SUPREME COURT OF NOVA SCOTIA
Citation: *Turner (Litigation guardian of) v. Roe*, 2024 NSSC 10

Date: 20240109
Docket: 453740
Registry: Halifax

Between:

Evan Turner, represented by his Litigation Guardian, Kevin Turner

Plaintiff

v.

Deborah Roe, Phillip Roe, and Taylor Roe

Defendants

DECISION

Judge:	The Honourable Justice John P. Bodurtha
Heard:	October 25, 26, 27 & 31, 2022, in Halifax, Nova Scotia
Final Written Submissions:	November 10, 2022
Decision:	January 9, 2024
Counsel:	Robert B. Carter, K.C., Allison Harris and Shani Frugtniet, for the Plaintiff Franco P. Tarulli and Ashley Dooley, for the Defendants

By the Court:

Overview

[1] The world can be cruel and unfair. Tragic events can result in horrible circumstances, the lives of loved ones can be altered in a matter of seconds, but such tragic events do not always result in liability. There can truly be horrible accidents.

[2] On May 2, 2013, Evan Turner ("Evan") left school and proceeded down Charles Road on the left side (the wrong side) of Charles Road toward Fraser Road on his bicycle. There is a Stop sign on Charles Road requiring those using the road to stop before entering Fraser Road. Evan made no attempt to stop his bicycle. He ignored the Stop sign and turned left, entering Fraser Road, on the wrong side of the lane. Taylor Roe ("Taylor") was driving her parents' 2008 Nissan Versa vehicle in an eastbound direction on Fraser Road when Evan entered the intersection striking the vehicle (the "Collision"). There are no traffic signs on Fraser Road. Taylor was operating her vehicle with the right-of-way.

[3] I find that Taylor was driving in a careful and prudent manner. She failed to do nothing that a reasonable and prudent driver would have done. She saw the bicycle at the last fraction of a second and could not avoid the Collision. The lay witnesses and expert witness confirm that Taylor was driving slower than most people on that street and there was no way that she could have avoided the Collision.

[4] I find that the Defendants have satisfied the reverse onus requiring them to prove that Taylor met the requisite standard of care while operating her vehicle. Taylor did not fail to do something that a reasonable and prudent driver would have done or fail to do something that a reasonable and prudent driver would have done. Taylor is not to be measured against a standard of perfection.

Background

[5] This action arises from the Collision that occurred on May 2, 2013. Taylor was 16 years old at the time and was a newly licensed driver. Evan was 12 years old. Evan suffered life altering injuries, including a brain injury resulting in quadriplegia. He is permanently disabled.

[6] Taylor describes having suffered emotional trauma from the Collision. She lived in the same neighbourhood where the Collision occurred. Her house was across the street from where Evan lived.

Taking a View

[7] After the first day of hearing, at the request of, and with the agreement of, both parties, the Court took a view of where the Collision took place pursuant to *Civil Procedure Rule* 51.12, which states:

> Taking a view
>
> 51.12 (1) A presiding judge may inspect a place or thing outside court in the presence of the parties.
>
> (2) A party may inform the judge in court, and on record, of that which the party wishes the judge to observe.
>
> (3) No one may communicate with the judge about the issues or the evidence when the inspection is being made, except a party may point the way to that which the party wishes the judge to observe.

[8] The view involved the following:

- View from right-side lane of Fraser Road, approaching Charles Road eastbound;
- View from right-side lane of Fraser Road, approaching Charles Road westbound;
- Driveway of 26 Fraser Road;
- View of the shed, house and trees located on the property of 3 Charles Road from Fraser Road approaching Charles Road eastbound;
- View from right-side lane of Charles Road, approaching Fraser Road; and,
- View from left-side lane of Charles Road, approaching Fraser Road.

[9] The taking of a view was done as close as possible to the time of day when the Collision took place (i.e., at approximately 4:30 p.m.). Taking a view provided the Court with the benefit of being able to situate the general area while considering the testimony of the witness. It allowed the Court to see features of

the intersection and the approaching roadways that could not be adequately conveyed using photographs alone, such as:

- The slope and grade of Charles Road as it approaches its end at Fraser Road;
- The width of the laneways; and,
- The visual perspective of the human eye from the various points referenced above, as opposed to a consideration of those views through photographic lenses.

Agreed Statement of Facts

[10] The parties agreed to the following facts:

- Kevin Turner is the father of Evan Turner;
- Evan Turner is disabled to the point that he is non-verbal, has no memory of the accident, and is not competent to testify;
- At the time of the accident, Evan Turner was of average intelligence, skill, and experience for a 12-year-old with respect to riding a bicycle;
- At the time of the accident, Evan Turner was aware of and knew the rules of the road;
- Evan Turner's parents were aware he was riding his bicycle on May 2, 2013;
- Kevin Turner was not present at the time of the accident; and,
- Evan Turner was not a driver or passenger of a motor vehicle at the time of the accident.

  (Exhibit 6)

Facts

[11] I have made the following additional findings of fact based on the evidence.

[12] At approximately 4:30 p.m., on May 2, 2013, Taylor left her family's home to pick up her mother in Bayers Lake. She was driving her parents' 2008 Nissan Versa along Fraser Road in Timberlea, Nova Scotia. Taylor regularly used this vehicle to commute to her part-time job in Bayers Lake. The weather that

afternoon was clear. There was no precipitation. The road surface was asphalt. It was daylight, and the pavement was dry.

[13] The Collision took place at the intersection of Charles Road and Fraser Road in a residential neighbourhood in Timberlea. This is a T-intersection with Charles Road ending at Fraser Road. Charles Road is a two-way street controlled by a Stop sign requiring motorists and cyclists to stop before entering Fraser Road. Fraser Road is likewise a two-way street. There are no traffic signals on Fraser Road governing traffic approaching Charles Road and, as such, traffic proceeding along Fraser Road has the right-of-way through the T-intersection. The posted speed limit is 50 km/hr on Fraser Road.

[14] Taylor was driving eastbound on Fraser Road. She was travelling below the speed limit, at an estimated speed of 40 km/hr. As she approached the intersection with Charles Road, she saw a vehicle approaching in the oncoming lane on Fraser Road and she slowed her speed.

[15] Evan was riding his bicycle down Charles Road toward Fraser Road and intended to turn left onto Fraser Road when the Collision occurred.

[16] As Taylor entered the intersection, she suddenly saw Evan on a bicycle coming from Charles Road turning into her lane. Evan's bicycle struck the passenger-side front fender of Taylor's vehicle.

[17] After the impact, Taylor pulled her vehicle forward past the intersection and over to the side of the road. Evan was thrown to the middle of the intersection.

Kenneth Zwicker

[18] Kenneth Zwicker ("Zwicker") is a former RCMP officer who has extensive qualifications in accident reconstruction. He is presently employed with AtlantiCrash Analysis. He was qualified as an expert, by agreement between the parties, in the field of forensic collision reconstruction, capable of giving opinion evidence on all aspects of accident reconstruction, including but not limited to the cause of the Collision on or about May 2, 2013, and whether the Collision could have been avoided.

[19] Zwicker conducted an accident reconstruction analysis and prepared three reports that were filed with the Court dated April 21, 2015 (the "Initial Report"),

August 11, 2021 (the "Supplementary Report"), and a third report dated July 11, 2022, which corrected typographical errors contained in the Initial Report.

[20] For the Initial Report, Zwicker considered the horizontal alignment of Fraser Road east-west and Charles Road north-south. Zwicker noted the following observations from his four visits to the site:

- Traffic on Charles Road is controlled by a "STOP" sign.
- There are no traffic controls on Fraser Road.
- The speed limit on Fraser Road is posted at 50 km/hour. Although not posted on Charles Road, the *prima facie* speed limit by legislation (the *MVA*, section 102(2)) in Nova Scotia is 50 km/hr.
- Charles Road slopes downward towards the intersection on a grade of approximately negative 5%.
- It was daylight at the time of the collision, there was no precipitation and the roadway was dry.

  (Ex. 1, Tab B-1, p. 7)

[21] Zwicker concluded that:

> …
>
> - primarily because of the obstruction to the respective lines of sight caused by the buildings on the property occupying the southwest quadrant of the intersection, neither driver could have had a view of the other driver's vehicle until each driver was approximately 2.1 seconds away from the collision. Between that time and the moment of collision, the trees on the same property would have caused intermittent sight restrictions, particularly Ms. Roe's view of the smaller bicycle;
> - the average perception-response time for each driver was probably approximately 1.9 seconds, within a range of 1.6 to 2.2 seconds. The 85th percentile response driver has responded in a similar scenario within 2.6 seconds;
> - sufficient time was not available to Ms. Roe to avoid or reduce the severity of the collision;

- Mr. Turner could have avoided the collision by approaching the intersection on the proper side of Charles Road, by stopping his bicycle before entering Fraser Road and by not entering Fraser Road until it was safe to do so.

  (Ex. 1, Tab B-1, p. 18)

[22] In reaching this conclusion Zwicker examined and considered the following materials:

- partial Nova Scotia "Report of Motor Vehicle Collision";
- Nissan Loss Report and damage appraisal including a colour copy of 36 photographs of the damaged car;
- a colour copy of two photographs of the collision site provided by Elaine Blanchard, Intact Insurance;
- handwritten statement of Patricia Taylor Roe recorded by Elaine Blanchard dated May 6, 2013;
- handwritten statement of Blair Hendren recorded by Elaine Blanchard dated May 8, 2013;
- handwritten statement of Nancy Elizabeth MacDonald recorded by Elaine Blanchard dated May 16, 2013;
- news media clipping from The Chronicle Herald dated May 3, 2013

  (Ex. 1, Tab B-1, p. 6)

[23] Zwicker took 60 photographs (Ex. 3) from where it was indicated to him that the Collision occurred. He began at the zero point (the point of impact), went 10 metres west of the area of impact, wrote "10" on the pavement, and took photos. He then went west another 10 metres and took another set of photos. He continued to do this every 10 metres until he had covered 50 metres, taking photos at 10-metre intervals. This exercise assisted Zwicker in determining the line of sight for both Taylor and Evan. The photos also helped Zwicker's conspicuity analysis which will be discussed later.

[24] Zwicker met with Taylor at the Collision site, and she identified the location where the Collision occurred. She also identified where her car and Evan came to rest after the Collision and the approach paths taken by both her car and Evan's

bicycle. Zwicker also met with Blair Hendren, and RCMP investigators Csts. Woodman and Reid at the Collison site. They all indicated the bike came to rest "approximately in the mouth of Charles Road, approximately midway between the east and west curbs. The range of distances from the area of impact to the location where Evan came to rest was found to be 9 to 11 m" (Ex. 1, Tab B-1, p. 8).

[25] Zwicker also met with Taylor who identified the location of her car when the Collision occurred (Ex. 1, Tab B-1, Appendix A, Figure 1). The damage to Taylor's vehicle was primarily the right front corner. Evan was thrown because of the impact an approximate distance of 9 to 11 metres. The bicycle came to rest approximately 17 metres from the area of impact.

[26] In determining the throw calculations Zwicker relied on the point of impact, and the final rest position of Evan. Based on discussions with the witnesses and investigating officers, Zwicker noted the final resting positions of Evan, Taylor's vehicle, and Evan's bicycle. Zwicker described the throw distance as the distance a rider travels while airborne, as well as any distance they tumble and/or slide on the road surface to rest. The distance to the blood and the manhole cover in the photos is the same. There is a reliable location on the street to accurately estimate the landing spot from the point of impact. I find that any uncertainty regarding the precise location of the Collision is resolved from 9 to 11 metres where Evan landed from the point of impact, a range of 2 metres from Zwicker's calculations. Whether the distance from the blood on the pavement or the manhole cover is used, I accept the evidence of Zwicker that that distance is the same because they are in a line with one another.

[27] Zwicker relied on the damage to Taylor's vehicle and the approach path of Evan to determine how Taylor's vehicle was hit by the bicycle. Based on the observations of the witnesses I find there was no reliable evidence supporting a finding that Evan slowed down prior to impact.

[28] The witnesses were consistent with their account of the point of impact. Blair Hendren identified the point of impact as the rear bumper on the police vehicle in the photograph at Ex. 1, Tab A-3, p. 3. Taylor indicated the point of impact at Ex. 1, Tab A-1, p. 29, which is consistent with Zwicker's animation at Ex. 1, Tab B-1, p. 21.

[29] Taylor and Blair Hendren indicated where Evan came to rest after the Collision. Both testified that Evan landed in the mouth of Charles Road, in the middle of the road.

Zwicker's Bike experiment

[30] To determine Evan's rate of speed on the bicycle, Zwicker performed a timing exercise with a bicycle on Charles Road with Blair Hendren and Nancy MacDonald, who witnessed the Collision (Ex. 2, pp. 37 and 82-83). They observed Zwicker's speed as he drove down Charles Road and compared it to their recollection of Evan's speed, advising Zwicker whether Evan's speed was faster, slower, or the same (Ex. 2, p. 82). The experiment consisted of Zwicker pedalling the bike 10 metres. He placed cones 10 metres apart to mark the distance. Zwicker made calculations based on what the witnesses felt would have been the same speed that Evan rode his bike. It took Zwicker 1.02 seconds to travel 10 metres, the equivalent of 9.8 m/sec which Nancy MacDonald felt was the correct speed for Evan. Zwicker then converted the 9.8 m/sec to 35.4 km/hr. Zwicker was not confident the speedometer on the bike was accurate but was confident in the distance and time measurements (e.g., 1.02 seconds to travel 10 metres).

[31] Zwicker stopped the exercise when Blair Hendren and Nancy MacDonald were satisfied with his speed on the bike. The two witnesses estimated Evan's speed on that bicycle remarkably consistently at 36 km/hr for Blair Hendren and 35 km/hr for Nancy MacDonald. This is the best evidence the Court has regarding Evan's speed and is consistent based on the lay witnesses. This exercise had no bearing on the calculation of Taylor's speed.

[32] The evidence is consistent that the point of impact occurred at a point on Fraser Road, in line with the curb which would have been on Evan's left side and from that point on the curb follow straight out to Taylor's vehicle.

[33] Based on the area of impact and Evan's final rest position, the distance Evan travelled from impact to rest ranged from approximately 9 to 11 metres. Assuming the shortest distance of 9 metres, Taylor's vehicle speed can be estimated to be in the range of approximately 32.5 to 42.4 km/hr, an average of approximately 37 km/hr. Assuming the longest distance of 11 metres, Taylor's vehicle speed can be estimated to be in the range of approximately 36.8 to 46.8 km/hr, an average of approximately 42 km/hr (Ex. 1, Tab B-1, Appendix C).

[34] The point of the bicycle exercise was to determine Evan's speed, which could then be used in the ARAS 360 HD software, which animated the approach of the car and bicycle along the paths they travelled and the speeds they were probably travelling along. Zwicker determined from the software using the line of sight that "each operator would have had their first view of the other vehicle

approximately 2.1 seconds before the Collison occurred." (Ex. 1, Tab B-1, at p. 14). Evan on the bicycle was approximately 20 metres from impact based on his speed of 35 km/hr and 2.1 seconds from impact (described later). Taylor's vehicle was approximately 24 metres from impact based on its speed of 42 km/hr and 2.1 seconds from impact (Ex. 1, Tab B-1, p. 15 and Appendix A).

[35] Taylor indicates in her statement that she did not see Evan until just before he turned into her vehicle. Zwicker confirms this in his report. He discusses the point of actual perception (Ex. 1, B-1, at p. 14), which is when Taylor and Evan actually perceived each other as an immediate hazard, versus possible perception, which is when they could have seen each other. Using accident reconstruction software and the evidence from various witnesses, Zwicker determined the line of sight for Evan and Taylor to be 2.1 seconds before impact (Ex. 1, B-1, at p. 14). He used the approach speed of Evan's bicycle determined from the bicycle experiment and Taylor's vehicle speed as calculated from the throw distance to determine when they first became visible to each other. Zwicker did not apply conspicuity factors in that determination.

[36] The primary factors that Zwicker felt affected Taylor and Evan perceiving each other as an immediate collision hazard were line of sight and conspicuity. The line of sight had two adjacent buildings, a shed and a house, which would have prevented either party from seeing the other until they could see past the buildings. In addition, after that first viewpoint occurring once they moved past the house and shed, three groups of deciduous trees would have intermittently obstructed their line of sight, particularly Taylor's view of the smaller bicycle (Ex. 3, A-1, at p. 19).

[37] Zwicker went on to consider conspicuity (including motion, colour contrast, illumination, visual clutter, distractions, expectancy and eccentricity) and formed the opinion that the "visual clutter in the background of Taylor's view of the bicycle, the distraction created by the oncoming car, the low expectancy that a bicycle would enter an intersection the way Evan did, and the eccentricity of the first view of the bicycle to Taylor all probably caused a slight delay to Taylor's perception of the bicycle as an immediate hazard": Ex. 1, Tab B-1, at pp. 14-15.

[38] Using the 2.1 seconds from impact when Taylor and Evan first became visual to one another, Evan travelling at a speed of 35 km/hr, would have been approximately 20 metres from impact. Zwicker advised that the 2.1 seconds does not take into consideration the conspicuity factors in section 38.2 of his report, because they were not relevant. The 2.1 seconds represents where each driver

(Taylor and Evan) would have had their first possible line of sight as they cleared the shed on Charles Road. Zwicker described this as a sight triangle. Both Evan and Taylor are the same time from impact, but their speeds and distances are different. With the animation Zwicker was able to plug the approach speed and paths into the software and drag the animation video back to where Evan and Taylor would have that sight line.

[39] Neither Evan nor Taylor could have seen each other until they had travelled past the shed. After that point the trees and background of the houses (i.e., conspicuity) comes into effect. Zwicker described how conspicuity would affect Taylor's perception response time. For instance, the more visible an object is, and the more likely it draws attention, results in increased conspicuity. Therefore, as an object's conspicuity goes up, Taylor's perception response time goes down (i.e., her ability to react would be faster). Therefore, if Evan was more of a match to the background, it would reduce his conspicuity and increase Taylor's perception response time. The less visible an object is, the longer it would take for someone to react to it.

[40] Zwicker discussed perception response time and how he obtained those figures using Interactive Driver Response research: Ex. 1, Tab B-1, at Appendix D. Perception response time is the time from when a collision hazard is detected to the time the driver evaluates and responds to it. Essentially, it is the time it takes for a driver to detect a hazard and decide what to do. Zwicker found that:

> Taylor's probable perception response time was estimated by examining how other drivers in similar circumstances have responded. This method showed the average perception-response time to a scenario with similar circumstances to be 1.9 second, within a range of 1.6 to 2.2 seconds. The 85th percentile response driver is someone who responds slower than 85% of drivers when faced with a similar situation. … The software reports that the 85th percentile response driver has responded within 2.6 seconds.
>
> (Ex. 1, Tab B-1, at p. 16).

[41] Zwicker used a perception response time of 1.9 seconds for Evan, ranging from 1.6 to 2.2 seconds, with the 85th percentile response being 2.6 seconds. He concluded that there was not enough time for either Taylor or Evan to react to avoid the Collision. His finding that Taylor did not have time to react is based on her 2.6 seconds perception response time using the 85th percentile and that in 2.1 seconds the Collision was to occur based on their first view of the other. This is consistent with Taylor's testimony that she had no time to react.

[42] Zwicker explained that when considering the driver's line of sight, although there is a space between the house and the shed from the photos, when the angles are considered there was no line of sight between the house and the shed (Ex. 3, p. 12). At 25 metres on Charles Road extending back from the point of impact, the shed and the house overlap to form an essentially blocked view. It is not until you travel 35 metres back from the point of impact (Ex. 3, at pp. 19-20) when you can first see a gap between the house and the shed. The gap continues at 40 metres with trees obscuring the view (Ex. 3, at p. 23).

[43] I accept Zwicker's evidence where he explained how 2.1 seconds is the maximum time available and how it is different from perception response time. The maximum time available (2.1 seconds) refers to the sightline. It was the available time any driver would have before contacting Evan (the time from when Evan comes into sight to impact). It is different from the time it would take for a driver to process a hazard. For example, if Taylor's perception response time was one second, she would have had time to respond, because the available response time was 2.1 seconds. If her perception response time was more than 2.1 seconds, she would not have had time to respond. In comparing the available time to respond and the probable perception-response time, he reached the conclusion that there is a high probability that there was insufficient time for Taylor to take action that could have avoided or reduced the severity of the Collision (Ex. 1, Tab B-1, at p. 17).

[44] Zwicker considered perception delay and found a high probability that there was insufficient time for Taylor to begin to take significant evasive action before the Collision occurred. He stated, "These times suggest Taylor *may* have been able to start evasive action at approximately the same time the Collision occurred or immediately thereafter. In either case, that action would not have affected the Collision." He found there was probably no delay in Taylor's perception of the bicycle as an immediate collision hazard.

[45] After reviewing the contents of the Halifax Regional Police ("HRP") file, Zwicker authored a Supplementary Report. He concluded the following:

- The location of the blood pooling confirms the throw distance assumed in the Initial Report.
- The photographs indicate that Taylor was likely accurate in saying that she had tried to turn left to avoid Evan.

[46] Zwicker stated that the contents of the HRP file enabled him to confirm the assumptions made in his Initial Report. The HRP file solidified his conclusions in the Initial Report.

[47] In the Supplementary Report at Ex. 1, Tab B-1, at p. 47, Zwicker addressed the blood pooling where Evan came to rest. Zwicker made a sketch in his notes at Ex. 2, Tab A-1, at p. 80, based on his discussion with Blair Hendren, the letter P in that sketch is approximately where the start of the blood trail was. To calculate the throw distance Zwicker needed the distance from the point of impact to the manhole cover where Evan came to rest. Zwicker measured the distance and found it to be approximately 10.5 metres. This is consistent when compared to the resting point of Evan from his Initial Report which ended up being 9 to11 metres from the point of impact. These calculations were consistent with the speeds calculated using the Searle equation, of 35.8 to 42.9 km/hr and Taylor's estimated speed (Ex. 1, Tab B-1, at p. 12). Zwicker testified that the location of the blood pooling confirmed the throw distance in his Initial Report.

[48] Applying the throw distance, Zwicker was able to conclude that Taylor's speed was below the speed limit, even applying the furthest possible throw distance. Zwicker concluded that the information in the HRP file did not affect the opinions stated in his Initial Report (Ex. 1, Tab B-1, at p. 50).

[49] Zwicker was cross-examined about Blair Hendren's statement in the HRP file that Evan was trying to stop. Zwicker responded that he received Hendren's statement after his Initial Report and said Blair Hendren did not tell him anything about Evan trying to stop. He advised that he would have written para. 34 at Ex. 1, Tab B-1, at p. 14, differently but it did not change anything else in his Initial Report. It did not affect his ultimate conclusion.

Taylor's credibility and reliability

[50] Zwicker noted that Taylor gave a post-Collision statement to the insurer and provided evidence on Discovery. In her statement to the insurer, she stated that as she approached, she observed another vehicle coming towards her and she slowed. She also said she had observed Evan on his bike on Charles Road on the wrong side of Charles Road and turning into her lane of travel. She estimated that she was travelling below the speed limit at 40 km/hr. She attempted to swerve left but did not avoid the Collision. She then stated she did not see Evan prior to impact.

[51] On discovery, her story changed somewhat. She said she saw the bike a half second prior to impact, and that she was at Charles Road when she first saw Evan approaching. She said she was unsure if she applied the brakes prior to impact, and that she attempted to swerve but the Collision occurred.

[52] Counsel for the Plaintiff performed an admirable job in pointing out inconsistencies regarding the timing of when Taylor first saw Evan and whether Taylor attempted to swerve to avoid the Collision. In my opinion, however, counsel failed to address the fundamental issue of whether Taylor had enough time to avoid the Collision. Regardless of elements of Taylor's testimony that I accept, the Plaintiff has not addressed the expert evidence that the Collision was inevitable. Zwicker's report is clear. In his opinion, there was nothing Taylor could have done to avoid the accident. Even if she did attempt evasive action, it would not have mattered, because there was not enough time. Zwicker estimated the speed of Taylor's vehicle on impact between 36.8 and 46.8 km/hr, with an average speed calculated at 42 km/hr. He also estimated Evan's bike was travelling 35 km/hr, based on two witnesses' observations. Zwicker estimated, based on the buildings in the area and speeds of the vehicle and the bike, that Taylor would have had approximately 2.1 seconds to observe the approaching bike and that the bike was approximately 20 metres away when it could have first been observed as an immediate collision hazard. Zwicker concluded that there was no reliable evidence that Taylor attempted to swerve to avoid the Collision, and neither independent witness observed any attempt to swerve. The expert evidence from Zwicker is clear and uncontradicted that Taylor did not have enough time to avoid the Collision.

Lay Witnesses

Blair Hendren

[53] At the time of the Collison, Blair Hendren lived at the corner of Charles and Fraser Road. He witnessed the Collision from inside his car in his driveway. He had just backed into the driveway and was talking on his cellphone. He observed Evan coming down Charles Road on his bike, on the left side of the road, pedalling with his head down and going fast. He saw Taylor approaching on Fraser Road. He testified that Evan went through the Stop sign just as the car got to Charles Road.

[54] Plaintiff's counsel pointed out that Blair Hendren's evidence was inconsistent with his police statement, where he stated that Evan was travelling "average speed for a bike…" and "I actually think he was trying to slow down…" (Ex. 2, Tab 3, at p. 5). Blair Hendren at trial would not adopt those statements, saying that he was affected by seeing a child in that situation when he spoke with the police. He did not want to cast accusations or blame on a child who suffered significant injuries. I accept Blair Hendren's explanation for the apparent inconsistency and accept his trial evidence.

Nancy MacDonald

[55] Nancy MacDonald was on her way home in a Ford F150 pick-up truck, and saw the Collision happen as she approached the intersection. She testified that Taylor was driving towards her at a slower speed than most people drive on Fraser Road. Nancy MacDonald was intending to turn left on to Charles Road. When asked about Taylor's driving she said that the only concern she had was [the bike] coming down Charles Road. She testified that Evan was driving "really fast" on the wrong side of the road and that he turned right into the car. Nancy MacDonald said she did not see the Collision; she turned her head because she knew Evan was going to hit the car. Taylor had no time to stop.

Halifax Regional Police

[56] The accident was investigated by Constables Kimberley Reid and Dwayne Woodworth of the HRP. No charges were laid against Taylor.

No children in the area

[57] The preponderance of evidence is that there were no other children or cyclists in the area. The witnesses agreed that the Collision occurred in a residential area and that they did not recall seeing any pedestrians. There is a school on Charles Road, but the evidence was that most of the children that attend the school are picked up. Blair Hendren and Nancy MacDonald, who are residents, said they do not often see children on Fraser Road. There was no evidence before the Court that children were walking or biking that day around the area of the Collision, and no reference in the police report to pedestrians or cyclists in the area of the Collision.

Issues

[58] This matter deals with liability only. The issue of the assessment of damages has been severed.

[59] The only issues for determination at trial are as follows:

(a) Was the accident caused in any way by negligence attributable to the Defendants?

(b) If so, is Evan contributorily negligent for the accident?

Analysis

Onus of Proof

[60] Section 148C of the *Insurance Act*, R.S.N.S. 1989, c.231 as amended places the burden of proof on the Defendant owner-operator of the motor vehicle, to show that the Collision did not arise entirely through their negligence or improper conduct. The section reads as follows:

> 148C (1) In this Section and Sections 148D and 148E, "highway" means a highway under the Motor Vehicle Act.
>
> (2) Where a person sustains loss or damage by reason of a motor vehicle on a highway, the onus of proof in any civil action that the loss or damage did not entirely or solely arise through the negligence or improper conduct of the owner or the employee or agent of the owner acting in the course of that person's employment or of the driver of the motor vehicle is on that owner or driver.
>
> (3) Subsection (2) does not apply
>
> (a) in the case of a claim by a passenger without payment against the owner or driver of the motor vehicle in which the passenger was being transported; or
>
> (b) in the case of an accident between motor vehicles on a highway if the claim is made by the owner or driver of any of the motor vehicles involved in the accident or by a passenger in one of the motor vehicles involved in the accident against the owner or driver of another vehicle.

[61] This section was considered by the Supreme Court of Canada in *Feener v. McKenzie* [1972] S.C.R. 525, where Ritchie J. said, at para. 19:

> In my opinion the effect of section 221(1)(b) of the *Motor Vehicle Act* in the trial of an action where damages are claimed for an injury sustained by any person by reason of the presence of a motor vehicle upon a highway, is to create a rebuttable presumption that such injury arose "entirely or solely" through the negligence or improper conduct of the operator of the motor vehicle. This presumption against

> the operator remains until the very end of the case, but it is a presumption which can be rebutted either in whole or in part, and if after all the evidence has been heard the jury is satisfied that the operator was only partly to blame, then the fault is to be divided in accordance with the provisions of the *Contributory Negligence Act*. If, on the other hand, the jury is satisfied on the whole of the evidence that there was no fault on the part of the operator which caused the accident, the plaintiff's action must be dismissed. The question of whether, and to what extent, the presumption has been rebutted is one which can only be determined at the conclusion of the case.

[62] *Feener* has been consistently followed in Nova Scotia. In *Clayton v. Skrobotz and Hall*, (1992), 110 N.S.R. (2d) 320 (N.S.C.A.), the Court of Appeal stated, at pp. 323-324:

> The seminal case explaining the onus and procedure to be followed by a trial court under the provisions of this section is *Feener v. McKenzie* (1971), 3 N.S.R. (2d), 829 (S.C.C.) see in particular, Hall, J., at p. 834 and Ritchie, J., at p. 854.
>
> The effect of the section in this type of case is to create a rebuttable presumption. It is sometimes called a reverse onus. The onus does not shift. It is upon the owner or operator until the end of the case. At that time the trier of fact must determine whether the owner or operator of the motor vehicle has proven by a preponderance of evidence that she or he did not in fact entirely or solely cause the accident by her or his negligence or improper conduct. Only then may the claim of the pedestrian be dismissed or, if the circumstances permit, liability apportioned.

[63] In *Eisnor v. Gracie*, [1987] N.S.J. No. 440, (1987), 82 N.S.R. (2d) 41 (S.C.A.D.), the Appeal Division considered the effect of the reverse onus provision, with Matthews, J.A. stating, at para. 16:

> With deference the trial judge should not have first considered whether the appellant, the plaintiff pedestrian, was negligent and then upon determining that was so, questioned whether there was any liability on the part of the respondent. The proper test to be applied by a trial judge in motor vehicle/pedestrian injury cases is that set out in s. 221 and the case law thereon. It is sometimes referred to as the reverse onus. The onus is upon the owner or operator of the motor vehicle to prove by a preponderance of evidence that the accident was not caused entirely or solely by his or her negligence or improper conduct. That burden is upon that owner or operator until the end of the case. It does not shift. It is only at the end of the case and on consideration of all of the evidence, should the trial judge after first concluding that owner or operator has proven by a preponderance of evidence that he or she did not in fact entirely or solely cause the accident by his or her negligence or improper conduct that the claim by the pedestrian may be dismissed.

[64] The Defendants acknowledge and accept the reverse onus provisions under s. 148C of the *Insurance Act*, recognizing that they bear the burden of proof to establish that the injuries sustained by Evan were not solely caused by their negligence.

[65] In *Gardiner v. Scherer*, [1999] N.S.J. No. 8, 172 N.S.R. (2d) 369 (N.S.C.A.), the Court of Appeal discussed the appropriate test and explained how the burden of proof requires the trier of fact to determine whether the defendant could have prevented the accident. The Court stated, at para. 17:

> In my opinion, the failure by the trial judge to apply the proper burden is a sufficient reason to allow the appeal. The underlying foundation of the decision that the plaintiffs had to prove "that the Collision occurred as they allege" was clearly an error of law that permeated the assessment of the evidence and the conclusions reached by the trial judge. As in *Eisnor v. Gracie, supra*, by first determining that the appellants were negligent in the operation of their bicycles without examining whether the respondent could have prevented the accident, the trial judge fell into error. After having rejected the appellants' evidence, the trial judge still had to assess the rest of the evidence in light of the burden of proof. Even assuming the respondent's version of the events is accepted, a specific finding as to whether the respondent could have avoided the accident by sounding his horn, or whether he should have seen the appellants prior to making the right turn onto Robie Street are examples of further findings that should have been made to determine whether the driver of the motor vehicle was not solely or entirely responsible for the accident.

[66] In *Walker v. Brownlee*, 1952 CarswellOnt 395, [1952] 2 D.L.R. 450, [1952] S.C.J. No. 56, the Supreme Court of Canada addressed the duty of a driver who has the statutory right-of-way and whether that driver had sufficient opportunity to avoid the accident, at paras. 47-51:

> 47 The duty of a driver having the statutory right-of-way has been discussed in many cases. In my opinion it is stated briefly and accurately in the following passage in the judgment of Aylesworth J.A., concurred in by Robertson C.J.O., in *Woodward v. Harris*, [1951] O.W.N. 221 at p. 223: "Authority is not required in support of the principle that a driver entering an intersection, even although he has the right of way, is bound to act so as to avoid a collision if reasonable care on his part will prevent it. To put it another way: he ought not to exercise his right of way if the circumstances are such that the result of his so doing will be a collision which he reasonably should have foreseen and avoided."
>
> 48 While the judgment of the Court of Appeal in that case was set aside and a new trial ordered [1952] 1 D.L.R. 82] there is nothing said in the judgments

> delivered in this Court to throw any doubt on the accuracy of the statement quoted.
>
> 49 In applying this principle it is necessary to bear in mind the statement of Lord Atkinson in *Toronto R. W. Co. v. King*, 7 C.R.C. 408 at p. 417, [1908] A.C. 260 at p. 269: "Traffic in the streets would be impossible if the driver of each vehicle did not proceed more or less upon the assumption that the drivers of all the other vehicles will do what it is their duty to do, namely, observe the rules regulating the traffic of the streets."
>
> 50 While the decision of every motor vehicle collision case must depend on its particular facts, I am of opinion that when A, the driver in the servent 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*.
>
> 51 In the case at bar I agree with what I understand to be the view of the majority of the Court of Appeal that it is not necessary in deciding this case to take into consideration the fact that Hugel Ave. was a through highway. Obviously, the fact that it was known to Harmon to have been so designated cannot worsen his position. Leaving this fact aside, an examination of all the evidence brings me to the same conclusion as that reached by Roach J.A., that, even had Harmon been observing the appellant's car, when the time arrived at which he could reasonably have been expected to realize that the appellant was not yielding him the right-of-way it would have been too late for him to do anything effective to prevent the collision.
>
> [Emphasis added]

[67] The conclusion in *Walker* is no different from Taylor's situation, Taylor did not have enough time to avoid the Collision. Evan was the source and origin of the unfortunate circumstances.

[68] In *Spaargaren v. Demont*, 2021 NSSC 318, the action arose from a collision between the defendant vehicle driver and the defendant ATV driver when the ATV driver attempted to cross the road. The plaintiff was the passenger on the uninsured ATV operated by the defendant ATV driver. The ATV driver crossed the road and was struck by the defendant vehicle driver. The law required the ATV driver to yield the right of way. Justice Smith found:

> 100 TD's position on this issue would make more sense if the Tomsett vehicle had collided with a moose, and not an ATV. When a person driving on the highway at night sees a moose cross the road in front of them, that driver, if acting reasonably, would slow down and be ready to respond if another moose should attempt to cross the highway. Wild animals are unpredictable. For this reason, if a collision can be avoided, responsibility falls entirely to the driver.
>
> 101 Other drivers attempting to cross the highway, however, are held to a higher standard than moose. As the leading authorities establish, the driver with the right of way is entitled to assume that other drivers, including those operating ATVs, will obey the rules of the road. The law required Mr. Demont to yield the right of way. It follows that Mr. Tomsett had no duty to react to the presence of the Demont ATV at the intersection until he became aware, or reasonably should have become aware, that Mr. Demont was not going to yield the right of way as required. It was only then that Mr. Tomsett had a duty to use due care to avoid a collision.

[69] In the case before me, I am convinced that Evan was not following the rules of the road. The question before me is, once Taylor became aware of Evan, or reasonably should have become aware did Taylor have an opportunity to avoid the Collision if using due care.

[70] Based on all the evidence, negligence cannot be attributed to Taylor in these circumstances. I can not accept the argument that Taylor should have been prepared to stop well before the intersection in anticipation that a cyclist would suddenly appear on the wrong side of the road after said cyclist ran a stop sign, and therefore, Taylor was negligent. This is not the law in Canada.

[71] The Plaintiff relies on *Chiasson (Litigation guardian of) v. Baird* [2005] N.B.J. No. 232, (N.B.Q.B), where a six-year-old child was struck when he rode his bike out onto the highway in front of his house. The view of the property was obscured by foliage. The defendant driver testified that he had been proceeding at the speed limit, was paying attention, and the plaintiff had darted out in front of him. He was found negligent in that he lived down the roadway and knew there were children playing in the area. The driver had a duty to drive at a speed significantly below the posted limit, given his knowledge that the road was curvy, visibility was poor, and children played in the area. In such circumstances, the Court held that driving at the posted speed limit was excessive. The possibility of a child driving a bicycle out on the road in the area was reasonably foreseeable, and had he been driving slower and maintaining a better lookout, he could have taken evasive action. The Court noted as follows at paras. 83-84:

> 83 The law imposes a greater duty upon motorists to be vigilant when operating a motor vehicle near children, and to anticipate that children may act impulsively and perform unexpected operations. However, the law of negligence does not hold that liability is absolute when children are involved.
>
> 84 When an accident occurs between a child on a bicycle and a motor vehicle operator, the first issue to be determined is whether it was reasonably foreseeable that the child (or, depending on the facts of the case, any child) may act so as to constitute an imminent danger, and therefore place a duty on the motorist to take steps to be able to take preventative or evasive action if necessary. Where a child's behaviour is reasonably foreseeable, the onus is high on motorists to show that all reasonable measures were taken to avoid the accident. Such measures which may be required of drivers are: to adjust vehicle speed according to the circumstances; to take evasive action, including braking; to keep a proper lookout and to warn others of one's presence (namely, by timely sounding of the driver's horn). The analysis of liability and onus on drivers is similar with respect to children cycling as for those running into the street, with the additional element that children on bicycles, in addition to being impulsive, may also be unskilled riders.

[72] Similar principles and considerations apply in the present case, but there are key distinguishing features. Taylor lived in the area and was aware of the presence of children in the overall neighbourhood, but in the specific area where the Collision took place there were no children or bicycles. The evidence was that it was not an area with a large concentration of children or bicycles. In addition, the road in *Chiasson* was windy and undulating. Fraser Road is straight. The witnesses in *Chiasson* said 50 km/hr was excessive, and said that no one should drive more than 30 km/hr. There is no evidence of 50 km/hr on Fraser Road being excessive. In fact, Taylor was driving below the posted speed limit. Finally, the plaintiff in *Chiasson* entered the roadway from the left-hand side of the road, which would give the driver a better opportunity to see the vehicle than Taylor had with Evan, who entered from the wrong side and entered the wrong lane.

Driver Negligence/Standard of Care

[73] Did Taylor do something that a reasonable and prudent driver would not have done, or fail do to something that a reasonable and prudent driver would have done?

[74] I have reviewed and considered the cases provided by the Plaintiff and Defendants in reaching my conclusion. I will address some in my decision but have considered them all.

[75] In *Stanley v. National Fruit Co.*, [1931] S.C.R. 60, the plaintiff was struck by a car that the defendant was driving at a speed dangerous to the public. The defendant was also following too closely to the vehicle in front of him, which impaired his ability to see. The intersection was well known for pedestrian traffic. The standard of care on a driver was described as follows at paras. 8-9:

> 8 The plaintiff being injured by reason of a motor vehicle, on the highway the state places upon the defendant the burden of proving that his injuries did not arise through the negligence or improper conduct of its driver. As to the degree of care which a driver of a motor vehicle must exercise, I agree entirely with what was laid down by Mr. Justice Turgeon, in giving the judgment of the Court of Appeal, when he said:
>
> > He must exercise at all times the same measure of caution as might be expected, in like circumstances, of a reasonably prudent man. He must take proper precautions to guard against risks that might reasonably be anticipated to arise from time to time as he proceeds on his way. This degree of care, and nothing more, is required of him, except in cases specially provided for, with which we are not concerned here.
>
> 9 The difficulty, however, is in determining what a reasonably prudent man would have done under the circumstances. That responsibility is placed in the first instance upon the tribunal whose duty it is to find the facts - in this case the trial judge.
>
> (footnotes omitted)

[76] There are several cases relied on by the Plaintiff which deal with the issue of the standard of care of drivers who are aware of the potential presence of children on a roadway, and which indicate that a high onus is on drivers approaching an area where they know or ought to have known children could be present. These cases dictate that drivers in such circumstances have a duty to proceed with caution, slow their vehicles, maintain proper lookout, and sound the vehicle horn in warning. I shall discuss and distinguish each of these.

[77] In *Arnold v. Teno (Next friend of)*, 2 S.C.R. 287, [1978] S.C.J. No. 8, the Court considered the duty of care and the standard of care on a driver who pulled out to pass a stopped ice-cream truck. The driver was travelling at or below the speed limit and was unable to avoid striking a 4 ½ year-old child who had darted out from behind the truck. The Supreme Court of Canada agreed with the trial judge that the defendant driver was negligent in that he failed to satisfy the Court that he was concentrating properly on the potential traffic situation in front of him as he overtook and passed the ice-cream truck, and that had he been driving at a

proper speed he would have seen the child in time to have avoided striking her. The driver was generally familiar with ice-cream trucks and their method of operation, and he had observed the truck and its warning, “Watch out for children”. The Court held that he should have appreciated the potential danger that this truck and its customers represented. He did not sound his horn and only slightly reduced his speed. The Court held that passing the truck given the children who might reasonably be expected to be about the truck and attempting to cross the street, required a much greater degree of caution than he exhibited.

[78] The Trial Judge in *Teno*, [1974] O.J. No. 2248, found that the driver was negligent in the speed he was driving, in his failure to keep a proper lookout, and because he was distracted in looking at a friend’s house as he drove by. He stated at paras. 46-48:

> 46 On his own evidence, having recognized the parked ice-cream truck, he knew that unsupervised small children who had a habit of running across the street were commonly in the vicinity of and customers of the ice-cream vendor. He failed to reduce his speed to a point where even the sudden emergence of a child into the path of his car would not have precluded his stoppage without striking the child: see *Gambino et al. v. DiLeo et al.*, [1971] 2 O.R. 131, 17 D.L.R. (3d) 167.
>
> 47 He further failed, in my opinion, to keep a proper look-out. From his position behind the wheel on the left side of his car, next the east curb of Academy Dr. he must have been at least 10 ft. from the left side of the truck. He admitted in cross-examination first seeing the child five or six feet away while she was still in front of the truck and running on an angle away from the truck and from him and not as he said, under direct examination, when she was only a foot away from the side of his car.
>
> 48 He conceded that his whole attention had been concentrated on determining whether his friend was at home or not until he had passed the last point where he could check his friend's property, and that it was not until then that he even looked to see what was in front of him as he drove down the street. He has failed to satisfy me that he was concentrating as he ought to, on the potential traffic situation in front of him as he overtook and passed the ice-cream truck. Had he been driving at a proper speed he could and ought to have seen the child in time to have avoided striking her.

[79] The Ontario Court of Appeal in *Teno v. Arnold*, 1976 CarswellOnt 825, 11 O.R. (2d) 585, 67 D.L.R. (3d) 9, stated, at para. 15:

> 15 It is not without interest that legislation in this Province now requires passing motorists to stop clear of school buses which are either picking up or discharging passengers. In my view the stopped ice-cream truck posed no less a danger and

> while obviously that legislation is not applicable to this vehicle, common sense must dictate a marked escalation in caution on approaching such a vehicle.

[80] These additional factors are not present in Taylor's situation, and it is noteworthy that the defendant's liability in *Teno* was assessed at only 25%.

[81] Counsel for the Plaintiff argues that Taylor's eyes were focused on the road, straight ahead when she should have been scanning. I find that Taylor's eyes were where they should have been. There is no evidence of any other cyclists in the area, no "children playing" sign was located on Fraser Road, and there is no evidence that there were children around at the time of the accident. What should Taylor have been scanning for? Perhaps something in the intersection, as is required by the *Motor Vehicle Act*, RSNS 1989, c. 293 (the "*MVA*"), for a left-hand turn (s. 118.1). A reasonable driver would not be scanning for a child on a bicycle, driving down the wrong side of the road, ignoring the Stop sign and turning directly into her lane (the wrong lane) of traffic. That is not reasonable, especially given the uncontradicted evidence of Nancy MacDonald, Blair Hendren, and Zwicker that Taylor had no chance to react.

[82] In *Mattinson v. Wonnacott* [1975] O.J. No. 2338, (1975) 59 D.L.R. (3d) 18 (Ont. H.C.), a 5 ½ year-old child got off a school bus some distance from home and was struck after running into the street with his head turned away from an oncoming vehicle. The court held that the defendant driver had failed to discharge the reverse onus concerning liability. The defendant driver was aware that she was driving through a school zone at the time of day when children were released from school, and she had observed the child some time before the collision, and she was obviously paying no attention to traffic. The defendant was 35% negligent due to failing to sound her horn or apply her brakes earlier. The bus driver was also negligent for failing to properly care for the safety of the child. There was no finding of contributory negligence on the part of the child, considering his age and the fact that he had only been in kindergarten a few months and had little safety instruction at school.

[83] This case is not applicable based on the court's findings that the defendant was aware of the presence of the child some time before the accident happened, and that she was driving in a school zone with the knowledge that the children had just been released for the day. The court said:

> 29 I have come to the conclusion that Mrs. Wonnacott has not satisfied the onus of disproving negligence cast upon her by s. 133 of the *Highway Traffic Act*,

> R.S.O. 1970, c. 202, and, indeed, that there was some negligence on her part. At some distance, she had observed a very small child running towards the highway with his head turned over his shoulder, obviously not paying any attention to traffic. She knew that the children had just been released from school for the day, that she was still within the school zone; that there were children about, and that Richard was running towards the highway paying no attention to traffic. If she had sounded her horn, or if she had applied her brakes earlier, the accident would, in all probability, have been avoided. She was aware for a significant period of time of Richard's unheeding approach to the highway and ought, at least, to have sounded her horn.

[84] In *Lloyd (Litigation guardian of) v. Rutter*, [2003] O.J. No. 5064, [2003] O.T.C. 1064 (Ont. S.C.J.), the standard of care on a driver who struck a pedestrian was considered. In that case, an 11-year-old boy was walking home from school and stepped out onto a street to cross, failing to notice the oncoming vehicle. The court, in finding the defendant driver 25% liable, stated as follows:

> 16 There is a duty resting on Austin to have his vehicle under control such that he could stop it within a distance at which he could see pedestrians on a street that the driver knows or ought to know that pedestrians cross. The onus on Austin to watch for children is increased when traveling in an area he knew to be populated by children. The Courts have emphasized that the approach to the liability question should not be too narrow. The driver is under an obligation to keep a lookout for potential problems when driving. Drivers must be keenly aware of child pedestrians. Children at or close to a cross-area should alert a driver to the fact that a child may dart out. The driver must proceed with the utmost caution and at a speed which would allow for a sudden stop. The driver should also use the horn to alert the pedestrian to both their presence and intention to proceed. …
>
> …
>
> 19 The standard of care owed to children on the highway is the same as that owed to adults, but there may be circumstances that should put motorists on their guard. In a school or playground area or in a built-up residential district, a motorist should drive slowly and carefully keep a lookout for children running out into the street.

[85] The court in *Lloyd* further noted the special duty owed to children on a roadway:

> 21 … "Because it is common knowledge that children are likely to run into the road without looking for traffic, there is a special duty towards children: *Beckson v. Dougherty*, [1953] O.R. 303 (Ont.H.C.); *Levesque v. St. Laurent* (1981), 35 N.B.R. (2d) 315, 88 A.P.R. 315 (N.B.Q.B.). The courts have stressed the need to take special precautions, for example, by reducing speed, when children are

> known to be in the vicinity, reference should be made to: *Buck v. Conway* (1975), 9 N.B.R. (2d) 124, 1 A.P.R. 124 (N.B.Q.B.); *Savois v. Mallais* (1983), 50 N.B.R. (2d) 189, 131 A.P.R. 189 (N.B.Q.B.), aff'd on other grounds, (1984), 59 N.B.R. (2d) 18, 154 A.P.R. 18 (N.B.C.A.)."

[86] I agree with the comments in *Lloyd*, but this is not Taylor's situation. The evidence clearly shows that there was no time available for her to avoid the Collision. The facts in *Lloyd*, at para. 7, that are not present before me include the following:

> [7] After considering the evidence of all of the witnesses, weighing issues of credibility and reviewing the submissions, I find the following facts:
>
> …
>
> c) Near the intersection of Folger and Sutherland, Turcott crossed ahead of Carmen and Lloyd (about 10 to 20 seconds). Lloyd did not run. He knew this was a well-traveled street. Lloyd's practice in crossing was to check both ways and walk across if it was safe to do so. Lloyd stepped from the curb. He was not at a crosswalk. He looked both ways for cars but failed to notice the Austin vehicle approaching. Lloyd's view was unobstructed. He failed to see the Austin vehicle as it approached. He should have seen Austin given the speed of the Austin car and the good road and weather conditions. He connected with the Austin vehicle. Lloyd was negligent in the manner he chose to cross the street and proceeded before it was safe to do so.
>
> …
>
> e) Austin was an inexperienced and unlicensed driver. He failed the G1 permit test administered by the Ministry of Transportation.
>
> …
>
> g) Austin knew the area well as a residential area with a school in close proximity. He knew it was near the end of the school day when children would be traveling home and that children sometimes behave unexpectedly.
>
> h) Austin saw Lloyd and his two friends at the side of the road. He recognized them as children. It was a clear day. He had Lloyd in view and under surveillance upon making his turn onto Sutherland from Conacher. His view was unobstructed. Austin drove well within the posted speed limits.
>
> i) Austin made eye contact with Lloyd before the collision and noticed Lloyd looked both ways across the street. He ought to have anticipated that Lloyd might cross the street after he looked both ways. He misinterpreted the child's look to him. Austin proceeded in spite of his

> acknowledgment that he knew that the children looked like they wanted to cross. He tried to rely on the fact "the boy gave a look" that lead him to believe he was not going to cross. Austin failed take appropriate steps to avoid the accident. A prudent driver would have proceeded very cautiously, honked the horn or stopped. Children are too unpredictable to proceed otherwise.
>
> …

[87] Based on these facts in *Lloyd*, Taylor's circumstances are entirely different, in particular, the defendant in *Lloyd* had seen the plaintiff and made eye contact with him.

[88] In *Williams (Guardian ad litem of) v. Yacub*, [1995] B.C.J. No. 2298, 14 B.C.L.R. (3d) 291 (BCCA), the Court stated:

> 8 The appellant says the trial judge was in error. He refers to *Underhill v. Louis*, Unreported, 19 December 1986, New Westminster Registry No. C840586 (B.C.S.C.), where the 11-year-old plaintiff failed in her claim against the driver as the driver had taken the necessary reasonable precautions in the circumstances of that case. The trial judge in *Underhill v. Louis* followed a judgment of this court in *O'Brien v. Mrakic*, Unreported, 13 September 1984, Vancouver Registry No. CA830176 (B.C.C.A.) [reported [1984] 6 W.W.R. 667]. In that case Mr. Justice Macfarlane, speaking for the court, said at p. 4 [p. 669]:
>
> > As I understand counsel, they do not disagree that the test to be applied is as follows: knowing that the actions of children are unpredictable, a driver has a duty to take reasonable precautions for the safety of a child on or near the highway.
> >
> > …
>
> 14 I do not think the trial judge stated a new or unreasonable standard of care. The special precautions to which he referred are those that a reasonable person, about to operate this van on this street at the time in question and in the known presence of children with their known propensities to use the street in the manner he was aware of, ought to have taken. In fact, he acknowledged a duty of care to children on this street when he said if he had backed up he would first have utilized his horn to warn children in the rear blind spot. As he knew he had a blind spot by reason of the van's configuration in front, the same precaution would have been the least a reasonable person in his circumstances should have done.
>
> 15 The trial judge instructed himself in terms of the *O'Brien* case and, in my view, there is no demonstrated error in law and no plain error on the facts has been brought to our attention. That being so, no basis exists for our intervention.
>
> 16 I have no doubt the appellant was sincere in stating he did not expect the child to be where she was and that he believed he had accounted for the children in the

> vicinity, but there was more than mere presence of children to alert him of the risks represented by the circumstances I have outlined.

[89] In *Yacub*, there were other risks to alert the driver that are not present in Taylor's circumstances. The driver knew that children were playing in the area (paras. 5 and 7) and the van had a blind spot. In Taylor's case there is no evidence of any children milling about in the area. The entire time Blair Hendren was on his phone in his vehicle he saw no one else around other than Evan.

[90] In *Buck v. Conway* (1973), 9 N.B.R. (2d) 124, a defendant driver of a large pulp truck was proceeding on a highway at 40 miles per hour. He saw several children ahead and reduced his speed to 35 miles per hour. He did not sound his horn. As he approached the area, a child suddenly ran out into the roadway and, despite quick application of the brakes, the defendant was unable to avoid a collision. The Court described the standard of care on the driver as follows:

> 5 In my opinion a heavy duty of care must be exercised by a person driving on a highway adjacent to which children are gathered or playing. The bussing of children to school is a well established fact of life in this province and drivers must be particularly cautious when children are gathering at their pickup points or are being let off at their discharge points. A driver approaching a group of children assembled at the side of a highway awaiting their bus must drive slowly and carefully and keep a sharp lookout. He must be taken to be aware of the inclination of young children to thoughtlessly step or run onto the roadway. He should sound his horn to warn of his approach and slacken his speed sufficiently to enable him to stop in time to avoid striking any child who does dart onto the roadway. The defendant was negligent in failing to sound his horn and in failing to decrease his speed sufficiently.

[91] This is, once again, another case that relates to children being present. There were 30 children congregated in the area at the time of the collision (para. 2). There is no evidence of the presence of children in the area in Taylor's situation.

[92] In establishing Taylor's duty of care, in my opinion, cases involving children are not particularly helpful. Cases dealing with a driver's ability to react are more applicable. The cases consistently demonstrate that where a driver has no time to react there is no liability. In *Brewster (Guardian ad litem of) v. Swain*, 2007 BCCA 347 a five-year-old on a bicycle collided into the side of a school bus after riding through a stop sign. The trial judge found the bus driver 50% liable and the child's mother 50% liable for lack of supervision. The bus driver was liable on the basis that she was negligent in not seeing the child approach the stop sign on the

bicycle. In allowing the bus driver's appeal and dismissing the action, the Court stated:

> 20 The negligence of Ms. Swain consists of failing to see the infant respondent as he approached the intersection. She did not have to constantly watch the intersecting street simply because she was aware that there were children on it. As stated above, her duty to drive safely also involved (and arguably to a greater extent) being on the lookout for movement of vehicles and pedestrians on the street on which she was travelling. Although she should have been more aware of the children on the side street after her first sighting of them, she did not have to be prepared to attempt avoiding action from the moment she saw them. As was said by Lord Atkinson in *Toronto R.W. Co. v. King*, [1908] A.C. 260 at p. 269 and quoted in the oft-cited decision of *Walker v. Brownlee*, [1952] 2 D.L.R. 540 (S.C.C.):
>
> > Traffic in the streets would be impossible if the driver of each vehicle did not proceed more or less upon the assumption that the drivers of all the other vehicles will do what it is their duty to do, namely, observe the rules regulating the traffic of the streets.
>
> 21 This basic principle is tempered in cases in which there is a need for extra care because of the presence of children on or near the road. But when Ms. Swain saw the infant respondent and the other children there was no need for her to anticipate that one of them might ride through the stop sign or was in any way at risk from the bus. It was not until the bus was closer to the intersection, at a point not determinable on the evidence, that she should have recognized that the unexpected was perhaps about to happen.
>
> 22 This case is governed by the following passage in *Pacheko (Guardian ad litem) v. Robinson*, [1993] B.C.J. No. 154 (C.A.):
>
> > [18] 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. As stated by Cartwright, J. in *Walker v. Brownlee*, [1952] 2 D.L.R. 450 (S.C.C.) at 461:
> >
> > > While the decision of every motor vehicle collision case must depend on its particular facts, I am of opinion that when A, the driver in the servient position, proceeds through an intersection in complete disregard of his statutory duty to yield the right-of-way and a collision results, if he seeks to cast any portion of the blame

> upon B, the driver having the right-of-way, A must establish that after B became aware, or by the exercise of reasonable care should have become aware, of A's disregard of the law B had in fact a sufficient opportunity to avoid the accident of which a reasonably careful and 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.
>
> 23 I think it is correct to say that, although extra precaution is required when a child is seen to be in a dangerous position, it must still be shown that the driver in the dominant position could have avoided the collision.
>
> 24 It is not possible to determine on the evidence how close to the intersection the bus was when the driver should have become aware that the situation was dangerous because of the possibility that the child might enter the intersection without stopping. The bus was a large vehicle. It appears from the whole of the evidence that an impact with the bicycle was unavoidable regardless of evasive action the driver might have taken. At the very least, the respondents have not proven that the driver would have had time to take effective evasive action had she seen the child on the bicycle when the situation was recognizable as being dangerous.

[93] In *Swain*, there was no finding that the negligence of Ms. Swain caused or contributed to the collision. The burden was on the respondents to "establish at trial that Ms. Swain, had she seen the child at the point when she should have become aware that he might enter the intersection without stopping, could have taken any action that likely would have avoided the collision or lessened the impact." (para. 10). Similarly, on the facts of the matter before me, the Collision happened too quickly for Taylor to take effective evasive action, regardless of whether she was negligent or not just prior to the Collision. There must be something that Taylor did wrong to attribute negligence to her. There is no evidence of that before me.

[94] In *Annapolis County District School Board v. Marshall*, 2012 SCC 27, a young boy ran out into the highway and was struck by a school bus. The Supreme Court of Canada addressed the statutory right-of-way provisions that govern the rules of the road:

> 7 I agree with the appellant that the Court of Appeal failed to appreciate the dual function of statutory right-of-way provisions. Not only do such provisions inform the assessment of whether a pedestrian was contributorily negligent by failing to yield a right of way, they can also help determine whether a driver breached the applicable standard of care in the circumstances. In this case, even though Johnathan's contributory negligence had been ruled out as a matter of law, the

> statutory right-of-way provisions continued to inform the standard of care that Mr. Feener owed to all pedestrians. The jury needed to be told that, absent special circumstances, where the driver has the right of way, he or she can reasonably proceed on the assumption that others will follow the rules of the road and yield the right of way to drivers.

[95] It was agreed by the parties in the Agreed Statement of Facts that Evan was of average intelligence and skill and experience for a twelve-year-old riding bicycles. His parents knew he was riding, and he knew the rules of the road. Therefore, Taylor could proceed on the assumption that Evan would follow the rules of the road and yield the right of way to her.

[96] In *Savard-Nash v. Kenny*, 2018 NBQB 131, the plaintiff attempted to cross a public roadway on a dirt bike and was struck by the defendant. The Court found that the defendant was not negligent. The plaintiff placed the defendant in the "agony of collision" by suddenly crossing the roadway. The Court concluded:

> 48 At that time and place the defendant Kenny was entitled, absent evidence to the contrary, to assume that the plaintiff was of an age to be lawfully permitted to operate the "mini bike" and, consequently, that the plaintiff would understand and obey the rules of the road:
>
> > ... Both were entitled to assume that he would respect their undoubted right of way. It is settled law that a trial judge may not find "negligence ... on the part of the driver in the dominant position if there is no evidence on which [the judge] could reasonably find that such driver, who was in no other way negligent, ought to have been aware that the other driver was not giving him the statutory right of way". See Horsley & Foster, Manual of Motor Vehicle Law, 2d. ed. (Toronto Carswell, 1974) at p. 238.
> >
> > (*McIlveen v. McAdam, supra* at para. 25; See also: *Narvey v. Tuazon*, 2002 BCSC 1448 (B.C. S.C.) at para. 7)
>
> iii.) Conclusion
>
> 49 In the end, the Court concludes that the plaintiff has failed to establish on a balance of probabilities that after the defendant Kenny became aware that the plaintiff was not yielding the right of way (or by the exercise of reasonable care Kenny should have become aware the plaintiff was not yielding the right of way) the defendant "had in fact a sufficient opportunity to avoid the accident of which a reasonably careful and skilful driver would have availed [herself]". In other words, the Court finds that the defendant Kenny was placed in the "agony of collision" by the plaintiff suddenly crossing the roadway in front of her. She was not negligent.

[97] Similarly, Evan placed Taylor in the "agony of collision." The defence of agony of collision recognizes that a court must not hold a driver confronted with a sudden emergency that is not of their own making "to a standard of conduct when one sitting in the calmness of a courtroom might later determine was the best course": *Canadian Pacific Ltd. v. Gill et al.*, [1973] 4 W.W.R. 592 (SCC), at para. 19. According to witnesses, Taylor was driving at a slow speed while Evan was driving very fast. The preponderance of evidence is that Taylor had no opportunity to avoid this Collision.

Taylor met the required Standard of Care

[98] Counsel for the Plaintiff argued that Taylor should have slowed down because of the approaching car. I find that Taylor is not expected to slow her car to a crawl because of an approaching car. That is not a reasonable expectation whether she was an experienced or inexperienced driver. The evidence is that she was already going below the posted speed limit and she testified that she did reduce her speed when she saw the approaching vehicle.

[99] Taylor was entitled to assume that other users of the road would follow the rules of the road. When a driver has the right-of-way, it is settled law that they can reasonably proceed on the assumption that other users of the highway will follow the rules of the road.

[100] The *MVA* sets out the rules of the road in Nova Scotia. The applicable provisions of the *MVA* that assist in determining whether a driver in these circumstances breached the applicable standard of care are as follows:

> 85(1) Bicycle, animal, push-cart or wheelbarrow
>
> Every cyclist…shall be subject to the provisions of this Act applicable to a driver of a vehicle, except those provisions which by their very nature can have no application.
>
> 101 Careful and prudent speed
>
> A person operating or driving a vehicle on a highway shall operate or drive the same at a careful and prudent rate of speed not greater than is reasonable and proper, having due regard to the traffic, surface and width of the highway and all other conditions at the time existing, and a person shall not operate or drive a

vehicle upon a highway at such speed or in such a manner as to endanger the life, limb or property of any person.

110(1) Duty to drive on right

Upon all highways of sufficient width…the operator or driver of a vehicle shall operate or drive the same upon the right half of the highway…

118(1) Rules respecting intersection

Wherever practical the driver of a vehicle intending to turn at an intersection shall do as follows:

…

(b) approach for a left turn shall be made in the lane for traffic to the right of and nearest to the centre line of the highway and the left turn shall be made by passing to the right of the centre line where it enters the intersection...

119(1) Signal required

The driver of any vehicle upon a highway before starting, stopping or turning from a direct line shall first see that such movement can be made safely…and, whenever the operation of any other vehicle may be affected by such movement, shall give a signal as required in this Section plainly visible to the driver of such other vehicle of the intention to make such movement.

123(1) Entering a highway

The driver of a vehicle entering a highway shall yield the right of way to all vehicles approaching on the highway.

133(1) Stop sign

…the traffic authority…may designate particular intersections and erect stop signs at one or more entrances thereto, and whenever any such signs have been so erected it shall be an offence for the driver of a vehicle or the motorman of a street car to fail to stop in obedience thereto, except where directed to proceed by a peace officer or traffic control signal.

171(4) Prohibited conduct or on place to ride bicycle

> A cyclist who is not riding in a bicycle lane shall ride as far to the right side of the roadway as practicable or on the right-hand shoulder of the roadway unless the cyclist is
>
> (a) in the process of making a left turn in the same manner as a driver of a motor vehicle;
>
> (b) travelling in a rotary or roundabout;
>
> (c) passing a vehicle on the vehicle's left;
>
> (d) encountering a condition on the roadway, including a fixed or moving object, parked or moving vehicle, pedestrian, animal or surface hazard that prevents the person from safely riding to the right side of the roadway;
>
> (5) A cyclist on a highway shall ride in the same direction as the flow of traffic.

[101] These provisions inform the way in which this Court should assess Taylor's actions in the circumstances.

[102] The jurisprudence supports the proposition that drivers will not be held liable when they had no time to react. I find that Taylor was not expected to anticipate that other users of the roadway would breach multiple infractions against the *MVA* by (a) driving on the wrong side of the road, (b) failing to stop at a stop sign, and (c) entering the wrong side of the road on Fraser Road.

[103] In *McIlvenna v. Viebig*, 2013 BCCA 411, the British Columbia Court of Appeal dismissed a six-year-old plaintiff's claim against a defendant driver on similar grounds. There, the child was injured when he made a left turn by cutting a corner at an intersection on his bicycle. The Court of Appeal endorsed the finding of the trial judge, in that the cyclist was not there to be seen until it was too late for the driver to react.

[104] In *Chen (Litigation Guardian of) v. Beltran*, 2010 BCSC 302, the defendant driver struck an 11-year-old boy who had run a red light while riding a skateboard. The defendant had been travelling the speed limit and there had been no prior indication of such a sudden and unexpected situation. There was no evidence of children in the area. The driver had no time to react and as such, was not held liable. The Court stated:

> 33 Mr. Beltran testified he did not see any children in the area of the intersection. Ms. Fernandez did not recall any children present although she said she was in a state of shock immediately after the accident.
>
> 34 I accept Mr. Beltran's evidence he was travelling below the posted speed limit and in a manner consistent with the speed of other traffic travelling in his direction. There is no evidence to suggest otherwise. I do not accept the plaintiff's argument that given the road conditions, steepness of the hill and the fact there was a "blind spot" on his right Mr. Beltran should, as a reasonably prudent driver, have been driving at a slower rate of speed. As Ms. Somogyi said, the defendant driver would not have been able to stop even if he had been travelling at 30 or 20 kph.

[105] In *Currie (Guardian ad litem of) v. Fitt*, 1996 CarswellBC 2932, [1996] B.C.J. No. 2882 (S.C.), a four-year-old child bolted from a driveway that had been obstructed to passing motorists by tall grass and was struck by a vehicle. Even though the British Columbia Supreme Court found that the defendant driver ought to have been aware of the presence of children due to a nearby playground and therefore should have been driving slower, the fact that there was such a brief moment in time between apprehension and impact meant that it was impossible for the driver to stop in time.

[106] The Court went on to make the following findings with respect to the actions of the defendant which are applicable to Taylor's situation, particularly her speed, lack of presence of children, and the lack of time to react:

> 42 In this case, I find that the likely speed of Mr. Fitt at the time of impact was about fifty kilometres per hour. I find that that was too fast for a residential area, in an area where there was a playground, where to his knowledge there was often children around, and where the presence of children has been agreed by counsel for the defendant to be foreseeable. I consider thirty kilometres an hour to be a reasonable speed for him to have been travelling at that time. I find that the plaintiff, Jeffrey Currie, did run out onto the road; that he did not stop at the edge of the road before doing that. I find that the defendant, Fitt, did not see him before then.
>
> 43 On the critical issue of when the defendant could reasonably have been expected to see Jeffrey I find that if he was going the more reasonable speed of thirty kilometres per hour, he would likely have seen him sooner. However, I do not consider that the time that he was likely to have seen him sooner to be significant.
>
> …
>
> 48 I find that when Jeffrey ran out, the Fitt vehicle was a very short distance away. The evidence given by Mr. Fitt was four to five feet. Mr. Funk said it was

one foot at most but, as I noted earlier, he appears not to have noticed Jeffrey until after the others did. Mr. Pirie said that Jeffrey was about five to eight feet away when he first noticed him and, as I said, I consider his evidence to be fairly good, and consider that likely to be the earliest that Mr. Fitt could reasonably have seen him.

49 I find that with such a short distance between the time Jeffrey was seen and the point of impact, that even if Mr. Fitt had been going considerably slower, what I consider to be a reasonable speed of thirty kilometres per hour, he would have been unable to stop in time to avoid a collision.

50 According to Mr. Brown, at thirty kilometres per hour, which is the speed conceded by the plaintiff's counsel to be reasonable, the vehicle would have been travelling at twenty-seven and a half feet per second, approximately. Taking a minimum perception and reaction time for an alert driver (that's a person who knows something will happen) that's point six of a second; so in that time the car would have gone about sixteen and a half feet, and it then takes additional time for braking. I thus conclude that, even if the vehicle had been going slower, had been going thirty kilometres per hour, the accident still would have occurred.

51 For a finding of liability, the negligence of the defendant, of course, must be the cause, or at least a contributory cause, to the damage sustained by the plaintiff. I find in this case that the speed of the Fitt vehicle was not the cause, or a contributing cause, to the accident. The essential facts are that Jeffrey Currie ran onto the road; that it was such a short distance before the Fitt vehicle that, even if he had been going slower, the time required to perceive the danger, to react and brake, he would still have struck him.

52 I also do not find his other actions to be below the appropriate standard of care. A number of suggestions were made by counsel for the plaintiff. Firstly, that he should have sounded his horn when he saw Amanda Currie. I consider that would be a very unusual thing to do, that there was no reason to, as Amanda was not on the roadway, she was off to the side. And as I have said, in my notes there was no indication that he saw, or that Mr. Pirie saw, that she was holding a squirt gun.

53 It was suggested that he should have flashed his lights when he saw Amanda. That would have been even more unusual to do in these circumstances, and likely would have made no difference in any event, in view of the brightness of the light conditions.

54 It was suggested that he should have seen the children from the viewpoint at his friend's before driving the vehicle. I do not consider it reasonable to expect a person out of car, socializing with friends, to note circumstances which he should then consider some minutes later when he is driving the vehicle.

55 It was suggested that he should have covered his brake when he saw Amanda. Again, based on my findings of fact of where she was positioned, there

> was no reason for him to do that. At that point he did not see any young children, and Amanda was off to the side of the road.
>
> 56 Counsel for the plaintiff did present a number of scenarios, which he suggested would have led to no motor vehicle accident. However, those scenarios were premised on Mr. Fitt taking extra precautions after he saw Amanda Currie, and, in two of the four scenarios put forward, that he would have braked at that point. As may be assumed from what I've said earlier, I do not accept that that was a reasonable thing to have done. There was no apparent hazard at that time. There was nothing in her position or her actions to alert Mr. Fitt to the presence of Jeffrey Currie, and in particular that he would run out into the roadway. The fact that she had a squirt gun, in itself, I do not consider to be sufficient. The other two scenarios assumed braking one-third and two-thirds of the distance to the point of impact. But, again, there was still no hazard apparent at that time, and there was nothing to warn Mr. Fitt of the possibility of Jeffrey running out onto the street.
>
> 57 I conclude, then, that the defendant was not at fault in the accident. The presence of Jeffrey Currie running out into the road was not reasonably foreseeable.
>
> 58 I conclude that the defendant was not meeting the standard of care of a reasonably prudent driver in travelling at fifty kilometres per hour. However, even if he was travelling the reasonable speed of thirty kilometres per hour at the time he could reasonably be expected to have first seen Jeffrey, there was no way to avoid the collision.
>
> 59 As I've said earlier, then, the acts of the defendant did not cause or contribute to the accident, and the action must thus be dismissed.

[107] The caselaw indicates that for a driver to be found liable for failing to avoid an accident requires a finding that the driver was reckless in some way in the face of the collision and that the driver could have avoided it in some way. That is not Taylor's situation. The evidence of lay witnesses Blair Hendren and Nancy MacDonald make this clear. The evidence of Zwicker indicates that Taylor had a mere 2.1 seconds to apprehend the risk of impact, react, and avoid the Collision. Taylor's acts did not cause or contribute to the Collision. The Collision was inevitable, and this is supported by Zwicker's findings. Taylor cannot be faulted in these circumstances.

[108] There is no need to consider contributory negligence because I find no negligence on the part of the Defendants.

Further Submissions

[109] In closing submissions, counsel for the Plaintiff referenced the duty on Taylor to scan the intersection. I invited further submissions on this point as neither counsel could point to an authority on that point at the time. Counsel for the Plaintiff provided the following provisions from the *MVA*.

[110] Section 100(1) imposes a duty on all drivers to drive in a careful and prudent manner having regard to all the circumstances:

> Duty to drive carefully
>
> 100 (1) Every person driving or operating a motor vehicle on a highway or any place ordinarily accessible to the public shall drive or operate the same in a careful and prudent manner having regard to all the circumstances.

[111] Section 122 governs the rights of way at intersections and states:

> Right of way or left turn at intersection
>
> 122 (1) The driver of a vehicle approaching an intersection shall yield the right of way to a vehicle which has entered the intersection, and when two vehicles enter an intersection at approximately the same time, the driver of the vehicle on the left shall yield to the driver on the right.

[112] Counsel for the Plaintiff provided the following authorities as well in support of their position. In *Walker*, the Supreme Court of Canada indicated that even a driver with the right-of-way has an obligation to prevent a collision if possible (para. 47).

[113] Two additional authorities were provided that address the duty of a driver entering an intersection. In *Whitehead v. Plouffe*, [2001] NSJ No 490 (NSSC), the court considered the duty of a driver turning left, pursuant to s. 122(3) and 122(5) of the *MVA*. Justice Robertson attributed 20% liability to a driver who was struck while completing a left turn due to the oncoming driver running a red light. Justice Robertson found that though the collision was caused by the driver who ran the red light, the left-hand turning driver did not exercise sufficient caution and due care. The left-hand turning driver should have seen the other vehicle accelerating as it approached the intersection. Justice Robertson found that, had she been keeping "a more watchful eye, she might have been able to avoid the collision", although her responsibility was diminished by the actions of the other driver (para. 7).

[114] The second case regarding entering an intersection was *Erickson v. Metro Transit*, (2000) 189 NSR (2d) 94, where a bus driver was found to be 80% liable

and the plaintiff driver 20% liable for a collision occurring in the Armdale Rotary. The bus driver was driving too fast and failed to yield, but the plaintiff driver failed to look and see the bus. The court stated:

> 5 Erickson testified that she was "looking straight ahead" when a bus came into the lane directly in front of her. The bus was merging into the bypass lane, moving to its right through a gap in a concrete lane divider. Only buses are permitted to travel through this gap. Erickson testified, "It came across in front of me like... He came across in front of me ... cut me off." And subsequently, "He came across right in front of me ... came from the driver's left-hand side ... he hit me."

[115] The court went on to make findings at paras. 63-67:

> 63 The plaintiff's expert, Smith has stated at p. 3 of his Supplementary Engineering Report in evidence that:
>
> > Assuming that the speed of the bus was 50 KPH (my "50/30 KPH" scenario), Mrs. Erickson would have had to look through her driver's door window to see this second bus at 2 seconds before impact. At this moment the "50 KPH" bus would have been outside the range of her left 90° peripheral vision if she was looking towards Quinpool Road...
>
> 64 A prudent driver in the bypass lane approaching the bus gap is doing more than looking straight ahead.
>
> 65 A prudent driver is on the lookout for buses in the Rotary approaching the gap and this would involve looking through her driver's door.
>
> 66 Had Erickson been doing so, she might well have been able to alter the speed of her vehicle so as to have avoided the collision.
>
> 67 The failure of the plaintiff, Erickson to keep a proper lookout in these circumstances is also negligence.

[116] The two cases cited by the Plaintiff are distinguishable from the facts of the case before me. In *Whitehead*, the issue before the court was whether the defendant Baker was liable for a collision that occurred while she was proceeding through an intersection and making a left-hand turn. In *Erickson*, the court heard a case where the plaintiff driver was proceeding through the Armdale Rotary and struck a bus. Both cases concern the drivers' obligations to maintain an appropriate lookout while completing a turn in the face of oncoming traffic or when traversing a busy rotary/roundabout with a merging bypass lane for buses. Neither case considered the scenario before me where a driver proceeding straight with a right-of-way collided with another user of the highway who failed to

observe traffic controls and who entered the former's lane of travel in an unexpected manner.

[117] I note that the Plaintiff was not able to provide a provision in the *MVA* that explicitly creates such a duty, and that the jurisprudence relied upon by the Plaintiff is distinguishable from the situation before me.

[118] For instance, in *Walker*, the Plaintiff submits, Cartwright J. held that a driver with the right of way has an obligation to prevent a collision if possible (para. 47). Indeed, they do, but the full context of Cartwright J.'s comments need to be considered. He went on to say that for a driver who has the right of way to be found in any way negligent, there must be some evidence that the driver had time to become aware of the driver who was violating the rules of the road (para. 51).

[119] I have already found that Taylor had no time to become aware of Evan's contravention(s) of the *MVA* and respond in time to prevent the Collision.

[120] In *Lawrence v Bateman*, [1996] N.S.J. No. 850, the plaintiff driver had been travelling down a thoroughfare street with no obligation to stop or slow down while the defendant driver was proceeding along a side street that was controlled by a stop sign. The defendant did not see the stop sign and collided with the plaintiff. The plaintiff "did not see the defendant's…vehicle until it was virtually in front of her": para. 3. The defendant argued the plaintiff should be partially liable.

[121] MacAdam J. concluded that the plaintiff should bear no liability for the accident because the cause of the accident was not the plaintiff's failure to observe the defendant's vehicle, but rather, the defendant's failure to bring his vehicle to a stop at the sign. This decision was distinguished by the court in *Whitehead* but is more helpful for my purposes in reaching a decision in this matter based on the similar circumstances. In *Whitehead*, Robertson J., speaks to the different circumstances in *Lawrence*:

> 7 … Her counsel cited the case, *Lawrence v. Bateman* (1996), 162 N.S.R. (2d) 257 (N.S. S.C.), to support the premise that she should be relieved of any liability as her actions were not the cause of the accident. However that case is distinguished on its facts, where the defendant therein was driving on a through highway and had no legal obligation to stop other than the common law duty to observe and take precautions in the face of a vehicle approaching from a side street. In the present case the defendant Mrs. Baker, is under a statutory duty when proceeding through an intersection and executing a left-hand turn to satisfy

> herself that such a turn can be completed in safety. Had Mrs. Baker been keeping a more watchful eye, she might have been able to avoid the collision although her responsibility is diminished by the fact that the defendant Plouffe ran a red light and proceeded into the intersection at an accelerated rate of speed. *McDougall v. Riedel, supra*.

[122] In *Whitehead*, there is no suggestion that a driver has an obligation to scan side streets for other users of the highway, but simply an obligation to react "in the face of a vehicle approaching" and, I would add to that, only if there is time for the driver to become aware of another driver who is violating the rules of the road. The evidence before the Court in this matter is that Taylor had no such opportunity.

[123] I find that a driver with a right-of-way approaching an intersection is still obligated to prevent a collision, but only within reason. It would not be reasonable for this Court to make a finding that Taylor was required to scan for oncoming traffic, approaching from the wrong side of a road, controlled by a Stop sign, and entering her lane. Drivers who have the right-of-way, can reasonably proceed on the assumption that other users of the highway will follow the rules of the road.

Conclusion

[124] I am satisfied by the preponderance of evidence that Evan was riding fast on the wrong side of Charles Road, and that he made a sharp left turn without stopping, trying to cut the corner, turning into the left side of Fraser Road from his vantage point into Taylor's lane.

[125] There is no duty for a driver proceeding on a thoroughfare with the right-of-way, as Taylor had been doing, to scan a side street for individuals contravening the rules of the road. Rather, Taylor is required to proceed normally, in a careful and prudent manner, and take action if reasonably necessary.

[126] Taylor always had her eyes on the road. What was going on in the intersection warranted her attention - a car approaching, and cars parked on the road. This is what was concerning, rather than a child riding a bike fast, on the wrong side of the road, going through a Stop sign, and entering her lane.

[127] To hold Taylor to such a standard would be a manifestation of Lord Atkinson's warning that: "Traffic in the streets would be impossible if the driver of each vehicle did not proceed more or less upon the assumption that the drivers of

all the other vehicles will do what it is their duty to do, namely, observe the rules regulating the traffic of the streets".

[128] Taylor failed to do nothing that a reasonable driver would have done. The evidence is that Taylor was driving safely, her eyes were forward paying attention to the road where she was going, she was driving under the speed limit around 40 km/hr. The "children playing" sign is on Charles Road, not on Fraser Road. Finally, Evan was not cutting across Taylor's lane, he was entering it, consistent with the evidence of Taylor and Blair Hendren. Taylor saw the bicycle at the very last fraction of a second and could not avoid the Collision. The expert witness, Zwicker, concluded that Taylor did not have enough time to avoid the Collision.

[129] The lay witnesses and expert testimony, as well as Taylor's own testimony affirm that at the material time, Taylor had been operating her vehicle in a careful and prudent manner. In any event, like in *Fitt*, the evidence has established that Taylor did not have time to react before the Collision.

[130] The Defendants have satisfied the onus requiring them to prove Taylor met the requisite standard of care while operating her vehicle on May 2, 2013. The test for negligence is not what Taylor could have done, but whether what she did was reasonable. There must be something a reasonable driver could have done differently to demonstrate what Taylor did fell below the standard of care. I cannot find anything a reasonable driver would have done differently.

[131] The evidence supports a finding that Evan made no attempt to stop, he was going fast, and, based on the expert evidence, was moving too fast for any driver on Fraser Road to anticipate he would be driving on the wrong side of the road, drive through a Stop sign, and enter Taylor's lane. The Collision was unavoidable. The preponderance of evidence supports the conclusion that Taylor was not negligent in this Collision.

[132] The Plaintiff's action is dismissed in its entirety, with costs to the Defendants. If the Parties are unable to agree to costs, within 30 days of the release of this decision, I will receive submissions from the parties. I would ask counsel for the Defendants to prepare the Order.

Bodurtha, J.