

CANADA / JUDGMENT

Bates v. Ewachniuk et al.

2001 BCSC 71

COURT

Supreme Court of British Columbia

DECIDED

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2001 BCSC 71 Docket:

974810

Registry: Victoria

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

JAMIE ROBERT BATES

PLAINTIFF

AND:

ALEXANDER THEODORE EWACHNIUK

and

A. TED EWACHNIUK & ASSOCIATES

DEFENDANTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE OWEN-FLOOD

Counsel for the Plaintiff Deborah Acheson, Q.C.

and Kevin W. Whitley

Counsel for the Defendants Albert M. Roos

and Errin A. Poyner

Date and Place of Hearing/Trial: November 28, 29 & 30

December 1, 7 & 8, 2000

Victoria, BC

General Background

- [1] This is an action for solicitor's negligence. In 1989 the plaintiff retained the defendants, Mr. Ewachniuk and his law firm, to represent him regarding a motor vehicle accident (the "Accident") in which he suffered a closed head injury.
- [2] The Accident occurred at approximately 7:40 p.m. on 31 May 1989. At that time, the plaintiff was driving his Mustang north on Bradner Road in the municipality of Matsqui. He was driving slowly and proceeded to turn left into the driveway of the residence of Larry Martin at 3653 Bradner Road. While making the left turn, the plaintiff's vehicle was struck by a police car. The police car was owned by the Municipal District of Matsqui (the "Municipality"), and driven at the time by a member of the Matsqui Police Department, Constable Howard Olson.
- [3] The defendants commenced action against Constable Olson, the Insurance Corporation of British Columbia ("I.C.B.C."), and the Municipality. However, the defendants failed to give the Municipality the statutory notice within 2 months, mandated by s.755 of the Municipal Act, R.S.B.C. 1979, c.290.
- [4] In the result, Skipp J., at the commencement of the trial in 1992, released the Municipality from the action, finding that the notice had not been served and that there was no reasonable excuse for the omission.
- [5] The learned trial judge did permit the balance of the action against Constable Olson to proceed, on the basis of s.21 of the Police Act, S.B.C. 1988, c.53. This restricts the personal liability of the police constable to acts found to be grossly negligent, or malicious, or to constitute wilful misconduct.
- [6] Section 20 of the Police Act also stipulates that a municipality is responsible for the simple negligence of its police officers.
- [7] The jury found that the plaintiff had failed to establish liability against Constable Olson for gross negligence. The issue of simple negligence was not determined due to the missed limitation period against the Municipality.
- [8] In this action, the plaintiff alleges that the defendants were negligent in missing the limitation period and are therefore liable to the plaintiff.
- [9] The plaintiff alleges that the defendants may be liable in two ways. First, was Constable Olson negligent in causing the Accident, whether completely or based on a division of liability with the plaintiff. Second, notwithstanding the likely original outcome on the issue of negligence, if it was possible that the original action would have been settled for a monetary amount, then the defendants should be liable to compensate the plaintiff in that amount.

[10] The defendants' position is that the plaintiff had, and has, no claim in negligence against Constable Olson. Alternatively, the defendants' argue that if Constable Olson was guilty of negligence, then the plaintiff was guilty of contributory negligence in failing to keep a proper, or any, lookout for other traffic. The defendants further contend that not only does the plaintiff not have a claim for negligence against the defendants, but the plaintiff does not have a claim with a settlement value.

Admissions of the Defendants

[11] Pursuant to the plaintiff's notice to admit, the defendants admit the following:

1. The plaintiff was injured in an Accident that occurred on 31 May 1989.
2. The Accident occurred in or about the 3653 block of Bradner Road, in the District of Matsqui, in the Province of British Columbia.
3. The Municipal Police Department of the District of Matsqui provided police services to the Corporation of the District of Matsqui.
4. On a date between 31 May 1989 and 16 June 1989, the plaintiff retained the defendants to represent him in a legal claim regarding the Accident.
5. The plaintiff was competent to instruct counsel and a guardian ad litem was not appointed.
6. In 1989, the defendants were aware that section 755 of the Municipal Act, R.S.B.C. 1979, c.290 required that a notice of claim be given to a municipality within two months of an accident.
7. The defendants failed to notify the Municipality within the required two months.
8. Prior to the trial in 1992, the defendants were not aware that s.755.1 of the Municipal Act disallowed an action against a municipal officer as an individual unless the officer was guilty of dishonesty, gross negligence, or malicious or wilful misconduct.
9. Prior to the January 1992 trial:
 - a) the defendants did not advise the plaintiff, in writing or verbally, to seek independent legal counsel regarding the missed limitation;
 - b) the defendants did not advise the plaintiff that the usual legal effect of a missed limitation is that the defendant is dismissed from the lawsuit;
 - c) the defendants did not advise the plaintiff that he had a potential cause of action against the defendants for missing the limitation.
10. During and after the January 1992 trial:
 - a) the defendants did not advise the plaintiff, in writing or verbally, to seek independent legal counsel regarding the missed limitation;

- b) the defendants did not advise the plaintiff that he had a potential cause of action against the defendants for missing the limitation.

ISSUES

- [12] There are two issues. First, were the defendants negligent in their handling of the plaintiff's retainer concerning the Accident? Second, if the defendants are guilty of negligence, has the plaintiff established negligent driving on the part of Constable Olson causing the Accident or a possibility that a settlement with a monetary value would have occurred?

Issue I - were the defendants negligent in their handling of the plaintiff's retainer concerning the Accident?

- [13] I have already noted that the defendants concede that they were indeed retained as alleged and did fail to serve the notice on the Municipality within 60 days under the Municipal Act.
- [14] The defendants have focussed their arguments on the second issue only, namely, whether or not negligent driving has been established on the part of Constable Olson.
- [15] That being so, I accept the evidence of the plaintiff that the defendant, Mr. Ewachniuk, did not explain to the plaintiff, after the claim against the Municipality was dismissed, that this was because of the missed limitation period. I accept that all Mr. Ewachniuk told the plaintiff was that the judge had erroneously preferred the provisions of the Municipal Act to those of the "Highway Act".
- [16] I accept that the plaintiff, if he had been told about the missed limitation and its significance, would have retained new counsel in 1989, in time for the trial.
- [17] I accept that Mr. Ewachniuk told the plaintiff that he had been able to negotiate a settlement of the defendants' claim for the costs awarded by the trial judge against the plaintiff. I accept that the defendants agreed to abandon their claim for costs in return for the plaintiff's agreement to abandon the notice of appeal against the dismissal of the case against the Municipality that had been filed.
- [18] I accept that, after the trial in 1992, Mr. Ewachniuk presented the plaintiff with a bill for approximately \$18,700 for disbursements. At a later date, Mr. Ewachniuk told the plaintiff's father that it would not be necessary for the plaintiff to pay the bill in question.
- [19] I accept that the plaintiff telephoned Mr. Ewachniuk's office on a few occasions in the years following the 1992 trial, to attempt to meet Mr. Ewachniuk for lunch, but he was not able to arrange a meeting. I accept that the plaintiff believed for many years that Mr. Ewachniuk had represented him well and that he told many people that Mr. Ewachniuk was a "great lawyer".

- [20] I further accept that the plaintiff did not discover that Mr. Ewachniuk had missed the statutory limitation period in question until some 5 years after the trial. In 1997 the plaintiff investigated his file and discovered the reasons of Skipp J. releasing the Municipality because Mr. Ewachniuk had failed to notify them within 60 days.
- [21] I accept the expert opinion of Robert Doell, an eminent counsel, that the defendant, Mr. Ewachniuk, failed to meet the standard of practice of a reasonably competent personal injury lawyer practising in British Columbia between 1989 and 1992.
- [22] Mr. Ewachniuk's conduct speaks for itself. No further elaboration is required. He is guilty of professional negligence as alleged.
- [23] The effect of my finding that the defendants were negligent in handling the plaintiff's retainer is that I must consider the merits of the unheard original action in negligence against Constable Olson.
- [24] I accept the law enunciated by Reid J. in *Prior et al v. McNabb* (1976), 16 O.R. (2d) 380, 78 D.L.R. (3d) 319. In that case, the plaintiff had a civil suit for assault against a police officer. However, plaintiff's counsel failed to commence the action within the 6-month limitation period prescribed under s.11 of the Public Authorities Protection Act, R.S.O. 1970, c.34. The plaintiff sued his lawyer for missing the limitation period. Reid J. held that the solicitor was clearly negligent. He noted that the limitation period under the Public Authorities Protection Act is one that solicitors are expected to know. Regarding the process to be followed, Reid J. at p.382 said:

It has been said by our Courts that the question I must ask myself is, would Robert Prior ... probably have succeeded in a suit for damages against the policeman? See *Banks et al. v. Reid* (1974), 6 O.R. (2d) 404 at p.415, 53 D.L.R. (3d) 27 at p.38, and cases collected there.

To do this it is said that I must attempt to try the hypothetical claim against the policeman: see *Fyk et al. v. Millar et al.* (1973), 2 O.R. (2d) 39, 42 D.L.R. (3d) 684. In other words, I must conduct a trial within a trial. But that may not always be possible. Lapse of time or the absence of witnesses might preclude a court from conducting a substitute trial in order to determine whether the claimant would probably have succeeded. In those circumstances, is a claimant out of Court?

I think the answer is that he is not. He may well have lost something of value through negligence. A Court would have to value the loss as best it could in spite of these difficulties. The issue was raised squarely in *Kitchen v. Royal Air Forces Ass'n et al.*, [1958] 2 All E.R. 241.

- [25] Holding that there is a scale of possibilities from certainty of victory at the top to certain failure at the bottom, and that anything above certainty of failure gives a right of damages, Reid J. stated at p.384:

... the question I must ask and answer is simply: did Robert or Elsie Prior have a right of value, a chose in action of reality and substance, arising out of Robert Prior's injury at the hands of the policeman?

[26] In the result, I am satisfied that the plaintiff had a right of value, that is the ability to sue Constable Olson for negligence, which right he lost by virtue of the negligence of the defendants in this case.

Issue II - has the plaintiff established negligent driving on the part of Constable Olson causing the Accident, or a possibility that a settlement with a monetary value would have occurred?

The Law on Overtaking and Overtaken Vehicles

[27] I am mindful of the decision of the Court of Appeal in *Samograd v. Collison*, [1995] B.C.J. No. 2597 (Q.L.), (13 December 1995) Vancouver Registry No. CA017371 (B.C.C.A.). In that case, the court addressed the issue of whether there was a greater obligation on the passing vehicle to avoid a collision than on the vehicle being overtaken. Speaking for the majority, Finch J.A. upheld the trial judge's decision and stated at paras. 61-63:

The question is whether the learned trial judge erred in law when he said: "I find that the greater obligation is on the overtaking vehicle to ensure that it can do so in safety". No applicable statutory provision gives either party a "right-of-way". Apart from statute, it was not suggested that any other legal principle would impose a greater duty of care upon the driver of the overtaking vehicle than on the driver of the left-turning vehicle. If the judge's statement that the greater obligation is on the overtaking vehicle is seen as a statement of law, then I would with respect agree that the learned judge was in error.

However, I do not interpret that part of his oral reasons for judgment that way. It is clear from the rest of the paragraph in which the criticised statement appears, and from the judgment read as a whole, that the judge regarded the parties' respective obligations as entirely dependent upon the facts of the case. The driver in the best physical position to foresee a possible collision was the overtaking driver. That was so because, having pulled out to pass, he had only to keep a look-out for what was ahead of him, whether on-coming traffic or vehicles he was intending to pass. The left-turning driver, however, had to keep a look-out in both directions, that is, for on-coming traffic approaching him as well as for traffic behind him which might be in the course of overtaking.

As I understand the judge's reasons in their entirety, he considered the overtaking driver had the better opportunity to see the potential for a collision before it occurred and therefore had a correspondingly greater opportunity to avoid it. His "greater obligation" to ensure that he could pass in safety arose from the circumstances of the case rather than from any higher legal duty, statutory or otherwise.

[28] I find this rationale applicable to the case at bar. The issue of liability for the Accident is one determined by the facts of the case, interpreted under the applicable statutory provisions.

Findings of Fact Surrounding the Accident

- [29] Shortly before the Accident, Constable Olson was in his police car at the beginning of his shift. He was on the Fraser Highway near the intersection with Bradner Road in Matsqui. He learned from the police dispatcher that another police officer, Constable Schultz, having attempted unsuccessfully to flag down the rider of a dirt bike in the area between Harris Road and Oland Road, had become involved in a pursuit and had lost sight of the dirt bike rider.
- [30] Constable Olson also learned that another police car, operated by Constable Powell, having moved into the area of Ross Road and Harris Road had reported that the dirt bike rider was proceeding westbound on the railway tracks towards Bradner Road. Constable Olson heard that Constable Powell was remaining at Ross Road and Harris Road and that Constable Wanamaker, also in a police car, was attending at Bradner Road and the railway crossing.
- [31] Constable Olson, of his own volition, resolved that he too would take part in the pursuit. Accordingly, he made a right turn onto Bradner Road, and proceeded north with a view to intercepting the dirt bike rider at the point where the railway crossing intersects Bradner. Upon turning onto Bradner, Constable Olson activated his "wigwag" lights, and also his red and blue tower lights.
- [32] Constable Olson was somewhat familiar with the area around Bradner Road, having recently joined the Matsqui Police Department. He said he decided to join in the "pursuit", as he referred to it in his report to the officer investigating the Accident, because he knew that the intersection of the railway track with Bradner Road was some miles away. He did not know exactly how many miles.
- [33] On the evidence, I find as a fact that the intersection of the railway track with Bradner Road was 2 miles north of the intersection of Bradner Road and the Fraser Highway.
- [34] I find that Bradner Road is a relatively straight, two-lane rural road from its intersection with the Fraser Highway, up to, including, and beyond the scene of the Accident.
- [35] I accept that when Constable Olson decided to intercept the dirt bike rider, the only information he had was that the rider had violated the Motor Vehicle Act by failing to stop at the request of a police officer, and that the rider was attempting to evade police pursuit.
- [36] I find that at all material times Constable Olson was driving his police car in the discharge of his duty and therefore it was an emergency vehicle within the meaning of s.1 of the Motor Vehicle Act.
- [37] It follows from this finding that Constable Olson was entitled to all the privileges and bound by all the burdens imposed on the operator of a motor vehicle pursuant to s.118 of the Motor Vehicle Act. That section stipulates:

Exemption for emergency vehicles

118 .(1) Notwithstanding anything in this part, but subject to subsections (2) and (3), a driver of an emergency vehicle may

- (a) exceed the speed limit ...
- (c) disregard rules ... governing direction of movement or turning in specified directions; ...
- (2) The driver of an emergency vehicle shall not exercise the privileges granted by subsection (1) unless he is
 - (a) sounding an audible signal bell, siren or exhaust whistle and showing a flashing red light;
 - (b) a peace officer in the immediate pursuit of an actual or suspect violator of the law; or
 - (c) a peace officer engaged in a police duty of a nature that the sounding of a signal bell, siren or exhaust whistle would unduly hamper the performance of that duty, in which case he may exercise the privileges granted by subsection (1) by showing a red flashing light only.
- (3) the driver of an emergency vehicle exercising a privilege granted by subsection (1) shall drive with due regard for safety, having regard to all the circumstance of the case, including
 - (a) the nature, condition and use of the highway;
 - (b) the amount of traffic that is on or might reasonably be expected to be on the highway; and
 - (c) the nature of the use being made of the emergency vehicle at the time.

[38] I find that Constable Olson, although the driver of an emergency vehicle, was not entitled to exercise the privileges of such a driver pursuant to s.118(1). None of the circumstances listed in s.118(2) are applicable in this case.

[39] I accept that Constable Olson was not sounding his horn at the time of the Accident as required by s.118(2)(a). He was not in immediate pursuit of the dirt bike rider, as required by s.118(2)(b), because the Matsqui police policy was neither being followed, nor enforceable. I shall return to that issue later in my reasons. I also accept Constable Olson's testimony that at no time had he made any visual observation of the dirt bike rider and that he had not been expressly directed by the Matsqui Police Department dispatch office to join in the search. Finally, Constable Olson was not operating under the protection of s.118(2)(c). I do not accept Constable Olson's testimony that he felt himself in a position where the sounding of a horn or a siren would unduly hamper, or indeed hamper at all, the performance of his duty. He was joining in the attempt to stop the dirt bike rider, whom he had never seen, whose precise location he did not know, and whose position was at best several miles away from him.

[40] Having found none of the provisions of s.118(2) applicable in this case, I now turn to consider whether Constable Olson did in fact improperly exercise the privileges afforded by virtue of s.118(1).

- [41] Did Constable Olson exceed the speed limit, under s.118(1)(a)? I accept Constable Olson's testimony that when he turned onto Bradner Road he accelerated almost from a stop to a speed approaching the posted speed limit of 70 k.p.h. I accept Constable Olson's testimony that if he did exceed 70 k.p.h. it was only slightly above and for a very short time. I accept that he accelerated as he crested a hill approximately 1500 feet before the Accident, and was going slightly faster than the speed limit at that time. I accept that, having crested the hill, he then slowed down slightly to a speed somewhere between 55 and 65 k.p.h. In the result, I conclude that while he may have slightly exceeded the speed limit, it has not been established on the evidence before me that he did exceed the speed limit in contravention of s.118(1)(a).
- [42] I now turn to whether it has been established that Constable Olson disregarded rules governing direction of movement or turning in specified directions, under s.118(1)(c).
- [43] I accept that at the time of the Accident the weather was dry and clear with the sun starting to set but that there was nevertheless full light.
- [44] I accept that Constable Olson first noticed the plaintiff's car, also in the northbound lane on Bradner Road, when it was 300 to 400 feet ahead of him. Constable Olson had just crested the hill. Constable Olson noticed that the plaintiff's car was travelling slowly, at something between 20 to 30 k.p.h.
- [45] Constable Olson testified that the plaintiff's car veered twice, very slightly, to the right and back again. I note that the plaintiff testified that he did not veer to the right at all.
- [46] The plaintiff testified that he was going slowly because he was looking for a residence sufficiently prosperous to indicate a potential customer for one of the water purifiers he was selling. I accept that all the residences on that part of Bradner Road were on the west side of the road.
- [47] I accept that the plaintiff did veer slightly to the right on two occasions as he was looking at potential houses in which to attempt to make sales. I accept that he decided to turn into the driveway of 3653 Bradner Road as, from its external appearance, the house looked promising for a potential sale.
- [48] I do not accept Constable Olson's testimony that the plaintiff's veering to the right justified his conclusion that the plaintiff had seen him and was going to pull over the fog line to the shoulder in order to yield the right of way. I find the plaintiff's veering to the right was sufficient only to indicate a driver who was looking for an address or otherwise was not sure where he was going. This finding is further supported by the fact that Constable Olson stated that he noticed the plaintiff veering to the right within one to two seconds of cresting the hill. This is inconsistent with the conclusion that the plaintiff would have had sufficient time to notice the police car crest the hill, see that the officer had his lights flashing, and then veer to the right to indicate his willingness to yield the right of way.

[49] Under sections 159 and 161, Constable Olson was permitted to pass the plaintiff on the left if the manoeuvre could be done at a safe distance and safely. The relevant provisions of the Motor Vehicle Act are as follows:

Duty when overtaking

159. (1) ..., the driver of a vehicle overtaking another vehicle

(a) shall cause the vehicle to pass to the left of the other vehicle at a safe distance; ...

Passing on left

161. A driver of a vehicle shall not drive to the left side of the roadway in overtaking and passing another vehicle unless he can do so in safety.

[50] I do not find that Constable Olson's driving met the requirement under s.161 to pass the plaintiff safely.

[51] I accept that the plaintiff activated his left turn signal approximately 100 to 150 feet prior to turning left. I note also that immediately after the accident, Constable Olson questioned the plaintiff as to whether or not he had his left signal on. That questioning was recounted by the plaintiff, the witness Larry Martin, and Constable Olson himself. The plaintiff told Constable Olson that his left signal was on.

[52] The plaintiff was required, by virtue of s.172, to signal his intention to turn. That section provides:

Signals on turning

172. (1) Where traffic may be affected by turning a vehicle, a person shall not turn it without giving the appropriate signal ...

(2) Where a signal of intention to turn ... left is required, a driver shall give it continuously for sufficient distance before making the turn to warn traffic.

[53] I accept that the plaintiff's left turn signal was operational and was an appropriate signal within the meaning of s.172. I find that the plaintiff gave that signal continuously for a sufficient distance to warn other traffic before making the turn.

[54] The plaintiff also complied with s.168, which requires that:

Turning left other than at intersection

168. A driver of a vehicle shall not turn the vehicle to the left from a highway at a place other than an intersection unless

(a) he causes the vehicle to approach the place on the portion of the right hand side of the roadway that is nearest the marked centre line, ...;

(b) the vehicle is in the position on the highway required by paragraph (a); and

- (c) he has ascertained that the movement can be made in safety, having regard to the nature, condition and use of the highway and the traffic which actually is at the time or might reasonably be expected to be on the highway.
- [55] When the plaintiff started the left turn, his vehicle was on that portion of the right hand side of the roadway nearest to the marked centre line.
- [56] The plaintiff also performed the appropriate checks in this case to try and make the turn safely under s.168(c). I find that the plaintiff looked in his rear view mirror, his side mirror and to his left, neither hearing nor seeing anything either immediately behind him in his own lane or in the southbound lane on his left. I am persuaded that he was not aware of Constable Olson's approaching police car prior to the Accident. Three reasons exist for this finding. First, the plaintiff's 1965 Mustang had a somewhat shallow, angled, rear window. The shallowness of the angle tends to restrict what can be seen in a properly adjusted rear view mirror, which I find the plaintiff's was in this case. This view is particularly restricted for a person of the plaintiff's height, that is, 6' 2". In the result, looking in his rear view mirror, the police car would only have become visible at approximately 375'. This was confirmed during a demonstration, conducted at the scene in my presence, by the engineers called by the defendants. Second, at the point in time when the plaintiff started the turn, he was approximately 100' south of Larry Martin's driveway and the police car was still more than 375' behind the plaintiff, or beyond the range of view of the plaintiff. Third, I am of the view that the plaintiff was not aware of Constable Olson's approach because Constable Olson did not have any siren or warning horn sounding at all.
- [57] I further find that the plaintiff was not in violation of s.179. That section provides:

Approach of emergency vehicle

179. On the immediate approach of an emergency vehicle giving an audible signal by a bell, siren ... and showing a visible flashing red light, ... a driver shall yield the right of way, and immediately drive to a position parallel to and as close as possible to the nearest edge or curb of the roadway, ... and stop and remain in that position until the emergency vehicle has passed.
- [58] The plaintiff was under no obligation to pull to the right on the approach of Constable Olson's vehicle because it is common ground that Constable Olson was not giving an audible signal by either siren or horn, though his vehicle was showing flashing lights. In the result, for the reasons already mentioned, the plaintiff did not see Constable Olson's emergency vehicle until it actually collided with his vehicle.
- [59] I accept the evidence of the witness, Larry Martin. He testified that he was standing on his property at 3653 Bradner Road when he saw the plaintiff's Mustang move slowly towards his driveway. He assumed that the Mustang was about to turn into his driveway. He said he heard the noise of a car accelerating. This turned out to be Constable Olson's police car and seemed to be some distance away. A short time later, out of the corner of his eye, Mr. Martin

saw the police car, moving fairly fast in a northerly direction. Next, he heard a loud bang. Mr. Martin said he heard Constable Olson query the plaintiff twice on whether he had had his left turn signal on and whether he had looked in his mirror. He heard the plaintiff say that he did have his signal light on and he had looked in his mirror.

[60] The plaintiff's counsel has invoked the provisions of the Matsqui Police Department pursuit policy, thought to have been in effect on 31 May 1989. The Matsqui Police Department's policy drew to the attention of its officers their duty to consider and fully appreciate the provisions laid out in s.118 of the Motor Vehicle Act, and then mandated them to strictly adhere to certain procedures laid out in the pursuit policy. Specifically, those procedures included provisions that a police vehicle involved in an emergency situation have its flashing emergency lights and siren in operation throughout a pursuit. It further imposed upon a police officer conducting a pursuit the duty to continually question whether the seriousness of the violation giving rise to the pursuit, and other factors, warranted the reasonable continuation of the pursuit. The policy goes on to state that

All members involved in a vehicular pursuit will be held accountable for the continuation of a pursuit when circumstances indicate it should have been discontinued.

The fact that a member is engaged in the pursuit of a violator does not relieve or protect him/her from the consequences of wanton or reckless disregard for the lives and safety of other persons.

In short, all members involved in a pursuit, are accountable for their actions. ...

[61] I am satisfied that the incident in question was not a "hot pursuit", that is, a pursuit within the meaning of the department's policy. However, the pursuit policy and its violations were academic insofar as liability is concerned. The pursuit policy itself was not enforceable against Constable Olson at the time of the Accident as it had neither been approved by the Abbotsford (formerly Matsqui) Police Board, nor had it been filed with the Police Commission as required under s.28 of the Police Act S.B.C. 1988, c. 53. That section stipulates:

28. (1) Every [police] board shall make rules not inconsistent with this Act and the regulations respecting the
 - (a) standards, guidelines and policies for the administration of the municipal police force,
 - (b) prevention of neglect and abuse by its municipal constables,
 - (c) efficient discharge of duties and functions by the municipal police force and municipal constables.
- (2) A rule under subsection (1) shall not be enforceable against any person until it is filed with the [police] commission.

- [62] Thus, I conclude that the Matsqui Police Department pursuit policy is not enforceable against Constable Olson with respect to this Accident. Even if it were enforceable, it does not relieve a police officer, in a pursuit, of his duty to drive without negligence and with due care regarding other users of the highway.
- [63] The plaintiff contends that the issues are whether Constable Olson's actions in overtaking the plaintiff fail to meet any of the following criteria:
- a) the standard of care for any driver;
 - b) the standard of care for a trained police officer driving in the course of duty; and/or
 - c) the standard of care for a trained police officer driving in the course of duty and involved in a pursuit.
- [64] Counsel for the plaintiff contends that the standard of care of police officers is higher than the standard of care for ordinary drivers because police officers are specially trained and are required to operate vehicles in emergency situations.
- [65] Counsel for the defendants contends, and I agree for the reasons already stated in my findings of fact, that in this case there is only one issue, namely, whether Constable Olson met the standard of care for an ordinary driver.
- [66] I do not read any of the cases cited by the plaintiff's counsel as supporting the argument that a higher standard of care is automatically expected of police officers in all situations. The plaintiff relies on the decision in *Doern v. Phillips (Public Trustee of)*, (1994) 2 B.C.L.R. (3d) 349, B.C.J. No. 2840 (B.C.S.C.). In that case Kirkpatrick J. wrote at p.372:
- ... there is little doubt that the standard of care to which a police officer will be held is that of a reasonable police officer, acting reasonably and within the statutory powers imposed upon him or her, according to the circumstances of the case. ...
- I do not interpret any of Madam Justice Kirkpatrick's dicta in *Doern*, supra, insofar as actual driving is concerned, as imposing a higher standard of care on a police officer in the ordinary course of driving as opposed to any ordinary driver.
- [67] Madam Justice Kirkpatrick did hold in *Doern*, supra, that in cases involving police pursuits the pursuit policy itself does not constitute the appropriate standard of care. Rather, whether or not the police department's pursuit policy has been complied with is an important factor to consider in determining whether the standard of care has been met.
- [68] At bar, I am satisfied that, independent of the pursuit policy, Constable Olson's driving did not comply with a reasonable standard of care for the reasons I have already mentioned.
- [69] In so finding, I am in agreement with the dicta in *Blaz v. Dickinson*, [1996] O.J. No. 3397 (O.C.J.) (Q.L.). In that case, the plaintiff was injured when his vehicle was struck by a driver fleeing the police. Cumming J. stated at para. 43:

Officers must exercise judgment in balancing the competing interests of arresting wrongdoers and protecting citizens. Officers are not required or authorized to do anything in a negligent manner. Hence, if the officer acts negligently, civil liability will result.

[70] I find that the plaintiff was not guilty of any contributory negligence. In all respects the plaintiff complied with the statutory requirements for a vehicle turning left. In the result, I find the cause of the accident to be solely and exclusively that of the defendant.

[71] The plaintiff shall have judgment on liability and his costs on Scale 3.

"D.D. Owen-Flood, J."

The Honourable Mr. Justice D.D. Owen-Flood

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