
CANADA / JUDGMENT

Charlton-Miner v. Hedgecock

2020 BCSC 86

COURT

Supreme Court of British Columbia

DECIDED

23 January 2020

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2020 BCSC 86 Charlton-Miner v. Hedgecock

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Charlton-Miner v. Hedgecock,

2020 BCSC 86

Date: 20200123

Docket: M114615

Registry: Kelowna

Between:

Valerie Charlton-Miner

Plaintiff

And

Reginald Hedgecock

Defendant

Before: The Honourable Mr. Justice Wilson

Reasons for Judgment

Counsel for the Plaintiff:

P.J. Hergott

Counsel for Defendant:

J.M. Doricic

Place and Date of Trial/Hearing:

Kelowna, B.C.

January 7, 9, and 10, 2020

Place and Date of Judgment:

Kelowna, B.C.

January 23, 2020

- [1] The sole matter for determination in this personal injury action is liability for a collision between the plaintiff cyclist and the defendant motorist as the parties were able to agree on the quantum of damages shortly before the trial was scheduled to commence.

Background

- [2] The plaintiff was cycling to work on a sunny spring day in March 2015. She had recently acquired a new bicycle, a cruiser style. Although she had ridden the bicycle before, it was the first time she had used it for work. She is an experienced cyclist.
- [3] The plaintiff was cycling northbound on Hollywood Road in Kelowna and was entering the intersection with Highway 33. Her intended route was to continue northbound on Hollywood Road. However, her commute was interrupted as a result of the collision with a vehicle driven by the defendant.
- [4] Hollywood Road has a single lane for vehicular traffic in each direction for much of the route taken by the plaintiff prior to the accident. Approximately half a block before the intersection with Highway 33, the roadway widens and there are two lanes in the northbound direction. The left of the two lanes is for traffic intending to continue straight through on Hollywood Road, and the right lane, which is the lane closest to the curb, is a right turn only lane for drivers intending to turn eastbound on Highway 33. Shortly before the intersection, there is a third lane for traffic to the left of the other two, intended for those intending to turn left (or west) on Highway 33.
- [5] There is a dedicated bicycle lane adjacent to the curb on Hollywood Road. The bicycle lane is therefore adjacent to the only lane for northbound traffic until the right turn lane commences; thereafter, the bicycle lane is to the right of the right turn lane.

The evidence and findings of fact

- [6] The plaintiff is currently 56 years of age. She testified she was riding in the bicycle lane and saw that the traffic light was green for through traffic as she approached the intersection. She observed two pedestrians crossing Highway 33 in the west crosswalk. She also noted a truck facing her in the left turn lane of Hollywood Road southbound that was about to turn eastbound on Highway 33. The latter observation was of greater importance to the plaintiff because the vehicle would be turning across her intended line of travel.
- [7] As she was entering the intersection, she heard the revving of an engine. She looked up and noticed that the traffic light had turned yellow. Her initial thought was that the vehicle was intending to accelerate to go through the intersection northbound on Hollywood Road, the same direction as she was riding. The next thing she recalls is noticing something white in her peripheral vision to her left side. This was the defendant's vehicle, which was not going through the intersection onto Hollywood Road North as she had anticipated, but rather was turning right onto Highway 33. The plaintiff impacted the defendant's vehicle with her shoulder while simultaneously braking and turning her bicycle to the right to avoid or at least minimize the impact.
- [8] Following the accident, the plaintiff had a conversation with the defendant. She says the defendant was very apologetic. She said that he told her he had seen her initially, but had forgotten about her. She testified that he had told her that he was on the way to the bank to get money for his granddaughter who was in trouble.
- [9] The defendant Reginald Hedgecock is currently 87 years of age and was 83 at the time of the accident. He lived in Kelowna at the time but now resides in Ontario with his daughter.
- [10] His evidence was that he had lived in the area for approximately eight years and was very familiar with the intersection. He said that he passed the cyclist while he was in the right turn lane, and did not see her again until the collision. He described the traffic light as "red" as he was approaching the intersection, but that it turned green as he arrived and he proceeded to turn having done a shoulder check and seen nothing. He said he would not have proceeded had he seen the cyclist, and that he had signalled his intention to turn in advance of the intersection.
- [11] The defendant had given two prior statements. One was a handwritten statement that he prepared himself. He thought he had prepared it within a couple of weeks of the accident but he clearly wrote it much later as there is reference in the statement to his having received a letter from ICBC on May 15, 2017. As such, his handwritten statement was written at least two years' post-accident. The statement makes no mention about his having passed the plaintiff.
- [12] He also was interviewed in some form by a representative of ICBC who took some notes. Those notes are not in evidence.

- [13] Neither of these prior statements indicate that the light was red at any relevant point. While his evidence was that he commenced his turn upon the light turning green, his earlier statements made no mention of a red light. In his handwritten statement, he indicated that both he and the cyclist arrived at the light at the same time.
- [14] I find that the accident happened as it was described by the plaintiff. She was riding in the dedicated bicycle lane and was proceeding through the intersection and across Highway 33 in a straight line towards the dedicated bicycle lane on Hollywood Road on the north side of the intersection. I conclude that the defendant had every opportunity to observe the plaintiff as he approached the intersection. He was in a hurry to get to the bank. He accelerated when he saw the light turn yellow and turned across the plaintiff's path, causing the right side of his vehicle to collide with the plaintiff's left shoulder area and causing her to fall.
- [15] On cross-examination, the defendant agreed that he was on the way to the bank at the time of the accident, and appeared surprised that he had told the plaintiff this. He had no recollection of having that conversation with the plaintiff but agreed that his granddaughter was in trouble and that he was going to the bank to get money to send to her. He also agreed that he was mad at the time, but denied driving while angry or upset because a person cannot drive while angry. It is difficult to accept that evidence, however. A person who is upset or angry cannot change their mood simply because they are driving. It is entirely understandable that he would have been upset if his granddaughter was in trouble and needed money from him.
- [16] The defendant testified that the plaintiff told him after the accident it was the first time she had ever gone through that intersection, something which clearly is not true and which she would not have said. She had lived there for 20 years, longer than the defendant. It is likely that he misinterpreted her, and that she told him it was the first time she had ridden her bicycle to work.
- [17] The plaintiff's version of events was not undermined nor even seriously contested on cross-examination. Her recollection was clear. The only aspect of her evidence I do not accept is her evidence of her location at the time of impact. She said that she was approximately between the two lanes of eastbound traffic on Highway 33; however, from a review of an overhead picture of the intersection, the defendant would not have been able to complete his right turn, even if it were a wide turn into the far lane as opposed to the curb lane, if the right side of his vehicle made contact with the plaintiff at the midpoint of the two lanes. However, I consider this discrepancy understandable in the circumstances and immaterial to my conclusions.
- [18] By contrast, the defendant has given several inconsistent versions of events over time, including that:
- a) the light was green as he approached the intersection and that he had passed the plaintiff prior to turning;

- b) they arrived at the intersection on a green light at the same time; and
 - c) the light was red as he approached, and that he stopped momentarily until the light turned green and then proceeded with his turn after shoulder-checking and not seeing the plaintiff.
- [19] I conclude that I cannot rely on the defendant's recollection of the events. I do not consider him to be dishonest, and formed the impression during his evidence that he was doing his best to recall and assist the court. However, his memory is unclear and he accepted that it has deteriorated over the past few years.
- [20] The plaintiff attempted to issue a subpoena to the ICBC adjuster who had taken a statement from the defendant shortly after the accident. The adjuster no longer works for ICBC but had been the adjuster assigned to the file immediately after the accident. An affidavit from a process server indicated that the adjuster was evading service of the subpoena.
- [21] Following the conclusion of the defendant's evidence, the defendant's lawyer conceded that the defendant had given differing versions of events at various times and that the traffic light was green as both parties entered the intersection and had not been red at any relevant point as they approached the intersection.

Positions of the parties

- [22] The plaintiff argues that the defendant is 100 percent liable for the accident. She says the traffic light was green as she approached the intersection and that she was therefore entitled to proceed. She says she did not leave the dedicated bicycle lane on Hollywood Road.
- [23] The defendant, while admitting that the light was green when the plaintiff entered the intersection, takes issue with the plaintiff proceeding as she did. First, he says that because the plaintiff was intending to cross over Highway 33, she was obligated to leave the dedicated bicycle lane and enter the lane of traffic for vehicles intending to continue through on Hollywood Road in a northbound direction. He says that the plaintiff was not entitled to continue straight across the intersection in the dedicated bicycle lane because it is to the right, or curb side, of the right turn lane. It was therefore reasonable for the defendant to assume that the plaintiff would have been turning right at the intersection.
- [24] He also argues that had the plaintiff been taking greater care of her own safety by being more aware of her surroundings and in particular of vehicles approaching from behind her, the plaintiff could have avoided the accident.

Legal framework

- [25] The Motor Vehicle Act, R.S.B.C. 1996, c. 318 contains a number of sections that may potentially apply in the circumstances.
- [26] Section 183 confirms that cyclists have the same rights and obligations as drivers:

Rights and duties of operator of cycle

183(1) In addition to the duties imposed by this section, a person operating a cycle on a highway has the same rights and duties as a driver of a vehicle.

(2) A person operating a cycle

- (a) must not ride on a sidewalk unless authorized by a bylaw made under section 124 or unless otherwise directed by a sign,
- (b) must not, for the purpose of crossing a highway, ride on a crosswalk unless authorized to do so by a bylaw made under section 124 or unless otherwise directed by a sign,
- (c) must, subject to paragraph (a), ride as near as practicable to the right side of the highway,

...

(14) A person must not operate a cycle

- (a) on a highway without due care and attention or without reasonable consideration for other persons using the highway, or
- (b) on a sidewalk without due care and attention or without reasonable consideration for other persons using the sidewalk. . . .

[27] Turning at an intersection is governed by s. 165(1). It provides that a driver intending to turn to the right must turn as close as possible to the curb:

Turning at intersections

165 (1) If the driver of a vehicle intends to turn it to the right at an intersection, the driver must cause it to approach the intersection and then make the turn as close as practicable to the right hand curb or edge of the roadway.

[28] Finally, s. 144 imposes a general duty of care:

Careless driving prohibited

144 (1) A person must not drive a motor vehicle on a highway

- (a) without due care and attention,
- (b) without reasonable consideration for other persons using the highway, or
- (c) at a speed that is excessive relative to the road, traffic, visibility or weather conditions.

[29] There are no provisions in the Motor Vehicle Act that deal with dedicated bicycle lanes, even though they are common features of roadways in British Columbia. The City of Kelowna has bylaws that specifically address bicycle lanes, however. Section 9.1.2 of Bylaw 8120 provides as follows:

9.1.2 Cyclist duties. A person operating a cycle:

- (a) must not ride on a sidewalk unless otherwise directed by a traffic control device, or unless that person is under the age of 12 years,
- (b) must not, for the purpose of crossing a highway, ride on a crosswalk unless otherwise directed by a traffic control device,
- (c) must, ride as near as practical to the right side of a highway, within a bicycle path if available,

...

- (h) shall not ride in a marked crosswalk, unless it is also marked by elephants' feet markings on one or both sides of the crosswalk, or it is otherwise signed to permit cycling.

[30] Statutory provisions inform the liability analysis but are not exhaustive in determining whether or not a party satisfied the requisite standard of care (*Salaam v. Abramovic*, 2010 BCCA 212).

[31] In *Illet v. Buckley*, 2017 BCCA 257, the Court of Appeal affirmed *Salaam* and restated the trial judge's analysis that led to each party owed a duty to each other. The case also involved a collision between a cyclist and a motorist. The Court held as follows:

[21] In citing the provisions of the Act as she did, the judge recognized the duty of care in negligence law, as embodied in the statute, that Ms. Buckley owed to other users of the highway to drive her vehicle with due care and attention and that Mr. Ilett was duty bound to ride his bicycle in the same way. Specifically, as stated, she was to drive and he was to ride with reasonable consideration for others and at a speed that was not excessive relative to the road, traffic, visibility, or weather conditions. Accepting that to have been the duty that was owed (being a question of law), the judge had then to determine whether each had discharged their duty by meeting what she determined to be the standard of care (a question of mixed fact and law). As discussed in *Galaske v. O'Donnell*, [1994] 1 S.C.R. 670, breach of the provisions of the Act that prescribe how the duty of care is to be discharged does not necessarily amount to negligence in the sense of being a breach of the standard of care in the given circumstances, rather such may be a factor to be taken into account in determining the requisite standard (see pp. 675-676 and 687-688). As this Court said in *Salaam v. Abramovic*, 2010 BCCA 212:

[18] While the statutory provisions provide guidelines for assessing fault in motor vehicle accident cases, they do not, alone, provide a complete legal framework.

* * *

[21] In the end, a court must determine whether, and to what extent, each of the players in an accident met their common law duties of care to other users of the road. In making that determination, a court will be informed by the rules of the road, but those rules do not

eliminate the need to consider the reasonableness of the actions of the parties. This is both because the rules of the road cannot comprehensively cover all possible scenarios, and because users of the road are expected to exercise reasonable care, even when others have failed to respect their right of way. . . .

- [32] The Court of Appeal held in *Ivanoff v. Bensmiller*, 2002 BCCA 173, that a person who violates a traffic law assumes a heightened duty of care. Motorists and other users of the roads are entitled to assume that other users will comply with the rules of the road, thus giving rise to a heightened duty of care for those who act differently. The Court of Appeal agreed with the trial judge's conclusion at paragraph 15 of her reasons as it related to a cyclist who was riding on the wrong side of the road:
- [7] The judge sets out her conclusions with respect to the plaintiff's conduct at par. 15 of her Reasons:
- [15] However, I also find that the plaintiff was at fault. He knew that riding his bicycle on the left facing traffic was an unusual manoeuvre. He chose to do so for his own convenience. The Motor Vehicle Act requires cyclists to ride to the right and that is what other users of the road are entitled to expect. That is borne out by Ms. Blakely's evidence that the plaintiff should have been (sic) other side of the road, as well as the fact she did not see him until the last minute. Having chosen to depart from the usual pattern, I find that the plaintiff had a duty to take greater care in travelling on the wrong side of the road. I would expect him to know that other users of the road may be surprised by his presence there and would expect him to proceed cautiously as a result. Rather than do that the plaintiff rode at a steady pace down the left shoulder. He says he did not see the defendant until the last minute. I do not accept that. Like the plaintiff, the defendant was there to be seen ahead of time. The defendant's evidence and Ms. Blakely's evidence convince me that the defendant was stopped due to busy traffic for some seconds. He did not proceed onto 27th without stopping. The plaintiff has provided no explanation for why he did not see the defendant earlier and then proceed more slowly and cautiously until he made sure that the defendant saw him. In my view, having chosen to ride on the wrong side, it was incumbent on the plaintiff to take care that drivers see him in this unexpected location. It was not good enough for him to simply assume that the defendant would stop when there was no assurance that the defendant had seen him, and he was approaching from this unusual position.

Discussion

- [33] Neither party was aware of any cases that address the issue of whether a cyclist who intends to cross an intersection is obligated to leave a dedicated bicycle lane and cross a right turn lane in order to move into the through lane for traffic. If the plaintiff was so obligated, she would have been subject to a heightened duty of care that may be significant in determining whether she was at fault, in whole or in part, for the accident.

- [34] The defendant argues that the most analogous decision is the Court of Appeal's decision in *McLaren v. Kucharek*, 2010 BCCA 206. In that case, the plaintiff cyclist was also faced with a situation of a single lane for traffic that widened to create a right turn lane. As such, the curb lane had become the mandatory right turn lane. The cyclist was intending to go straight through the intersection and believed that he was required to move to the centre "through lane" rather than riding straight through in the mandatory right turn lane.
- [35] The primary issue before the Court of Appeal was whether the cyclist was negligent because he rode his bicycle alongside the vehicles that were also intending to go through the intersection, as opposed to 'taking the lane', which would have rendered him more visible to the defendant motorist who was turning left across the through lane.
- [36] At paras. 29 and 30, the Court of Appeal held the following:
- [29] While Mr. MacLaren did the right thing by moving out of the curb lane, he should have moved in behind the vehicles travelling toward the "through" lane, not beside them. By cycling between lanes Mr. MacLaren did not show sufficient care for his own person to avoid a finding of contributory negligence. Taking a lane was the only way, in my view, that a bicyclist could have satisfied the mandate of s. 183(2)(c) to safely travel as near as practicable to the right of the highway.
- [30] It cannot be said, based on the evidence at trial, that the decision of the trial judge that Mr. Kucharek was negligent in making his left-hand turn is unreasonable. The trial judge found that Mr. Kucharek completed his turn negligently by failing to ensure that there was no traffic approaching that would constitute an immediate hazard. In other words the appellant did not see the bicyclist, but had he exercised the required care, he should have. At the same time I am of the view that the trial judge erred in failing to conclude that Mr. MacLaren, in choosing to ride in between the two travel lanes and beside the stopped pick-up rather than in the lane of travel behind it, did not take reasonable care for his own safety. His failure to take reasonable care for his own safety was one of the causes of the accident. Mr. MacLaren was therefore contributorily negligent.
- [37] I conclude the presence of a dedicated bicycle lane to be an important and distinguishing feature here because the plaintiff was not obligated in the circumstances of this case to move her bicycle into the through lane of traffic prior to the intersection.
- [38] In *MacLaren*, the Court of Appeal agreed with the trial judge's conclusion that the cyclist had no alternative but to move into the through lane in order to comply with his obligation to keep as far right as possible while also continuing straight through the intersection; had he remained to the right and adjacent to the curb, he would have been within a mandatory right turn lane.

- [39] However, in this case, the plaintiff's options were not so limited. The plaintiff cyclist in this case had the option of keeping her bicycle as close to the right side of the road as practicable as required by s. 183(2)(c) of the Motor Vehicle Act, while also complying with the municipal bylaw that requires her to use the bicycle lane if one is available.
- [40] If I were to accept the defendant's argument, the dedicated bicycle lane should not be used by cyclists who intend to cross the intersection and would instead be used solely by cyclists intending to turn right. However, there are neither signs nor markings in the bicycle lane that would indicate that the bicycle lane has ended for through cyclists. There are no signs or markings that require users of the bicycle lane to turn right. The bicycle lane is separated from the single lane and what subsequently becomes the right turn lane by a solid white line. The bicycle lane contains only one painted sign, which is a picture of a bicycle. The painted bicycle sign is positioned shortly after northbound lane divides into two lanes divided by a broken line. In the absence of any signage indicating that through cyclists should do otherwise, it is reasonable to assume that cyclists are intended to remain within the bicycle lane, regardless of whether they intend to turn right or to continue through.
- [41] Dedicated bicycle lanes provide cyclists with a small portion of the roadway in which to travel to the exclusion of motor vehicles, recognizing that motor vehicles may need to traverse a bicycle lane, whether to enter or exit the roadway, to park adjacent to the curb, or for other reasons. Cyclists can expect that vehicles will not be driving in the dedicated bicycle lanes and will yield to cyclists using those lanes, just as drivers of motor vehicles can expect that cyclists will confine themselves to dedicated bicycle lanes where available.
- [42] At this intersection, a cyclist would have to leave the dedicated bicycle lane, traverse the right turn lane, and then merge into and 'take' the through lane, a potentially hazardous manoeuvre when the latter two lanes can be expected to contain vehicular traffic travelling much faster than the cyclist.
- [43] I find that the plaintiff was not in breach of any traffic rules or the rules of the road when she stayed in the dedicated bicycle lane and proceeded to cross over the intersection in the direction of the dedicated bicycle lane on Hollywood Road north of Highway 33 because cyclists in the dedicated bicycle lane are not obligated to turn right. The dedicated bicycle lane is both for cyclists who are turning right and those who are continuing through the intersection. The plaintiff was not subject to a heightened duty of care.
- [44] The facts here are similar to those in *Levers v. Blace*, [1993] B.C.W.L.D. 1666, 1993 CarswellBC 2355. In that case, a cyclist was riding alongside a motorist in the same lane of traffic when the motorist made a sudden right turn into a parking lot, resulting in the cyclist colliding with the passenger side of the motorist's vehicle. Justice Lowry held the motorist to be solely responsible for the collision:
- [5] Mr. Blace says that he was stopped beside Mr. Levers at the light. But he says Mr. Levers was in the right turning lane. He says that when the light changed, he accelerated and did not see the bicycle again until the impact. He assumed Mr. Levers had turned right on Trunk

Road. Mr. Blace has no recollection of looking to his right or behind before he made his turn into the Dairy Queen lot. If he had, he would have seen the cyclist. He activated his turn signal just as he cleared the intersection. He assumed there was no reason he could not turn safely. His assumption was wrong.

- [45] The circumstances in this case are similar to those here because the defendant had previously seen the plaintiff before he got to the intersection, but had lost track of her and failed to ensure that it was safe to commence his right turn.
- [46] I do not accept that the plaintiff should share any responsibility for the accident. The plaintiff had been travelling in the dedicated bicycle lane for several blocks. It was a bright and sunny day and she was clearly visible. Motorists such as the defendant who were travelling in the same direction as the plaintiff had a prolonged opportunity to observe her in the bicycle lane and the defendant ought to have anticipated that she may continue through the intersection in line with the dedicated bicycle lane.
- [47] Because I have concluded that the plaintiff was ahead of the defendant as they approached the intersection and that they arrived at the intersection at approximately the same time, the defendant was obligated to yield to the plaintiff, no different than if she had been a pedestrian using the adjacent crosswalk. The defendant's evidence was that he did not see her, even though he had seen her previously. However, it does not matter whether he actually saw her at the time he was commencing his turn. Rather, she was riding her bicycle in the dedicated bicycle lane in accordance with the bylaw and she was there to be seen.
- [48] I do not accept the defendant's submission that the plaintiff failed to take sufficient precautions for her own safety by not having a rear-view mirror attached to either her bicycle or helmet. Even if she had been aware that the defendant was approaching her from behind in the right turn lane, it was reasonable for her to expect that the defendant would have allowed her to pass before commencing his turn, and it is not apparent on the face of the evidence as to what kind of evasive action the plaintiff could have taken upon the sudden realization that the defendant was not going to allow her to do so.

Disposition

- [49] I find the defendant 100% at fault for the accident. Subject to something of which I am unaware, the plaintiff is entitled to her costs.

"Wilson J."

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