
CANADA / JUDGMENT

Bathgate v. Korolek

2010 BCSC 37

COURT

Supreme Court of British Columbia

DECIDED

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2010 BCSC 37 Bathgate v. Korolek

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bathgate v. Korolek,

2010 BCSC 37

Date: 20100113

Docket: 06 1225

Registry: Victoria

Between:

Bonnie-Jean Bathgate

Plaintiff

And

Rodney Richard Korolek

Defendant

Subject to Rule 68

Before: The Honourable Mr. Justice Walker

Reasons for Judgment

Counsel for the Plaintiff:

B. Flewelling

Counsel for the Defendant:

J.D. Martin

Places and Dates of Trial:

May 25-29, 2009

Williams Lake, B.C.

September 8-11, 2009

October 19 & 21, 2009

November 9, 10, 24 & 25, 2009

Vancouver, B.C.

Place and Date of Judgment:

Victoria, B.C.

January 13, 2010

Introduction

- [1] The plaintiff, Bonnie-Jean Bathgate, seeks damages from the defendant, Rodney Richard Korolek, arising from a motor vehicle accident that occurred near Williams Lake, BC on April 14, 2004.
- [2] Contact between the two vehicles owned and operated by Ms. Bathgate and Mr. Korolek (respectively) took place near the intersections of Highway 97 South and an access road that connects to Lakeside Road and Bass Road.
- [3] Both liability and quantum of damages potentially recoverable are in dispute.

The Motor Vehicle Accident

The accident scene and facts agreed upon by the parties:

- [4] The facts set out in this portion of my reasons for judgment come from photographs marked in evidence and, inter alia, facts contained in an agreed statement of facts. References to "right" or "left" in this section are from the vantage point of the parties, who were heading south on Highway 97 at the time the accident occurred.
- [5] The parties agree that the accident took place at or near the intersection of Highway 97 and a short access road that leads to Bass Road and Lakeside Road. That intersection is located a few kilometres from Williams Lake. The collision occurred at approximately 11:24 a.m.
- [6] Highway 97 consists of single lane traffic in each direction. Ms. Bathgate and Mr. Korolek were both travelling south on Highway 97 before the accident occurred.

- [7] Photographs of Highway 97 and the intersection with the access road show a large shoulder on the right or west side of Highway 97 as it nears that intersection. That shoulder is marked on its left or east side with a single white line. A ditch sits adjacent to its right or west side before the highway intersects with the access road.
- [8] The short access road that intersects Highway 97, Lakeside Road, and Bass Road does so in the form of a "T". Lakeside and Bass Roads run parallel to Highway 97.
- [9] The photographs also show a road, running (approximately) parallel to Highway 97 to the left or east, albeit at a higher elevation. I am not able to determine from the photographs if that road intersects with Highway 97.
- [10] Ms. Bathgate was the owner and operator of a 1987 Mercury Topaz. Mr. Korolek was the owner and operator of 1998 Chevrolet four-wheel drive pick-up truck; he was towing a utility trailer.
- [11] Before reaching the intersection, the parties drove on a stretch of the highway that curves. The curve straightens out just prior to the intersection. Sitting in the middle of the highway, in the midst of the curve, is a median designated by a yellow line on its outer side (which is to the left or east). Those yellow lines are located on the left or east side of the median; in addition, photographs show diagonal yellow lines contained within the median itself. Unfortunately, the yellow demarcation line marking the right or west side of the median was almost obliterated at the time of the accident.
- [12] The median comes to an end at a point that is almost directly aligned with the access road where it intersects with Highway 97.
- [13] The speed limit along this portion of Highway 97 is 80 kph.
- [14] There is no evidence as to the length or dimensions of the curve on Highway 97, the width of the north and south bound lanes of traffic, or the width of the shoulder. No accident reconstruction evidence was tendered.

Ms. Bathgate's version of events:

- [15] Ms. Bathgate was heading to her home, where she had lived since 2001, for a lunch break from her work as a travelling insurance agent. She had been on the road that morning selling policies and collecting premiums from policy holders.
- [16] Ms. Bathgate was driving her vehicle southbound on Highway 97. The weather was sunny and warm. Although she could not recall if she had taken any that morning, Ms. Bathgate had at that time been taking Tylenol 3s for pain relief for her ongoing shoulder and neck pain.

- [17] According to Ms. Bathgate, she activated her right turn signal as she approached the intersection of Highway 97 and the access road to indicate her intention to turn right. Ms. Bathgate said she slowed down as she started to make her turn. Ms. Bathgate estimated her speed to be between 10 to 15 kph as she began to make that right hand turn.
- [18] She looked in her rear view mirror when she activated her right turn signal and did not observe anyone behind her. She admitted that she did not pay attention to traffic behind her when she began to make her turn; she did not check her rear view or side mirrors or carry out a shoulder check before making the turn.
- [19] Ms. Bathgate was positive she activated her right turn signal. At first she claimed that she recalled doing so; later, she added that it was also her standard practice to activate it before turning right at the intersection.
- [20] Ms. Bathgate said her vehicle was travelling in the "main lane" of Highway 97 heading southbound. By that, she meant the traffic lane heading southbound as opposed to the wide shoulder to the right. She denied changing the position of her vehicle, either to the left into the median in the middle of the highway, or to the right into the shoulder, before commencing her right hand turn. She claimed that she never drove on the shoulder after she did so on a prior occasion and suffered a flat tire.
- [21] When it was put to Ms. Bathgate in cross examination that she was in fact attempting to make a wide right turn from the median of Highway 97, in order to make what was in effect a U-turn (or 180 degree turn) from the Highway onto Bass Road, Ms. Bathgate asked for the question to be explained:

Q Isn't it true that you were attempting to make a wide right turn from the median, so you could circle around, do a one-eighty back onto Bass Road?

A You will have to explain that a little clearer to me.

Her answer to the last question was surprising since up until that point Ms. Bathgate appeared to have no trouble comprehending questions put to her, whether in examination in chief or in cross examination, in relation to the circumstances surrounding the accident.

[22] The question was rephrased:

Q Okay. What I am suggesting to you is that because you had to turn all the way around, like a U-turn -

A Right.

Q -- to get back onto Bass Road, you made a wide turn. You started out wide, to the left, and then you turned - a big turnaround to the right.

A I stayed in my lane and made the turn.

[23] Ms. Bathgate was then asked whether she made a wide turn. She did not answer the question directly:

Q Do you agree you made a wide turn?

A I didn't go over the yellow line. I stayed in my lane, and got to the point where the access road was - there, so that I was fully on the road at all times and be able to make that U-turn.

[24] Ms. Bathgate also denied looking over papers in her vehicle while driving and denied speaking on her cell phone just prior to the accident.

[25] Ms. Bathgate lived in a mobile home nearby, located on Bass Road. She said she had made that right hand turn onto the access road and onto Bass Road hundreds of times before; as a result, she agreed, she did not need to concentrate on the turn since she had done it so many times.

[26] Ms. Bathgate said that as she began to make her turn, she "felt something" hit her from behind without warning. This was, she said, the initial contact. Later, in cross examination, she described it as a "bang". Shortly thereafter, she said she was hit again when she was mid-way through her turn. Ms. Bathgate could not explain why the right front side of her vehicle and the left side of Mr. Korolek's pickup truck were damaged if her vehicle was hit from behind as she claims. In any event, although she tried to apply her brakes, she said "my vehicle was bouncing back and forth". She only remembered "seeing black" when she looked to the right.

[27] When asked if, at the point when her vehicle turned to make its right hand turn, the right front corner of her Topaz hit the left door of Mr. Korolek's pick-up truck, Ms. Bathgate said she could not recall.

[28] After her vehicle came to a full stop, Ms. Bathgate put it in reverse and pulled off to the side of the road.

[29] She described "some people", two to three of them, approaching her, "yelling and screaming at me". She felt "a little bit dizzy". She locked the doors to her car and called 911 even though she agreed "circumstances were somewhat blurry". She does not recall what anyone said, describing it as "a real blank". Ms. Bathgate said she was in a state of shock immediately following the accident, as well as suffering from a headache, light headedness, and dizziness, all of which she claims affected her ability to recall certain events.

[30] Ms. Bathgate could not recall if Mr. Korolek and his wife asked her why she drove her vehicle to the left before turning right and why she had not activated her right turn signal. She did recall that she refused to speak with them.

[31] The police arrived. Ms. Bathgate was taken to the local hospital by ambulance.

Mr. Korolek's version of events:

- [32] Mr. Korolek was driving his pick-up truck (with five by eight foot trailer attached) at the time of the accident. He is 56 years old and lives now, as he did at the time of the accident, in Grand Forks. He is a millwright. Mr. Korolek built the trailer that was attached to his vehicle.
- [33] Mr. Korolek remembers the circumstances leading up to the accident very well. He was driving from Fort St. James that morning, heading towards Vernon. He was rested, having slept well the night before. Mr. Korolek denied having used alcohol or prescription medications immediately prior to the accident. The passengers in the vehicle were his wife (front passenger seat) and father-in-law (sitting in the middle of the rear seat). While en route to Vernon that morning, they made two stops to allow their dog a break from the ride. Mr. Korolek was wearing his glasses, which he uses for reading and to see the first five or ten feet of distance.
- [34] His pick-up truck was in excellent mechanical condition. He had the brakes checked three months prior to the accident. He had not experienced any mechanical problems with his truck on the trip.
- [35] He described Highway 97 as comprised of two lanes of traffic. The speed limit is 80 kph. According to Mr. Korolek, he was travelling at or slightly below that speed. The weather was excellent, he said, as was overall visibility.
- [36] Mr. Korolek described the events immediately leading up to the accident. He was driving southbound, on a straight "stretch" of the highway, which turned into a gradual curve. He first observed Ms. Bathgate's vehicle travelling in the same direction on the highway, in front of him, before the curve began. He estimated she was about seven to eight car lengths ahead of his vehicle at that point.
- [37] That distance decreased once Ms. Bathgate's vehicle came to what Mr. Korolek described as the "inside curve". At that point, Ms. Bathgate's vehicle began moving over to the left. As she did, and only at that point, the speed of her vehicle began to slow down. Ms. Bathgate's vehicle then moved completely into the median.
- [38] Mr. Korolek described the median as shaped like a "teardrop". Its width, at its widest point he said, was more than the width of a vehicle and as wide as the lane of traffic in which he was travelling.
- [39] As Ms. Bathgate began to move into the first part of the median, the distance between their vehicles decreased to three to five car lengths. Thereafter, once the Bathgate vehicle was completely within it, the distance between the two vehicles decreased to two to three car lengths. Mr. Korolek did not appreciate that it was a median: he thought it was a left turn lane. Mr. Korolek said the demarcation line to the right or west side of the median was almost entirely obliterated. As I have noted, the photographs also show that to be the case: the right side line of the median, which at one time was yellow, is very difficult if not impossible to see. Mr. Korolek was not able to see the median before the curve on Highway 97 "starts to straighten out".

[40] As well, it was not until he made his way through the curve could he see the intersection with the access road. Mr. Korolek described it this way in cross examination:

Q Yes. Your visibility, in other words your ability to see this intersection, was not affected by that curve in the highway?

A To see that intersection, yes. When you are coming around the curve you don't see the intersection until you're - the curve kind of - it starts to straighten out. That's when you see the intersection.

[41] Mr. Korolek now knows the area that the Bathgate vehicle moved into is a median.

[42] Even though he never saw a turn signal activated on Ms. Bathgate's vehicle, Mr. Korolek thought Ms. Bathgate was going to turn left since he thought the median was a left turn lane.

[43] When he first observed the Bathgate vehicle begin to move into the median, Mr. Korolek remained in his lane of traffic; he did not reduce his speed. As he put it: "I didn't slow down - I had no reason to because it looked like she was making a left turn".

[44] Within a "couple of seconds", Mr. Korolek realized that there was no place for Ms. Bathgate to turn left. He also observed the "T" intersection leading to Bass and Lakeside Roads to the right. Ms. Bathgate's vehicle was "clearly in the median" at this time. That is when Mr. Korolek "backed off", which he explained meant that he took his foot off the gas pedal entirely. It was at that point that Ms. Bathgate commenced a right hand turn, from the southernmost point of the median. According to Mr. Korolek, it was a "sharp turn", which he also described as a 90 degree turn. By this time, their vehicles were very close to each other.

[45] Mr. Korolek's attention was not distracted at any time.

[46] After "backing off", Mr. Korolek perceived that a collision was imminent since he now knew that Ms. Bathgate could not turn left: "I anticipated she was going to turn before she started to turn". As he did, Mr. Korolek prepared to drive his vehicle to the right, off the highway, onto a wide gravel shoulder (approximately the width of a vehicle) that has grass and a shallow ditch to its right.

[47] Once Mr. Korolek saw the Bathgate vehicle start to turn, which was as his vehicle was coming up alongside the "T" intersection with the access road, he aimed his pick-up truck directly at the shoulder and ditch on the right, which meant it was travelling in a direction diagonal to Highway 97. He also slammed on his brakes. His vehicle skidded forward, with its right wheels moving partially into the ditch, and the front end moving into the access road. Mr. Korolek attributes the skidding to his ABS brakes. In describing this sequence of events, Mr. Korolek testified:

Q So what was your reaction when you first saw her turn to the right?

A Well, that was - that's when I - like I said I already backed off just previous to that and I slammed - aimed for the ditch and slammed on the brakes all pretty much the same time. I aimed, well, not totally for the ditch, but for the edge of the shoulder.

Q And why did you do that?

A Because I wanted to avoid the accident.

...

Q Well, can you describe the shoulder of the road?

A Okay. How wide the shoulder was?

Q Yes.

A Okay. That shoulder was, I would say, approximately about the width of a vehicle.

[48] Ms. Bathgate's vehicle made contact with the Korolek pick-up truck. She drove into the driver's door "right behind the front fender". After that impact, Mr. Korolek's vehicle continued to move forward. As it did, the Bathgate vehicle continued to make contact with it, scraping the driver's door and continuing to scrape the body of the pick-up truck behind it.

[49] No damage was caused to the front end of Mr. Korolek's pick up truck. Damage was caused to his truck starting at a point just forward of the wheel well on the driver's side; the damage extended horizontally, to the rear of the vehicle and then onto the trailer (its axle was bent). Mr. Korolek believes the Bathgate vehicle made additional contact with his trailer due to the "surge" he felt following the initial contact.

[50] Mr. Korolek is positive that he never rear-ended Ms. Bathgate's vehicle and never struck it from behind. He could not recall ever being shown or seeing damage to the rear bumper of Ms. Bathgate's vehicle.

[51] Once Ms. Bathgate's vehicle came into contact with Mr. Korolek's, her vehicle spun around. The passenger side of her vehicle ended up "right beside" the passenger door to the Korolek vehicle (where Ms. Korolek was sitting).

[52] Both vehicles came to a stop. The Bathgate vehicle was sitting to the right (or west) of and at a 45 degree angle to the Korolek vehicle.

[53] Mr. Korolek was unharmed. He did not lose consciousness and was not hurt.

[54] Mr. and Mrs. Korolek were unhappy that the accident occurred, but still wanted to make sure Ms. Bathgate was okay. They got out of their pick-up truck and approached her vehicle to see if she was all right. The driver's window to the Bathgate vehicle was open. Mr. Korolek saw Ms. Bathgate speaking on a cell phone, and heard her tell someone to call 911 in order to get the police to come to the accident scene. Mr. Korolek described Ms. Bathgate yelling into the telephone that there had been an accident, and mentioning children. When he

asked her if she was okay, Ms. Bathgate rolled up her window. She told the Koroleks to "go away".

[55] He agreed he might have remarked to Ms. Bathgate that it would have been helpful if she had used her turn signal. He denied yelling or screaming at her, and denied expressing anger towards her.

[56] Mr. Korolek believes he did everything he could to avoid the collision. He believes he sounded his horn, but candidly admitted that he could not be sure that he did.

Ms. Korolek's version of events:

[57] Ms. Korolek was riding as a passenger in the front seat of her husband's vehicle when the accident occurred. She is presently 57 years old.

[58] Ms. Korolek's recollection and account of the accident was quite clear. She and her husband were travelling from Fort St. James, heading to Grand Forks by way of Vernon. Her father, who has since passed away, was riding in the back seat.

[59] She described the weather as beautiful and sunny; there were no visibility problems. She said that her husband was driving at 80 kph on Highway 97, which was the posted speed limit.

[60] Ms. Bathgate's vehicle was travelling several car lengths ahead when Ms. Korolek first saw it. There were no vehicles separating them, nor were there any travelling behind the Korolek vehicle. Ms. Korolek had an unobstructed view of Ms. Bathgate's vehicle well prior to the collision.

[61] Suddenly, and without warning, Ms. Bathgate's vehicle pulled to the left, moving into what Ms. Korolek thought at that time was a left hand turn lane. It "took a minute" for Ms. Korolek to realize it was not a left hand turn lane, but a median in the centre of the highway. At no time during the sequence of events leading up to the accident did Ms. Bathgate activate her left or right hand turn signals.

[62] The Bathgate vehicle moved into the middle of the median, completely out of the lane of traffic heading south. In fact, Ms. Korolek said, "[Ms. Bathgate] was so far over I thought she was turning left - [the Bathgate vehicle] had slowed right down".

[63] Mr. Korolek slowed down. The Koroleks remarked, between themselves, upon the movement of the Bathgate vehicle. They concluded Ms. Bathgate was turning left. For that reason, Mr. Korolek decided to continue straight ahead on the highway. Ultimately, Ms. Korolek realized that Ms. Bathgate was turning right, and would turn right into their vehicle. At that point, the front portion of the Koroleks' pick-up truck was "just about at the access road" and the Bathgate vehicle was a few feet away from the Korolek vehicle. The Koroleks' vehicle had remained in its lane travelling south on the highway throughout. Mr. Korolek took evasive action by driving his pick-up truck to the right, towards the shallow ditch to the right of their lane of travel; even so, his vehicle was struck by the Bathgate vehicle.

- [64] Ms. Korolek saw the front of the Bathgate vehicle continuing to come towards their pick-up truck. The front passenger side of the Bathgate vehicle first came into contact with the Korolek's truck door behind the front tire on the driver's side. From there, and even though Mr. Korolek took evasive action, the Bathgate vehicle remained in contact with the Koroleks' truck, causing damage down its driver's side, and onto the left side of the trailer. Eventually, both vehicles came to a stop. The Korolek's pick-up truck was approximately 10 steps behind the Bathgate vehicle.
- [65] The Koroleks were not injured. Ms. Korolek got out of the pick-up truck and went to see if Ms. Bathgate was all right. When she got to the Bathgate vehicle, she saw her driver's window partially open and observed Ms. Bathgate speaking on a cellular telephone. She heard Ms. Bathgate telling someone to call 911. She said this several times, and it was clear to Ms. Korolek that Ms. Bathgate was not speaking directly to emergency services or the police. Ms. Korolek also observed papers all over Ms. Bathgate's front passenger seat. Ms. Bathgate then started yelling at Ms. Korolek to leave her alone. According to Ms. Korolek, Ms. Bathgate "was frantic about saying 'Go away, leave me alone,' while she was talking on the phone". Ms. Korolek denied being angry or upset towards or yelling at Ms. Bathgate.

Photographs:

- [66] The damage to the vehicles shown in the photographs marked in evidence is consistent with the description of the accident given by Mr. and Ms. Korolek. There is no evidence of damage to the rear end of the Bathgate vehicle. Indeed, damage to that vehicle is shown to be to the front passenger side headlight and turn indicator (completely removed) and denting to the rear passenger side of the rear portion of the body of the vehicle just above the right rear wheel well. Damage to the Korolek vehicle is shown to be a large dent to the lower portion of the front driver's side door, with a long horizontal scrape mark running to the rear of the vehicle.

Mr. Brian MacDonald:

- [67] Mr. MacDonald was called to provide evidence that the turn signal indicators on the Bathgate were working at the time of the accident.
- [68] Mr. MacDonald is a 45-year old truck driver who was formerly a mechanic who worked on heavy duty equipment, farm and logging equipment, as well as trucks. He and Ms. Bathgate have known each other for approximately eight to nine years, and have in the past maintained an intimate relationship.
- [69] Mr. MacDonald's evidence was vague and unhelpful. The attitude he displayed while giving evidence, i.e., curt and indifferent, was also unhelpful.

- [70] Mr. MacDonald described what he did in terms of checking and changing lights, including turn signal indicator bulbs, all of which he claimed to recall doing within a week before the accident. He said that Ms. Bathgate asked him to inspect the vehicle to make sure it was safe. He said he had previously carried out mechanical repairs on Ms. Bathgate's vehicle.
- [71] It quickly became apparent that Mr. MacDonald's recollection was suspect. He could only speak of matters he "believed" to have happened. He could not recall which bulbs he replaced let alone where they were located, nor could he recall who was with him to assist in conducting the vehicle test (he was not sure if it was his brother or Ms. Bathgate). Mr. MacDonald could not recall if Ms. Bathgate had asked him to inspect the vehicle on any previous occasion. He did not keep any records. Further, even though he said he helped fix other friends' vehicles, he could not recall if he worked on any others during that week. Despite Mr. MacDonald's attempts to stick to what appeared to be a memorized sequence of matters he attended to on Ms. Bathgate's vehicle, which he said occurred over five years ago (in April 2004), he had trouble with dates. For example, he could not recall over what period of time he worked on Ms. Bathgate's vehicle.
- [72] I do not accept Mr. MacDonald's evidence as proof that the turn signal indicators on Ms. Bathgate's vehicle were working at the time of the accident. In my opinion, he is guessing about what he did. In any event, Mr. MacDonald's evidence is unhelpful in terms of resolving the issue of liability since it does not prove that Ms. Bathgate actually activated her right turn signal indicator before the accident occurred.

Analysis and Determination:

- [73] I prefer the evidence of Mr. and Ms. Korolek to that of Ms. Bathgate concerning the circumstances surrounding the accident. I accept the Koroleks' evidence as an accurate account of the circumstances of and those leading up to the accident. The Koroleks presented as very honest and credible witnesses, providing a candid account of the circumstances leading up to the accident. I accept that Mr. Korolek was not able to see the intersection with the access road until the curve on the highway began to straighten out, which is very close to that intersection. The evidence that Mr. Korolek gave at his examination for discovery in relation to visibility of the intersection of the access road with Highway 97 is not, as suggested by counsel for Ms. Bathgate, inconsistent with his evidence at trial and does not impact upon my view of the veracity of the whole of his evidence given at trial.
- [74] Moreover, and quite importantly, the photographs showing the damage to both vehicles corroborates Mr. and Mrs. Koroleks' description of the accident.

- [75] Ms. Bathgate's account is not borne out by the photographs. Her vehicle was not struck from behind. In addition, despite her clear recollection of facts and events that would assist her case, throughout her evidence Ms. Bathgate displayed a tendency to not recall events or to fail to comprehend questions when the proposition put to her would, if true, be adverse to her case. As well, she claims to have been shocked and dazed after the accident. Her account of events is not reliable.
- [76] Also, Ms. Bathgate's version of events makes no sense. She was not hit from behind, yet she described the initial impact as coming from behind. The photographs do not show any evidence of an impact to her vehicle from behind. Later, Ms. Bathgate said that the initial impact was to her vehicle's right rear quarter panel above the wheel well. If the accident occurred the way she says it did, it means the front end of Mr. Korolek's vehicle, especially the left front end, would be damaged (which it was not - the damage consists of horizontal scratch marks on the left side of his truck and a dent on his driver's side door).
- [77] In summary, the photographic evidence is consistent with Ms. Bathgate turning into Mr. Korolek's vehicle: as he continued to move forward, her Topaz continued to make contact with his truck, causing the scratch marks.
- [78] I do not accept Ms. Bathgate's evidence that she called 911 and the RCMP for assistance. The sequence of events (including timing) described by Ms. Bathgate and the Koroleks lead me to conclude that she asked someone else to make that call for her.
- [79] Ms. Bathgate is at fault and her fault caused the accident. I find that she:
- (a) drove her vehicle directly into the median;
 - (b) never activated her turn signal, contrary to s. 170 of the Motor Vehicle Act, R.S.B.C. 1996, c. 318 ("MVA") ;
 - (c) failed to indicate her intention, at any time, to turn right onto the access road; and
 - (d) made a sudden right hand turn onto the access road in a dangerous manner, from the median situated in the middle of the road, and did not check for traffic around and behind her, all of which is contrary to ss. 144(1), 151 (c) and (e), and 165(1) of the MVA.
- [80] I must now determine whether there was any fault on the part of Mr. Korolek, and if there was, whether it contributed to the accident.
- [81] Counsel for Ms. Bathgate submits that even if I were to find her client at fault, Mr. Korolek was also negligent in three respects:
- (a) he was driving too fast and too close to Ms. Bathgate in all of the circumstances,
 - (b) he should have slowed down when Ms. Bathgate first entered the median given his uncertainty as to her intentions and her failure to activate her left turn signal; and

- (c) once he appreciated that Ms. Korolek was about to turn right onto the access road, Mr. Korolek should have sounded his horn.
- [82] Respectfully, and in spite of the valiant submissions of Ms. Bathgate's counsel, I do not agree that Mr. Korolek was negligent in the circumstances of this case.
- [83] In my opinion, Mr. Korolek was reasonably entitled to think that at the point in time when Ms. Bathgate began to enter the median, she was going to make a left hand turn. Ms. Bathgate did nothing to indicate or suggest that she was intending to turn right at any time. Viewed objectively, there was nothing to require Mr. Korolek to brake his vehicle at the point when the Bathgate vehicle began to move into the median.
- [84] In addition, the median could have been construed, at least initially, as a left turn lane given that the demarcation line on the right (west) side was virtually obliterated. Although Mr. Korolek did not remark on it, the road running parallel to the left or east side of Highway 97 would, in terms of its visibility as shown in the photographs, afford a basis for a reasonable driver in the circumstances to conclude that Ms. Bathgate was going to turn left to connect with that road.
- [85] Mr. Korolek continued to observe Ms. Bathgate's vehicle as she moved fully into the median. As soon as Mr. Korolek became uncertain as to what her vehicle was going to do, he took his foot off the gas pedal. His vehicle slowed down. Moments later, he realized there was no place for her to turn left; he concluded she was going to turn right onto the access road. As he considered evasive action, she commenced her sudden and sharp turn. Mr. Korolek slammed on his brakes and aimed his vehicle towards the ditch to the right of the shoulder. Nonetheless, Ms. Bathgate drove into his vehicle and continued to make contact as Mr. Korolek's vehicle headed away from the highway. Clearly, Ms. Bathgate was not paying attention. In my opinion, Mr. Korolek took appropriate action to avoid what he perceived as an impending collision.
- [86] It was submitted that Mr. Korolek owed a greater responsibility than Ms. Bathgate in the circumstances since he was the "overtaking" driver. Respectfully, I do not agree with that characterization. This is not a case where Mr. Korolek sought to overtake the Bathgate vehicle on the left. He was entitled to think, as he did for that brief period of time when he thought Ms. Bathgate was intending to turn left, that he could continue to proceed in his lane of travel which was entirely free of vehicles.
- [87] Even if Mr. Korolek's vehicle could be characterized as the overtaking vehicle, liability does not necessarily follow. The respective obligations of the parties are, as Finch J.A. (as he then was) said in *Samograd v. Collison* (1995), 17 B.C.L.R. (3d) 51, 67 B.C.A.C. 223 (C.A.): "entirely dependent upon the facts of the case" (para. 62). There is no general principle of law that an overtaking driver owes a greater obligation than the other driver.

[88] In that case, the driver who pulled out to pass on the left (and was thus the overtaking driver) was considered to have had the "best physical position to foresee a possible collision" since he only had 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" (para. 62).

[89] In quoting from Samograd, Mr. Justice Barrow said, in Eccleston v. Dresen, 2009 BCSC 332, at para. 26:

Thus, the law does not impose a greater obligation on either the passing driver or the driver being overtaken simply by virtue of whether the driver was overtaking or being overtaken; rather, their respective obligations are to be assessed in relation to the circumstances they faced and within that assessment the question of who had the better opportunity to avoid the collision is relevant.

[90] In the circumstances of this case, it was Ms. Bathgate who had the only opportunity to avoid the collision.

[91] Even if it could be said that Mr. Korolek should have slowed the speed of his vehicle sooner - once he saw Ms. Bathgate's vehicle slow down and enter the median without an activated turn signal - so that he was negligent, there is no evidence from which I can conclude that such negligence contributed to the accident. Given the lack of any evidence showing relative distances, including the length of the median, there is no evidence from which I can conclude, either directly or through inference, that if Mr. Korolek had slowed his vehicle sooner - even at the outset when the Bathgate vehicle began to enter the median - the accident would have been avoided.

[92] In terms of sounding the horn, Ms. Bathgate has not proven, on a balance of probabilities that Mr. Korolek failed to sound his horn, or even that if he did not, that there is a nexus between that alleged failure and the accident.

[93] Ms. Bathgate's claim is dismissed with costs.

"P. Walker J."

The Honourable Mr. Justice Paul Walker

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