IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Turner v. Dos Santos,*
2012 BCSC 1382

Date: 20120920
Docket: M105104
Registry: Vancouver

Between:

Erin Turner

Plaintiff

And

Walter Dos Santos, Jr., Roadsters Auto Group Inc. and Johal Wholesale Enterprises

Defendants

Before: The Honourable Mr. Justice Goepel

Reasons for Judgment

Counsel for the Plaintiff:	K.L. Simon K.J. MacDonald
Counsel for the Defendants:	C. Bekkering J.W.C. Fearon
Place and Date of Trial:	Vancouver, B.C. August 7-10, 2012
Place and Date of Judgment:	Vancouver, B.C. September 20, 2012

[1] The plaintiff, Erin Turner, claims damages arising out of a motor vehicle accident that took place on March 11, 2010 in Richmond, British Columbia when the Honda Civic that she was driving was struck by a Mustang driven by the defendant, Walter Dos Santos, Jr.

[2] This trial was limited to a determination of liability.

BACKGROUND

[3] Immediately prior to the accident, Ms. Turner, in the company of her young daughter, went to the Urban Farm Market (the "Market") to purchase groceries. She testified that she shopped at the Market regularly and that she was familiar with the location.

[4] The Market is located on the southwest corner of No. 5 Road and Westminster Highway. No. 5 Road runs north-south, while Westminster Highway runs east-west.

[5] After making her purchases, Ms. Turner got into her vehicle and at approximately 5:30 p.m. she exited the parking lot of the Market on the west side of No. 5 Road (the "No. 5 Exit"). The No. 5 Exit is approximately 44 metres south of the intersection of No. 5 Road and Westminster Highway.

[6] There are several lanes of traffic at the No. 5 Exit. Southbound there are two through lanes and a merge lane, which ends just north of the No. 5 Exit. Northbound, there are two through lanes, a left turn lane, and a right turn lane. A painted meridian separates north and southbound traffic. In addition, there is a gas station on the southeast corner of No. 5 Road. There is a lane adjacent to the gas station. Traffic from the gas station and the lane exit onto the northbound lanes of No. 5 Road immediately across from the No. 5 Exit. The speed limit is 50 km/h.

[7] Ms. Turner intended to cross the southbound lanes and enter into the left hand turning lane of No. 5 Road heading north. She would then turn again at the intersection of No. 5 Road and Westminster Highway to head towards her home.

[8] Ms. Turner testified that at the No. 5 Exit, she moved the Honda forward and stopped the front of the Honda over the sidewalk to check oncoming traffic prior to turning. She described the traffic as being moderate which meant that there were some cars on the road, but it was not rush hour traffic. She testified that when she checked traffic to the left, she could see clearly to the intersection of No. 5 Road and Westminster Highway, and beyond. She testified that there was no traffic coming from the left. She then scanned ahead to check traffic at the gas station and the laneway on the east side of No. 5 Road. When she checked traffic to the right she could see vehicles far in the distance. She was looking straight ahead as she proceeded to turn left.

[9] Ms. Turner testified that she commenced her left hand turn at a "normal" speed. In her words, she was not dawdling but not darting out. She pulled straight out and crossed the right and left southbound lanes. When she crossed the first of two yellow lines separating north and southbound traffic, she started to turn the Honda to the left. She says that as she prepared to turn into the left hand turn lane a vehicle exited from the gas station, and did a wide right hand turn, and then proceeded north on No. 5 Road. Because she was concerned as to how the vehicle was going to proceed, she stopped her vehicle.

[10] At the location that she stopped her vehicle, her vehicle was approximately one-half way into the turning lane. The back portion of her car, however, remained in the southbound lane.

[11] At the time that the accident occurred, Ms. Turner testified that she had been stopped for a few seconds . She said that she saw the Mustang for the first time a split second before the accident. She did not have any warning that the collision was about to occur. She did not remember hearing a horn or the screeching of tires. She testified that she did not have any opportunity to avoid the collision with the Mustang.

[12] Mr. Dos Santos was taking the Mustang on a test drive from a motor dealership which owned the vehicle. He was proceeding south on No. 5 Road. When

he entered the intersection of No. 5 Road and Westminster Highway the light had turned amber. He said that he was at all times driving the speed limit of 50 km/h. There were no vehicles immediately ahead, behind, or beside the Mustang.

[13] Mr. Dos Santos testified that he was halfway through the intersection when he saw the Honda for the first time. The Honda was then in the right southbound lane, and he was in the left southbound lane. He said that as Ms. Turner pulled out of the parking lot, her headlights and left turn signal were on. He braked lightly when he first saw the Honda. He thought that it was going to remain in the right southbound lane until he passed.

[14] When the Honda moved across his path, Mr. Dos Santos honked his horn, but did not attempt to change lanes or reduce his speed. When the Honda stopped in his lane of traffic, Mr. Dos Santos braked hard and tried to change lanes into the right southbound lane, but was not able to avoid the collision. He could not say how much time elapsed between when the Honda stopped in his path and the collision. He could only say that it happened very fast.

[15] Mr. Dos Santos' vehicle struck Ms. Turner's vehicle in the rear driver's side. His vehicle sustained impact damage to the left front corner. The impact caused the Honda to move into the left turn lane, facing northbound. The Mustang came to a rest in the left southbound lane, facing southbound.

EXPERT EVIDENCE

[16] Both parties called expert evidence. The plaintiff called William E. Cliff while the defence called Craig Allan Luker. Mr. Cliff prepared a collision investigation report dated May 18, 2012. He was instructed to assess Mr. Dos Santos' pre-braking speed, the location of the Mustang when Ms. Turner started her left turn and whether Mr. Dos Santos had sufficient opportunity to avoid the collision. Mr. Luker prepared a crash reconstruction report dated June 18, 2012. He was instructed to perform a technical review of Mr. Cliff's report.

[17] Both experts agreed that the impact speed of the Mustang was between 26 to 33 km/h. They could not agree on the pre-braking speed of the Mustang. Mr. Cliff opined that the pre-braking speed of the Mustang would have been in the 57 to 79 km/h range. Mr. Luker suggested that the Mustang's pre-braking speed was between 7.1 to 12.7 km/hr less than that.

[18] Fundamental to both experts' pre-braking speed calculations was Mr. Dos Santos' perception-response time ("PRT"). Mr. Cliff used a PRT of 1.5 seconds which in prior studies reflected the 50th percentile. Mr. Luker suggested that Mr. Cliff's assumed PRT of 1.5 seconds was likely too short. He suggested a more accurate range, accounting for the fact that the collision occurred at dusk and for the viewing angle between the vehicles, was 1.9 to 2.1 seconds. Both experts agreed that the longer PRT, the slower the pre-braking speed.

[19] There was no evidence of Mr. Dos Santos' actual PRT. Absent such evidence, both expert reports are of limited assistance and their evidence of pre-braking speed cannot be relied on. I cannot conclude, based on the expert evidence, that Mr. Dos. Santos was speeding prior to the accident.

POSITION OF THE PARTIES

[20] Ms. Turner submits that Mr. Dos Santos was driving in a negligent manner. She submits that Mr. Dos Santos accelerated through the intersection in order to avoid being caught in the intersection on a red light and was likely travelling at a speed exceeding 50 km/h. She submits that Mr. Dos Santos recognized the Honda as a hazard when he first saw it, and that a reasonably skilled driver, who was not speeding, would have had adequate time to change lanes and avoid a collision. She submits that Mr. Dos Santos was not keeping a proper lookout and therefore was unaware of Ms. Turner's movements. She submits Mr. Dos Santos did not change lanes because he was travelling too fast and made inappropriate assumptions about Ms. Turner's actions.

[21] Ms. Turner concedes that by stopping her vehicle in the middle of the north and southbound lanes on No. 5 Road she contributed to the accident. She submits that the determination of liability should, however, be heavily weighted against the defendant. In her submission, she is no more than 25 to 45% at fault for the accident.

[22] Mr. Dos Santos denies the particulars of negligence alleged. Although he admits that he had an onus to take reasonable precautions to avoid the accident once the plaintiff put herself in harm's way, he submits that he exercised all reasonable care, caution, and skill in the operation of the Mustang and there were no reasonable steps that he could have taken to avoid the accident. He notes that he touched his brakes lightly when he first saw the plaintiff and then braked fully when she unexpectedly stopped her vehicle in his lane. He was not speeding. He submits that the accident was caused solely by Ms. Turner's negligence.

[23] Mr. Dos Santos submits that the plaintiff had a high onus to keep a sharp lookout in order to avoid a collision, which she failed to do. She did not see the Mustang approaching despite the fact that it was there to be seen. He submits that the plaintiff stopped her vehicle in the middle of the roadway, straddling north and southbound traffic, when it was unsafe to do so. In his submission, if the Court is inclined to divide negligence, it should be weighted heavily against Ms. Turner. He submits his liability should not exceed 10%.

FINDINGS OF FACT

[24] The plaintiff submits that Mr. Dos Santos is not a reliable witness, and as such, where his evidence conflicts with the plaintiff's evidence, his evidence should be rejected, and Ms. Turner's evidence preferred. While the plaintiff does not impute an intent to deceive, she submits that Mr. Dos Santos is a poor historian.
Mr. DosSantos' passengers were not called to testify, and the plaintiff submits that Mr. Dos Santos provided no explanation for the absence of these key witnesses. In my view, the defendant provided a satisfactory explanation for the absence of these witnesses, which was that they no longer live in B.C. The defendant submits that the

plaintiff and the defendant both did their best to recall events, but that the plaintiff's memory was not particularly good. However, he does not suggest that this Court should make a finding that one party was trying to deceive the Court.

[25] I have difficulty with Ms. Turner's evidence that when she pulled out from the No. 5 Exit and she checked traffic to the left, that she could not see any vehicles. In the Speed Scene photos taken of the accident scene looking north it is possible to see beyond the intersection to the crest of the overpass of No. 5 Road and Highway 99. The Mustang was clearly there to be seen. Either Ms. Turner did not look, or if she did, she did not see the Mustang which I find was clearly present.

[26] I accept Mr. Dos Santos' evidence that he was travelling at or near the speed limit when he first observed Ms. Turner's vehicle. As noted I cannot accept Mr. Cliff's evidence that Mr. Dos Santos was travelling in excess of the speed limit. There is no other evidence of Mr. Dos Santos' speed.

LEGISLATIVE FRAMEWORK

[27] The rules of the road are set out in the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318 (the "*MVA*"). In *Salaam v. Abramovic*, 2010 BCCA 212, 4 B.C.L.R. (5th) 117, Mr. Justice Groberman at paras.18-21 explained the role that the statutory provisions play in assessing fault in motor vehicle accident cases:

> [18] While the statutory provisions provide guidelines for assessing fault in motor vehicle accident cases, they do not, alone, provide a complete legal framework.
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> [19] In *Carich v. Cook* (1992), 90 D.L.R. (4th) 322 at 326, 9 B.C.A.C. 112, this Court considered liability for an accident that occurred when a vehicle turning left on a four-lane road was in collision with a vehicle proceeding in the opposite direction, in the outside lane. While the Court was considering what is now s. 174 of the *Motor Vehicle Act* rather than s. 175, it is my view that the opinion expressed by Lambert J.A. has some relevance to this case:
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> > The question as a driver turns left is whether there is any vehicle in any approaching lanes that constitutes an immediate hazard. If there is, the turn should not be made. If there is not, then the turn can be made and of course, care should be taken throughout the turn and as each new lane is entered to make sure that the situation as it was assessed when the turn started has not changed in the meantime. But that care is more a matter of the ordinary duty of a reasonably careful driver and not a duty, in my view, imposed specifically

> by s. 176 [now s. 174] which, in my view, states the situation when the turn is commenced. Once the turn is commenced both of the drivers in that situation, the one who is doing a left turn and the ones that are approaching straight ahead in a situation where a vehicle could turn in front of them, all must keep a proper look-out.

[20] To the extent that there is a need to refer to a section of the *Motor Vehicle Act* for this proposition, one can turn to s. 144, which requires drivers to drive with "due care and attention" and to have "reasonable consideration for other persons using the highway".

[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.

[28] In this case, the relevant sections of the *MVA* are ss. 144 and 176. Those sections are as follows:

> 144 (1) A person must not drive a motor vehicle on a highway
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> (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.
>
> 176 (1) The driver of a vehicle in a business or residence district and emerging from an alley, driveway, building or private road must stop the vehicle immediately before driving onto the sidewalk or the sidewalk area extending across an alleyway or private driveway, and must yield the right of way to a pedestrian on the sidewalk or sidewalk area.
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> (2) The driver of a vehicle about to enter or cross a highway from an alley, lane, driveway, building or private road must yield the right of way to traffic approaching on the highway so closely that it constitutes an immediate hazard.

DISCUSSION

A. Ms. Turner's Negligence

i. Immediate Hazard

[29] Ms. Turner crossed a highway from a driveway. Pursuant to s. 176(2) of the *MVA*, she was required to yield the right of way to traffic that constituted an immediate hazard. She submits that when she entered the highway the Dos Santos' vehicle was not an "immediate hazard".

[30] In *Rollins v. Lovely*, 2007 BCSC 1752 [*Rollins*], Dickson J. at paras. 34-38, concisely summarized the law interpreting the meaning of the phrase "immediate hazard":

> [34] When does an approaching vehicle constitute an "immediate hazard"? This question was considered by the British Columbia Court of Appeal in *Raie v. Thorpe* (1963), 43 W.W.R. 405, a left turn case. In *Raie*, Tysoe J.A. stated at p. 410:
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> > I do not propose to attempt an exhaustive definition of "immediate hazard". For the purposes of this appeal it is sufficient for me to say that, in my opinion, if an approaching car is so close to the intersection when a driver attempts to make a left turn that a collision threatens unless there be some violent or sudden avoiding action on the part of the driver of the approaching car, the approaching car is an "immediate hazard" within the meaning of section 164.
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> [35] The question of immediate hazard and right of way is to be assessed temporally in the moment before the driver proposing to make the manoeuvre at issue commences to make it: *Raie*, pp. 413-414. If an approaching car does not present an immediate hazard when the manoeuvre is commenced but later creates one by unreasonable conduct such as speeding the approaching driver will be held responsible for an ensuring collision: *Devidi v. Filatow* (1998) CanLII 6405 (BCSC).
>
> [36] When a driver concludes, reasonably, that no immediate hazard is posed by oncoming traffic and commences to cross a multi-lane highway care must be taken to keep a proper lookout as each lane is crossed: *Carich v. Cook* [1992] 90 D.L.R. (4th) 322 (BCCA) p. 326. In the words of Lambert J.A. in *Carich*, another left turn case that applies by analogy:
>
> > The question as a driver turns left is whether there is any vehicle in any approaching lanes that constitutes an immediate hazard. If there is, the turn should not be made. If there is not, then the turn can be made and of course, care should be taken throughout the turn and as each new lane is entered to make sure that the situation as it was assessed when the turn started has not

> changed in the meantime. But that care is more a matter of the ordinary duty of a reasonably careful driver and not a duty, in my view, imposed specifically by s. 176 which, in my view, states the situation when the turn is commenced. Once the turn is commenced both of the drivers in that situation, the one who is doing a left turn and the ones that are approaching straight ahead in a situation where a vehicle could turn in front of them, all must keep a proper look-out.

[37] Drivers are generally entitled to assume others will observe the rules of the road, except where they know or should know otherwise: *Kamoschinski v. Hein* [1989] B.C.J. No. 909. As noted by Drossos, Co.Ct.J. in *Kamoschinski*, however, this general rule is limited to the extent described by Lord Dunedin in *Fardon v. Harcourt-Rivington* (1932), 48 T.L.R. 215 as follows:

> The root of this liability is negligence, and what is negligence depends on the facts with which you have to deal. If the possibility of the danger emerging is reasonably apparent, then to take no precautions is negligence; but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions.

[38] All drivers, whether dominant or servient, have a common law duty of care to avoid a collision which can reasonably be foreseen and avoided: *Atchison v. Kummetz* (1995), 14 M.V.R. (3d) 271 (BCCA). Where a dominant driver poses an immediate hazard, the burden of proof on the servient driver to cast a portion of the blame on the dominant driver is significant. In the words of Cartwright J. in *Walker v. Brownlee* [1952] 2 D.L.R. 450 (SCC):

> While the decision of every motor vehicle collision case must depend on its particular facts, I am of the 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 skilful 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*.

[31] In the circumstances of this case, I find that at the time Ms. Turner entered the highway the Dos Santos' vehicle was not an immediate hazard. Had Ms. Turner not stopped in the middle of the road, she had ample time to complete her turn in safety. Ms. Turner's decision to leave the driveway and commence across No. 5 Road was not negligent.

ii. Keeping a Proper Lookout

[32] Regardless of whether the Dos Santos vehicle was an immediate hazard when Ms. Turner commenced to cross No. 5 Road, she had a duty of care to keep a proper lookout as she crossed each lane: *Carich v. Cook* (1992), 90 D.L.R. (4th) 322 at 326, 9 B.C.A.C. 112 (C.A.).

[33] In *Dickie Estate v. Dickie* (1991), 11 W.A.C. 37, 5 B.C.A.C. 37 (C.A.) the plaintiff, Dickie, was making a U-turn across a double solid line when he was broadsided by the defendant, De Sousa. The defendant was travelling 137 km/h in an 80 km/h zone. The trial judge concluded that the grossly excessive speed was the sole cause of the accident and found the defendant 100% at fault. The Court of Appeal held the trial judge erred in principle in failing to assess any degree of negligence against the plaintiff on the issue of lookout. The Court noted the heavy onus put on a driver crossing a double solid line:

> [11] Dickie was engaging in a manoeuvre that was fraught with danger. He placed himself and the oncoming drivers in a position of risk. That being so, in my opinion, the law required of him a very high degree of care which would manifest itself in a sharp look-out before he crossed over the solid double line into the northbound lanes on the causeway. There was nothing to prohibit Dickie from seeing the oncoming De Sousa vehicle before his vehicle entered the northbound lanes of travel. The trial judge found as a fact, and this is not challenged on this appeal, that the De Sousa vehicle was going at least 137 k.p.h. In my opinion, on these facts the only possible inference is that Dickie failed to keep a look-out which the law required of him in these circumstances. If he had been keeping such a look-out I think the inference is irresistible that as a reasonable driver he would have become aware that the De Sousa vehicle was exceeding the speed limit by a margin such as to make it dangerous for him to proceed into the northbound lanes.

[34] Ms. Turner testified that she checked to the left when she began to cross the southbound lanes of No. 5 Road but she did not do so again until a split second before the accident. It was incumbent upon Ms. Turner to take greater care than she did as she crossed the southbound lanes. The situation should have been assessed on a continuous basis as each new lane was crossed. Had Ms. Turner glanced repeatedly to her left as she crossed the southbound lanes of No. 5 Road she would have seen Mr. Dos Santos' vehicle proceeding in the left toward her and known that

she could not safely stop her car in the middle of the road. I find that Ms. Turner was negligent in not keeping a proper lookout.

iii. Stopping

[35] I find that the cause of the accident was Ms. Turner unexpectedly stopping mid-roadway in a position which infringed on Mr. Dos Santos' lane. In *Saffari v. Lopez*, 2009 BCSC 699, Harvey J. at paras. 40-42 found that stopping or suddenly slowing one's vehicle on the roadway may constitute negligence:

> [40] That, however, does not end the matter as it relates to the responsibility of Mr. Lopez. He acknowledged that the area where he applied the brakes was not an area of the road where a following vehicle would expect him to slow down or stop. Further, he agreed that his actions were "sudden".
>
> [41] Section 144(1)(b) prohibits drivers from driving without reasonable consideration for other persons using the highway.
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> [42] Such would include, in my opinion, consideration of the circumstances of stopping or suddenly slowing one's vehicle in the flow of traffic where other viable options, such as exiting the roadway, existed. The emergency resulting in the deceleration of the Lopez vehicle was self-created. In any event, there is no suggestion that the cigarette had fallen onto the driver's lap or otherwise onto his person. Mr. Lopez's reaction, that is to suddenly slow or stop his vehicle, was but one of several choices he had. He acknowledged these included signalling an intention to change lanes to reach a point of safety where he could stop his vehicle without impeding traffic or putting on four-way flashers to alert following vehicles and other users of the road to an emergency.
>
> [43] I find Mr. Lopez was negligent in suddenly stopping or slowing his vehicle on the roadway approaching the Lions Gate Bridge

[36] In the case at bar, Ms. Turner submits she stopped out of an abundance of caution in an effort to avoid an unidentified vehicle which was coming out quickly from the gas station parking lot. She was unsure of that vehicle's intended manoeuvre. While that may explain why she stopped, I find she stopped in an unsafe location and without reasonable consideration for other persons using the highway. If she had kept a proper lookout she would have well recognized that stopping the vehicle where she did was fraught with danger. I find Ms. Turner's

decision to abort her turn and suddenly stop her vehicle in the middle of the road was negligent.

B. Mr. Dos Santos' Negligence

[37] I must also consider the actions of the defendant Mr. Dos Santos and what, if any, responsibility he has for the accident. He admits that he had an onus to take reasonable precautions to avoid the collision once the plaintiff put herself in harm's way. As noted by Dickson J. in *Rollins* at para. 38, where the defendant poses an immediate hazard, the burden of proof on the plaintiff to cast a portion of the blame on the defendant is significant. In this case, Ms. Turner must establish that after Mr. Dos Santos became aware, or by the exercise of reasonable care should have become aware, that Ms. Turner's vehicle had stopped, he had, in fact, a sufficient opportunity to avoid the accident.

[38] Mr. Dos Santos was within the intersection of No. 5 Road and Westminster Highway when he first saw Ms. Turner's Honda. He was not speeding. He braked lightly when he first saw the Honda. As the Honda moved across his path, Mr. Dos Santos honked his horn, but did not reduce his speed or attempt to change lanes. Only after the Honda stopped in his lane of traffic did Mr. Dos Santos brake hard and attempt to change lanes into the right southbound lane.

[39] I find that if Mr. Dos Santos had kept a proper lookout he could have taken steps to avoid the accident. He had the Honda in his sight from the time he was in the intersection. While he apparently tapped his brake once when he first saw the Honda, he did not reduce his speed when he observed that the Honda was going to pass in front of him. Rather than reduce his speed, he chose instead to honk his horn. If he had reduced his speed or, alternatively, not distracted himself by honking his horn, I find that he would have perceived the danger of the stopped car sooner and had time to avoid the collision.

[40] In the circumstances, I find both drivers at fault.

C. Apportionment of Liability

[41] Having found both parties were negligent and combined to cause the accident I must apportion fault under s. 1 of the *Negligence Act*, R.S.B.C. 1996 c. 333 which provides:

> 1(1) If by the fault of 2 or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree to which each person was at fault.
>
> (2) Despite subsection (1), if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability must be apportioned equally.
>
> (3) Nothing in this section operates to make a person liable for damage or loss to which the person's fault has not contributed.

[42] In *Hynna v. Peck*, 2009 BCSC 1057, 99 B.C.L.R. (4th) 357, Ballance J., at paras. 88-93, concisely summarized the law:

> [88] In assessing apportionment, the Court examines the extent of blameworthiness, that is, the degree to which each party is at fault, and not the degree to which each party's fault has caused the loss. Stated another way, the Court does not assess degrees of causation, it assesses degrees of fault: *Cempel v. Harrison Hot Springs Hotel Ltd.*, [1997] 43 B.C.L.R. (3d) 219, 100 B.C.A.C. 212; *Aberdeen v. Langley (Township)*, 2007 BCSC 993 [*Aberdeen*]; reversed in part, *Aberdeen v. Zanatta*, 2008 BCCA 420.
>
> [89] In *Alberta Wheat Pool v. Northwest Pile Driving Ltd.*, 2000 BCCA 505, [2000] 80 B.C.L.R. (3d) 153, Finch, J.A. (now the Chief Justice), for the majority of the Court of Appeal, explained this important principle at paras.45-47:
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> > In my view, the test to be applied here is that expressed by Lambert, J.A. in *Cempel*, *supra*, and the Court's task is to assess the respective blameworthiness of the parties, rather than the extent to which the loss may be said to have been caused by the conduct of each.
> >
> > Fault or blameworthiness evaluates the parties' conduct in the circumstances, and the extent or degree to which it may be said to depart from the standard of reasonable care. Fault may vary from extremely careless conduct, by which the party shows a reckless indifference or disregard for the safety of person or property, whether his own or others, down to a momentary or minor lapse of care in conduct which, nevertheless, carries with it the risk of foreseeable harm.
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> [90] In *Aberdeen*, Groves J. provided insight into the difficulty that the Court faces in quantifying the concept of blameworthiness under the *Negligence Act*. At para. 62 he endorsed the factors in assessing relative degrees of fault set out by the Alberta Court of Appeal in *Heller v. Martens*, as follows:

> 1. The nature of the duty owed by the tortfeasor to the injured person...
>
> 2. The number of acts of fault or negligence committed by a person at fault...
>
> 3. The timing of the various negligent acts. For example, the party who first commits a negligent act will usually be more at fault than the party whose negligence comes as a result of the initial fault...
>
> 4. The nature of the conduct held to amount to fault. For example, indifference to the results of the conduct may be more blameworthy... Similarly, a deliberate departure from safety rules may be more blameworthy than an imperfect reaction to a crisis...
>
> 5. The extent to which the conduct breaches statutory requirements. For example, in a motor vehicle collision, the driver of the vehicle with the right of way may be less blameworthy...
>
> [Authorities omitted.]

[91] To the foregoing factors, Groves J. added the following at para. 67:

> 6. the gravity of the risk created;
>
> 7. the extent of the opportunity to avoid or prevent the accident or the damage;
>
> 8. whether the conduct in question was deliberate, or unusual orunexpected; and
>
> 9. the knowledge one person had or should have had of the conduct of another person at fault.

[92] After surveying the authorities, Groves J. summarized at para. 67 the approach to be taken in assessing the relative degree of blameworthiness of the parties:

> Thus, the key inquiry in assessing comparative blameworthiness is the relative degree by which each of the parties departed from the standard of care to be expected in all of the circumstances. This inquiry is informed by numerous factors, including the nature of the departure from that standard of care, its magnitude, and the gravity of the risk thereby created.

[93] On appeal, the decision in *Aberdeen* in relation to the issue of contributory negligence was remitted for retrial. However, the Court of Appeal did not criticize Groves J.'s careful summation of the governing legal principles on apportionment.

[43] In this case, Ms. Turner failed to keep a proper lookout as she crossed the street. She then suddenly stopped when it was unsafe to do so. She created a substantial level of risk for herself and others. Mr. Dos Santos failed to take

reasonable precautions to avoid the accident. His reaction to a crisis that Ms. Turner caused was imperfect.

[44] I find that Ms. Turner is primarily to blame for the accident. I apportion liability 75% against Ms. Turner and 25% against Mr. Dos Santos.

"R.B.T. Goepel J."

The Honourable Mr. Justice Richard B.T. Goepel