention also caused the accident. The reaction time of a driver labouring under conditions of poor visibility would be approximately 2.4 seconds. Had she maintained a proper lookout, it is likely that she would have spotted Mr. Dewar and would have had time to brake or swerve sufficiently to avoid the collision.

[47] The cases cited by the defendant are unhelpful. This is not a case in which the driver was proceeding within the speed limit and maintaining a proper lookout; *Pinsent v. Brown,* 2013 BCSC 794 at para. 53; *Embury v. Vanderryst,* [1997] B.C.J. No. 1427 (S.C.) at paras. 6 & 11. It is not a case of a vehicle-pedestrian collision in which the pedestrian rather than the driver was solely at fault because the pedestrian unexpectedly stepped or ran into the roadway and the driver could not avoid a collision; *Ibaraki v. Bamford,* [1996] CanLII 1814 (B.C.S.C.) at paras. 10–14; *MacCulloch v. Francis,* 1997 CanLII 2083 (B.C.S.C.) at para. 17; *Edwards v. Stroink,* 2015 BCSC 1318 at para. 43; *Christensen v. Gerber*, 2007 BCSC 1397 at para. 50.

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[48] In sum, I find that Ms. Finnigan was negligent in three ways – driving without due care and attention, at an excessive speed, and on the wrong side of the road – each of which independently caused the accident.

Was the accident also caused by Mr. Dewar's contributory negligence?

[49] In entering the roadway, Mr. Dewar was required to take reasonable care for his own safety. Just as drivers are required to take reasonable care to anticipate apparent potential hazards arising even from irregular or illegal conduct on the part of pedestrians, pedestrians must take reasonable care to anticipate equivalent conduct on the part of drivers. The duties of drivers and pedestrians are symmetrical; each owes an equivalent duty; *Liston v. Striegler* (1996), 25 B.C.L.R. (3d) 57 (C.A.) at para. 14, leave ref'd [1996] S.C.C.A. No. 477; *Mawani v. Pitcairn,* 2012 BCSC 1288 at paras. 103–106, aff'd 2013 BCCA 338.

[50] As with drivers, the content of a pedestrian's duty to take care is informed by legislated rules. A rule of significance in this case is stated in s. 180 of the *MVA*:

> When a pedestrian is crossing a highway at a point not in a crosswalk, the pedestrian must yield the right of way to a vehicle.

[51] In addition to s. 180, the defendant relies on s. 12(1) of By-Law 2849. It states:

> Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection, shall give the right-of-way to all vehicles upon the roadway.

[52] Mr. Dewar maintains that neither *MVA* s. 180 nor s. 12(1) of By-Law 2849 go so far as to require him to yield the right of way to a vehicle travelling up the wrong side of the street.

[53] I agree with Mr. Dewar that, given Ms. Finnigan's position on the wrong side of the road, it is not helpful to frame the issue in this case by asking who had the right-of-way. The fundamental question is whether Mr. Dewar took reasonable care for his own safety.

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[54] Mr. Dewar was crossing in mid-block wearing dark clothes. Coming from behind an SUV, he saw Ms. Finnigan's vehicle as she emerged from the roundabout, 35 to 40 m (or 9 to 10 car lengths) away. He could not judge her speed. He was underdressed for the weather, carrying his jacket, and was probably in a hurry to get out of the rain. Mr. Dewar testifies that he was not hurrying, but I am sceptical of his memory on this point.

[55] Mr. Dewar says that he looked, saw Ms. Finnigan's headlights, thought he could make it across, and proceeded. On cross-examination, he would not agree that he was in a better position to see Ms. Finnigan than she was to see him, but it is obvious that he was. It should have been evident to him that she could not see him before he came onto the roadway, and that she might have difficulty spotting him immediately after that.

[56] Det. Cst. Rajtschan interviewed Mr. Dewar in the hospital following the accident. Det. Cst. Rajtschan testifies that Mr. Dewar told her that he "saw a vehicle, but thought it saw him and would stop". When the statement was put to him on cross-examination, he said that he could not remember it. I find that the statement was made and reflected Mr. Dewar's recollection of the accident in its immediate aftermath, bearing in mind that he was in pain and suffering from a head injury at the time.

[57] Mr. Dewar no longer recalls thinking that the vehicle would stop for him. He had long experience with this stretch of Wall Street. He testifies that he relied on his experience crossing the street many times in advance of vehicles traversing the roundabout as he began to cross. He says that he had never had a close call or even had to quicken his pace.

[58] In ordinary circumstances, Mr. Dewar would be in a position to assess the speed of an approaching vehicle and could expect any approaching vehicle to see him and slow down if necessary. On this rainy night, Mr. Dewar had next to no information to inform a judgment that it would be safe to cross. If Ms. Finnigan was travelling at the speed limit, she was slightly less than 5 seconds away from him, but

that would be an assumption. A reasonable adult in his position would have understood that some drivers speed. That is why traffic calming measures such as the speed bumps one block to the south of Mr. Dewar's building are installed. Any expectation on Mr. Dewar's part that an approaching vehicle would see him in time to slow down if necessary was a risky proposition in the circumstances.

[59] In this light, I find that a reasonable person in Mr. Dewar's position ought to have waited rather than stepping into the path of an oncoming vehicle whose speed he could not judge. Dressed in dark clothes and hurrying forward to get out of the rain rather than waiting a few seconds for the approaching vehicle to pass, Mr. Dewar was contributorily negligent.

[60] Mr. Kazimirski acknowledges that whether Mr. Dewar ought reasonably to have anticipated that Ms. Finnigan's driving could constitute a hazard to him is a factual question. He nevertheless submits that other cases involving vehicle-pedestrian collisions are informative, placing particular emphasis on *Perez-Alarcon v. Lee,* 2013 BCSC 408, a decision of Justice Griffin when she was a judge of this Court.

[61] In *Perez-Alarcon*, the accident took place in an unmarked crosswalk at an intersection. The defendant motorist was travelling at 68–70 kph in a 50 kph zone just before he struck the plaintiff pedestrian. The plaintiff demonstrated care in interacting with another motorist, seconds before the collision. It was nighttime, but the area was well-lit. The plaintiff's injuries rendered him unable to testify and Griffin J. had to resort to hypotheses concerning his state of mind. At para. 82, she stated that:

> … in such good lighting, I find that it would not be unreasonable for a pedestrian to think that if he was in the middle of the street crossing at an intersection, having already crossed one-half of the road, that he would be well visible to oncoming traffic in the second half of the road if it appeared in the distance and that it would yield to him.

[62] In contrast, Mr. Dewar was not in a position to reasonably assume that he would be well visible to the oncoming vehicle and that it would yield to him.

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[63] Taking all the possibilities into account, Griffin J. concluded:

> [95] The defendant has not proved on a balance of probabilities that Mr. Alarcon ought to have realized that Mr. Lee's car was approaching too fast or realized that Mr. Lee was not paying sufficient attention to the road in front of him and would not decelerate, such that it made it unsafe for Mr. Alarcon to complete his road-crossing.
>
> [96] The notion that Mr. Alarcon failed to pay proper attention to approaching traffic is inconsistent with the care with which he crossed the street: he crossed at the intersection with 8th Avenue, rather than in the middle of the block; he took care when he observed Mr. Agland's vehicle and assessed his safety in crossing given Mr. Agland's intended direction of travel. Such actions are not the mark of someone who was oblivious to his own safety in crossing the street.

[64] Justice Griffin's reasoning in the very different circumstances of *Perez-Alarcon* does not persuade me that Mr. Dewar exercised reasonable care for his own safety when he stepped into the roadway as Ms. Finnigan's vehicle approached.

[65] Mr. Kazimirski cites three other cases involving pedestrian-motor vehicle collisions in which the driver was found solely at fault. I do not find any of them helpful in my analysis of this case. *Giuliani v. Saville,* 1999 BCCA 768 involved a confrontation between motorist and pedestrian, who knew one another. The collision resulted from the motorist's flagrant and deliberately reckless conduct, which the pedestrian could not have anticipated until it was too late to take evasive action. In *Williams v. Couturier,* [1986] B.C.J. No. 2072 (S.C.), the pedestrian was crossing a highway at a diagonal and was struck from behind by a motorist who had crossed over the centre line. The pedestrian had no reason to believe he was at risk of being struck from behind in that location. *Lemieux v. Evers*, 2000 BCSC 1464 involved an 11 year old pedestrian who stopped, looked for traffic, and reasonably concluded that it was safe to proceed, before stepping into the roadway only to be struck by a motorist driving on the wrong side of the road.

[66] I find that, had Mr. Dewar exercised reasonable care, he would have waited to cross the street and avoided being hit. His contributory negligence was a cause of the accident.

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In what proportions are Ms. Finnigan and Mr. Dewar at fault?

[67] Section 1(1) of the *Negligence Act,* R.S.B.C. 1996, c. 333, requires me to apportion the liability to make good the damage or loss suffered by Mr. Dewar "in proportion to the degree to which each person was at fault". By s. 1(2), if it is not possible to establish different degrees of fault, the liability must be apportioned equally.

[68] In this context, "fault" means blameworthiness, and the court must evaluate the extent to which each party's conduct departed from the standard of reasonable care; *Alberta Wheat Pool v. Northwest Pile,* 2000 BCCA 505 at para. 46; *Randhawa v. Evans,* 2020 BCCA 292 at paras. 22–23.

[69] In *Aberdeen v. Langley (Township),* 2007 BCSC 993 at para. 62, varied on other grounds 2008 BCCA 420, Justice Groves summarized the factors that courts have taken into account in assessing moral blameworthiness and contributory negligence. In *Howell v. Machi,* 2017 BCSC 1806 at para. 117, Justice MacNaughton considered *Aberdeen* and other cases and refined the *Aberdeen* factors to the specific context of pedestrian-motor vehicle collisions. MacNaughton J.'s list of factors is worth quoting in its entirety:

- whether the driver or pedestrian was keeping an adequate look-out for cars or pedestrians, including jaywalking pedestrians;
- whether the driver or pedestrian took reasonable precautions, such as modifying speed in areas where pedestrians might be or looking both ways before proceeding into a crosswalk;
- the speed of the driver compared to the speed limit and the conditions;
- whether the driver obeyed the rules of the road, such as signaling;
- whether the pedestrian or car was 'there to be seen' including an assessment of the weather, time of day, state of traffic, use of headlights, light or dark clothing for pedestrians, and other visibility factors;
- the nature of the area where the accident occurred, such as whether it is a busy street or whether there are frequent jaywalkers;
- the presence of nearby crosswalks;
- where the pedestrian crosses, mid-block or nearer to an intersection where any reasonable adult might be expected to attempt to cross;

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- whether the pedestrian was wearing headphones; and
- generally, what could reasonably be foreseen by either the driver or pedestrian.

[70] Considerations from this list that favour a finding of greater blameworthiness on the part of Ms. Finnigan are: her failure to keep a proper lookout; her excessive speed on a residential street with a 30 kph limit; and her breach of the rules of the road by driving on the wrong side. Considerations that favour a finding of greater blameworthiness on the part of Mr. Dewar are: his dark clothing, making it more difficult for him to be seen (specifically noted in *Howell* at para. 141); that he was not in a crosswalk or at an intersection; and that he was aware that Ms. Finnigan was approaching and was in a better position to foresee what was about to occur.

[71] In my view, Ms. Finnigan is more to blame for the collision, because she breached multiple rules of the road, while Mr. Dewar was simply careless in a snap judgment. However, Mr. Dewar's contributory negligence is more than simply nominal because it was to some degree advertent. Balancing these considerations and taking everything into account as best I can, I apportion liability for the accident 65% to Ms. Finnigan and 35% to Mr. Dewar.

<u>Disposition</u>

[72] For these reasons, I hold that Ms. Finnigan is liable to Mr. Dewar for 65% of the loss and damage suffered by him.

[73] I will hear the continuation of the trial for the assessment of Mr. Dewar's damages.

"Gomery J."

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