
CANADA / JUDGMENT

D'Amici v. Fahy

2020 BCCA 89

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 89 D'Amici v. Fahy

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

D'Amici v. Fahy,

2020 BCCA 89

Date: 20200313

Docket: CA45498

Between:

Daniele Guissepe D'Amici

Appellant

(Plaintiff)

And

Dara Martin Fahy,

Mercedes Benz Financial Services Canada Corporation

Respondents

(Defendants)

Before:

The Honourable Madam Justice Bennett

The Honourable Mr. Justice Willcock

The Honourable Mr. Justice Goepel

On appeal from: An order of the Supreme Court of British Columbia, dated July 12, 2018 (D'Amici v. Fahy, 2018 BCSC 1372, Vancouver Registry M151333).

Counsel for the Appellant:

S. Wittman

Counsel for the Respondents:

M.-H. Wright

J.E. Fergusson

Place and Date of Hearing:

Vancouver, British Columbia

January 29, 2020

Place and Date of Judgment:

Vancouver, British Columbia

March 13, 2020

Written Reasons by:

The Honourable Mr. Justice Willcock

Concurred in by:

The Honourable Madam Justice Bennett

The Honourable Mr. Justice Goepel

Summary:

The parties were involved in a motor vehicle collision that occurred when the appellant attempted to cross a major thoroughfare and was struck by the respondent, who had the right of way. The appellant relied on expert evidence to show the accident would have been avoided had the respondent not been speeding. The judge discounted this evidence, found the respondent's speeding was not negligent in the circumstances and found the appellant 100 percent liable. Held: Appeal dismissed. The trial judge's assessment of the value of expert evidence is entitled to deference and should not be interfered with in this case. The suggestion the accident would have been avoided had the respondent not been speeding is not itself sufficient to establish a breach of the standard of care.

Reasons for Judgment of the Honourable Mr. Justice Willcock:

Introduction

- [1] The appellant's claim for damages arising out of a March 19, 2013, motor vehicle accident was dismissed for reasons indexed as 2018 BCSC 1372. This is an appeal from the order dismissing the claim.
- [2] The accident occurred when the appellant crossed Main Street, travelling eastbound, at the intersection of E. 6th Avenue in the city of Vancouver. The respondent was driving north on Main Street. Their vehicles collided after the appellant crossed the three southbound lanes of Main Street (causing southbound vehicles to have to brake suddenly) and entered into the respondent's path of travel.
- [3] The judge found the accident was solely a result of the negligence of the appellant in entering the respondent's path when it was unsafe to do so.
- [4] The appellant contends the judgment is founded upon errors of fact and errors of mixed fact and law.

Background

- [5] The appellant's counsel at trial (not counsel before us) advised the judge at the outset of the trial that the appellant had no memory of the accident. He called the respondent as an adverse witness, filed photographs of the vehicles taken at the scene of the accident and afterwards, and relied on the expert opinion evidence of Dr. Toor, an engineer with expertise in accident reconstruction.
- [6] The respondent called a witness, Megan Hunter, who testified to her observations of circumstances surrounding the accident (she did not see the accident occur) and he testified himself.
- [7] The accident occurred at about 4:00 p.m. It was cloudy, visibility was good and the road was dry. Southbound traffic on Main Street was heavy; northbound traffic was relatively light. The posted speed limit on Main Street at the location of the accident is 50 km/h. It is, of course, a principal thoroughfare in Vancouver.
- [8] Ms. Hunter testified that as she was driving in the middle of the three southbound lanes on Main Street approaching 6th Avenue she had to come to a sudden halt to avoid colliding with the vehicle in front of her. That vehicle had "slammed on its brakes" because a car (later identified as the Honda Civic driven by the appellant) had crossed Main Street at 6th Avenue in front of the southbound traffic.
- [9] As she started to move again, she travelled through the intersection before being alerted to the accident. When asked when that occurred, she testified:

Almost immediately. As I passed by it, I just thought that guy was being an idiot, and he was going to have an accident, and then I heard the accident, and so I pulled over

- [10] She had not seen the respondent's vehicle before the accident occurred. She estimated that she was one quarter of a block past the intersection when she heard the collision. When she last saw the appellant's Honda Civic it was close to the centre of Main Street. She could not recall if it was stopped.
- [11] The respondent testified that before the collision he was travelling north on Main Street in the centremost lane at about 50-60 km/h. He was speaking on a hands-free telephone, something he had done with regularity for years. He had two hands on the wheel and was looking ahead.
- [12] The respondent saw the front of an eastbound vehicle crossing Main Street from the west at 6th Avenue that appeared to be coming to a "rolling stop" at the double yellow centreline. The driver of that vehicle was looking north, to his left. When asked where he was when he first saw the appellant's vehicle he said: "It would be a guess, but I would say maybe two car lengths, at most." He had not seen much of an opening for vehicles to cross Main Street at 6th Avenue and believes heavy southbound traffic had obscured his view of the appellant's vehicle.
- [13] The appellant's vehicle accelerated suddenly into his path. The respondent applied his brakes and felt the vibration of the anti-lock brake system (ABS) just before impact for a period that he estimated as less than one second. When asked how long he applied his brakes before collision, he said:

A Again, I would I would guess I mean, it was very quick, the whole thing was very quick from the time I applied the brake to the impact, I don't know exactly how many seconds

Q Okay.

A or half a second or whatever the case.

Q All right.

A I'm not sure.

[14] When asked how he estimated his pre-braking speed at 50-60 km/h, he testified:

Well, just a general feel for, you know, having driven for a long time, I think I'm aware of when I'm going too fast in a certain situation I did not look at my speed, so I would guess that I was somewhere in the 50 to 60 range, based on a feel. For the flow of traffic and so on.

[15] Dr. Toor was retained to express an opinion on the manner in which the accident occurred and whether the respondent could have avoided the collision. The appellant's counsel provided Dr. Toor with a number of assumptions upon which to rely in drafting a report. Among these were assumptions: that the appellant's vehicle came to a stop before crossing the double yellow centreline on Main Street; that the respondent was able to apply his brakes as hard as possible for between 0.5 and 1.5 seconds after observing the appellant's vehicle accelerate and before the collision; that the respondent was talking on his cell phone

in the hands-free mode and should be considered to be a "distracted driver"; and certain assumptions with respect to the resting positions of the vehicles after the impact.

- [16] Dr. Toor began by estimating the impact speed of the vehicles. He did this using two methods, first by attempting to estimate the linear momentum and second by attempting to estimate the damage momentum. The linear momentum was generated from four variables: (1) the point of impact; (2) the vehicles' rest positions (which could not be ascertained because of uncertainty with respect to where the vehicles collided and significant uncertainty with respect to the rest positions, because they were moved after coming to a stop); (3) deceleration after impact; and (4) the vehicle masses. The damage momentum was estimated by examining the damage to the vehicles in light of the principal direction of force and the post-impact displacement direction. In order to arrive at this estimate of the impact speeds, Dr. Toor had to draw inferences with respect to the point of impact and the vehicles' rest positions and to estimate the damage to the respondent's vehicle from photographs.
- [17] He concluded the speed of the respondent's vehicle at the time of impact was between 50 and 60 km/h. Using that estimate of impact speed, Dr. Toor then attempted to estimate the pre-braking speed of the respondent's vehicle. Relying on the assumptions provided to him with respect to duration of brake application, he estimated the pre-braking speed of the respondent's vehicle at 61-94 km/h. The lower figure corresponded to a 0.5 second brake application, the higher to a 1.5 second brake application. Dr. Toor's opinion was, thus, consistent at the low-end, with the respondent's high estimate of his pre-brake application speed.
- [18] Dr. Toor then addressed the ultimate question asked of him: whether the respondent could have avoided the collision. In order to express an opinion on that question he made additional assumptions with respect to perception/response times (the time between observation of a potential hazard and application of brakes) to generate two estimates of stopping distances. The first estimate was based on a perception/response time of 1.1 seconds, the 50th percentile on a recognized study of perception/response times (the Olsen study). The second was based on a 1.6 second perception/response time, a figure arrived at by making a .5 second allowance for distraction (a figure derived from another study).
- [19] With a long reaction time (1.6 seconds) and full brake application of 0.5 seconds, a driver in the 50th percentile could have stopped a vehicle in the respondent's position before impact if travelling at 48 km/h or less when the hazard appeared.
- [20] With a shorter reaction time and full brake application for 0.5 seconds a driver in the 50th percentile could have stopped a vehicle in the respondent's position before impact if travelling at 55 km/h or less when the hazard appeared.

Judgment at Trial

- [21] The judge concluded, at para. 23, that he was unable to put much weight on Dr. Toor's opinion, because:

Dr. Toor was put in a difficult position of preparing a report and developing opinions on the basis of minimal physical evidence or data. As a result, the report is highly speculative.

- [22] In particular, the trial judge found that the median perception/response time used by Dr. Toor could not reliably be used to determine whether the respondent could have avoided the collision because of the wide range of perception/response times that could be considered "normal."
- [23] With respect to the time of brake application, the judge noted:
- [25] The evidence also does not establish actual braking time for the defendant. Dr. Toor uses a range of .5 to 1.5 seconds, and although the defendant did testify that he thought it was less than a second, such estimates are largely meaningless for a driver who is responding to an emergent situation.
- [24] In making findings of fact with respect to speed and the sequence of events the judge therefore placed weight primarily upon the evidence of the witnesses, which was "not seriously challenged". The following findings were made:
- [39] [T]he defendant testified that he was about two car lengths away when he first saw the plaintiff's vehicle approach the double yellow line. Like estimates of time expressed in fractions of seconds, this is little more than a best guess. Nonetheless, I accept his evidence that when he first saw the plaintiff's vehicle it was slowing or stopping and as such he would not have perceived it as a hazard at that time. I also accept his evidence that the plaintiff then accelerated quickly into the northbound lanes and that the defendant, despite slamming on his brakes, had no opportunity to avoid the impact.
- [40] I also find, based on the evidence of Ms. Hunter and the defendant, that the plaintiff was looking to his left. He did not properly look to ensure that he could safely cross the northbound lanes of Main Street. I do accept that the defendant was going faster than the posted speed limit of 50 kilometres per hour; however, the evidence has not established that driving at such a speed on Main Street, a significant north-south roadway, was negligent or that the defendant's speed prevented him from taking reasonable evasive action.
- [41] Similarly, the mere fact of using a handsfree telephone does not render the defendant negligent and, again, the plaintiff has not established on the evidence that the handsfree phone distracted the defendant to the point that it prevented him from taking reasonable evasive action.
- [42] Ultimately the accident in this case was caused by the plaintiff crossing Main Street when it was unsafe to do so, failing to keep a proper lookout, and failing to yield to the defendant's vehicle.

[Emphasis added.]

- [25] The appellant was found to be "100 percent liable for the accident."

Grounds of Appeal

[26] The appellant advances two principal arguments. First, for a number of reasons, some of which are characterized as errors of fact and others as mixed errors of fact and law, he says the judge inappropriately dealt with the expert opinion evidence of Dr. Toor. Second, he contends the judge erred in his treatment of the balance of the evidence of the witnesses by failing to reconcile inconsistent evidence and by failing to consider relevant evidence of fault on the part of the respondent.

Treatment of the Expert Evidence

[27] The appellant contends the judge erroneously discounted the weight that could be afforded to the expert report and the opinions of Dr. Toor for two reasons: first, he says the judge erred in fact by misunderstanding the expert's evidence; second, he says he erred in law when he concluded the expert had failed to address whether the respondent himself, rather than a driver with average perception/response time, could have stopped in time to avoid a collision. This, the appellant contends, reflects the placement of an inappropriate burden upon the appellant.

Appreciation of the Evidence

[28] In my view, there was no error in the appreciation of the evidence.

[29] The appellant says the judge erred in summarizing the evidence of Dr. Toor when he wrote at para. 17: "According to Dr. Toor, if the defendant applied his brakes for .5 seconds, his pre-impact speed would have been 61 to 71 kilometres per hour" (emphasis added). He submits this suggests the judge may not have appreciated the opinion was an estimate of "pre-braking" speed, as opposed to "pre-impact" speed. The appellant acknowledges this error is not palpable and overriding. In my view this criticism is unfounded. The judge clearly addressed and was considering the distinction between impact speed and pre-impact speed. The only pre-impact speed of importance was the pre-braking speed.

[30] The appellant says the judge, at para. 19 of his reasons for judgment, inaccurately summarized the conclusion of Dr. Toor as an opinion on the role of distraction in accident avoidance in this case. The judge wrote:

[19] [Dr. Toor] opined that depending upon the defendant's pre-impact speed and his braking time, had the defendant's perception response time not been prolonged by reasons of his use of the handsfree phone, his vehicle could have stopped or at least sufficiently slowed to avoid the impact. The plaintiff relies on Dr. Toor's opinion to support his position that the defendant was negligent in the operation of his vehicle.

- [31] The passage cited by the appellant should be read in context. The judge, briefly summarizing an extensive report, notes some of the highlights and critical conclusions of the report, in particular the opinion in support of the allegation that the respondent was distracted and the effect of distraction. In my view, it should not be said in doing so that the judge "forgot, ignored, or did not understand" portions of the report to which he did not expressly refer.
- [32] The appellant says it was an error for the judge to refer to the impact speed of the respondent's vehicle as "an unproven assumption" in para. 38 of the reasons for judgment. In the critical passage the trial judge noted:

Dr. Toor's opinion is based upon a number of unproven assumptions, including the plaintiff's stop time, the defendant's braking time, the impact speed, and the pre-impact speed.

- [33] Dr. Toor's estimate of the impact speed of the appellant's vehicle was based on unproven assumptions, as the expert was asked to assume the appellant's vehicle came to a complete stop at the centreline and "accelerated normally" to the point of impact. The appellant is correct to say, however, that the estimate of the impact speed of the respondent's vehicle (derived from the damage momentum analysis) may be characterized as inference drawn primarily from the physical evidence (although even this analysis places some weight upon speculative estimates of movement after collision). If there is a palpable error in the judge's description of the foundation for the opinions expressed by Dr. Toor, which is arguable, it is certainly not overriding.
- [34] The trial judge's conclusion that Dr. Toor's evidence was unhelpful was unlikely to have been different if he had concluded, to paraphrase para. 38 of his reasons, that the opinion was based upon a number of unproven assumptions, including the appellant's stop time, the respondent's braking time, the pre-impact speed, the impact speed of the appellant's vehicle and upon an inference with respect to the respondent's impact speed drawn primarily from the damage to the vehicles.
- [35] Dr. Toor came to three conclusions with respect to critical facts:
- a) the impact speed of the respondent's vehicle was between 50 and 60 km/h;
 - b) the pre-braking speed was probably between 61 and 94 km/h; and
 - c) the respondent could have avoided the impact, even with brief brake application, if he was driving at a speed in the range of 48-55 km/h before applying his brakes.
- [36] The first of these opinions was not highly speculative but I cannot conclude it was ignored by the trial judge. He did not discount Dr. Toor's opinion entirely, and the judge's conclusion with respect to the pre-braking speed of the respondent's vehicle was not inconsistent with Dr. Toor's estimate. At para. 17 of the reasons for judgment, he notes Dr. Toor's estimate of the impact speed at 50-60 km/h. Based on that impact speed, Dr. Toor estimated that if brakes had been applied for 0.5 seconds, the pre-braking speed was probably in the range of

61-71 km/h. As noted above, the trial judge found that before briefly applying his brakes the respondent was travelling at a speed greater than the posted 50 km/h speed limit. It was not necessary to reject Dr. Toor's least speculative evidence, his opinion with respect to impact speed, in order to accept the respondent's evidence that he was travelling above the speed limit but with the flow of traffic.

- [37] It is correct to say there were many variables in this case which rendered Dr. Toor's other opinions, with respect to pre-braking speed and collision avoidance, highly speculative. The judge identified two of those variables, the large range of perception/response times and the unreliability of a driver's own estimate of the duration of brake application in the agony of the moment. The judge made the following comments with respect to the reaction times and braking times relied upon by Dr. Toor in forming his opinion:
- [24] [H]is use of a 1.6 second perception response time for the defendant is based on a median perception response time of 1.1 seconds, taken from what is referred to as the Olsen study. However, as he acknowledged, Olsen suggests that a perception response time anywhere in the range of .7 to 2 seconds would be considered normal. There is no way of telling where the defendant falls within that range, if indeed he does. Similarly, the addition of .5 seconds to reflect distraction from the use of the handsfree phone is speculative and somewhat arbitrary. There is simply no way of knowing whether the defendant was distracted, and, if so, to what degree.
- [25] The evidence also does not establish actual braking time for the defendant. Dr. Toor uses a range of .5 to 1.5 seconds, and although the defendant did testify that he thought it was less than a second, such estimates are largely meaningless for a driver who is responding to an emergent situation.
- [38] The appellant says it was an error to conclude the respondent's estimate of his braking time was "largely meaningless" and to find there was no way of telling where the respondent fell within the range of potential perception/response times. However, the respondent himself acknowledged his evidence with respect to braking time was unreliable and Dr. Toor testified that he had no idea what his own perception/response time is. I can see no error in the trial judge's assessment of this evidence.
- [39] A trial judge should be given broad latitude to determine the extent to which expert reports are of assistance in weighing the evidence of witnesses. Opinions with respect to accident reconstruction are properly weighed by considering the extent to which the facts upon which they are based can be verified. That is an exercise for the trier of fact. The Supreme Court of Canada described the deference owed to the trial judge's assessment of the value of expert opinion evidence in *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16 at para. 105, where Gascon J., writing for the majority, observed:
- [105] In my opinion, the Court of Appeal should not have intervened in this regard. The qualification of an expert and the assessment of the probative value of his or her testimony or opinion are evidentiary issues that require deference, especially given that s. 123 of the

Quebec Charter [Charter of human rights and freedoms, CQLR, c. C-12] confers considerable flexibility on the Tribunal in such matters. It is not open to a reviewing court to carry out its own assessment of the probative value of an expert's testimony or opinions simply because it disagrees with the Tribunal's assessment.

[Emphasis added.]

[40] Affording such deference to the trial judge, it is my opinion that we ought not to interfere with his view that Dr. Toor's report was of limited value, particularly with respect to the respondent's pre-braking speed and his ability to avoid the collision. The trial judge did not err by concluding that Dr. Toor's opinion was of limited assistance in the assessment of the respondent driver's conduct. A similar conclusion was arrived at by this Court in *Melgarejo-Gomez v. Sidhu*, 2002 BCCA 19, where accident reconstruction based upon assumptions with respect to perception/response times was found to be of no use in attempting to determine the fault of a driver.

Evidentiary Value of the Toor Report

[41] The appellant challenges the judge's conclusion that the expert report was not helpful because of Dr. Toor's reliance upon median perception/response times. The respondent says a driver's actual perception/response time cannot be known unless it is observed and measured and there is no real alternative to using median times in accident reconstruction. This is commonly done by experts and opinions founded upon such statistical reaction times are probative. He says that when the judge expressed the view that it would have been more useful to have a range of "normal" perception/response times, he was placing upon the appellant the burden of establishing fault to a standard higher than the balance of probabilities.

[42] The judge concluded, at paras. 40 and 41, that:

- a) driving faster than the posted speed limit of 50 km/h on Main Street, in the circumstances of this case, was not negligent;
- b) the appellant had not established on the evidence that the respondent's speed prevented him from taking reasonable evasive action.

[43] The appellant says both the conclusion with respect to whether the respondent breached the standard of care by speeding and the conclusion that excessive speed was not causative were affected by the judge's erroneous treatment of Dr. Toor's report. First, he says Dr. Toor's opinion that most drivers could have avoided the collision if driving at the posted speed limit ought to have been weighed in determining whether the respondent's conduct was blameworthy. Second, he says the evidence that a driver with a median perception/response time could have avoided a collision goes to proof of causation in fact.

- [44] Trial courts in this province have wrestled with the extent to which the prospect of accident avoidance should be used to determine fault. In part, conflicting statements in judgments cited to us are a result of lack of clarity with respect to the distinction between fault and causation.
- [45] Of course, blameworthy conduct does not result in liability in negligence unless it is a cause in fact of damages. Thus, excessive speed on the part of a dominant driver, even if blameworthy, does not lead to liability in negligence unless the speed prevented him from taking reasonable steps to avoid the collision: *Cooper v. Garrett*, 2009 BCSC 35 at para. 42; *Morehouse v. Andrews*, [1987] B.C.J. No. 2670 (S.C.); *Santos (Guardian ad litem of) v. Raes*, [1998] B.C.J. No. 389 at para. 11 (S.C.); and *Schucknecht v. Singh et al.*, 2006 BCSC 1025.
- [46] In *Cooper*, a driver failed to yield the right of way when making a left turn and was struck by an oncoming driver who was speeding. Three out of four accident reconstruction engineers who gave evidence believed the accident would have been avoided had the dominant driver not been speeding. Despite this evidence, the court found the servient driver fully liable for the accident. In a passage that has been proven to be problematic the judge held:
- [44] While it seems attractive to attribute blame based on the speed of the dominant driver and hypothesize on what would have happened if [the dominant driver] kept to the speed limit, the fact is that [he] drove at the speed he did and there was nothing he could have done, driving at the speed he did, to avoid the collision. When [the servient driver] decided to proceed with his left-hand turn, [the dominant driver] was approximately 40 metres away. He was an immediate hazard and [the servient driver] should have yielded to him.
- [47] In *Hynna v. Peck*, 2009 BCSC 1057, Ballance J., correctly in my view, rejected the broad reading of that passage from the reasons in *Cooper*:
- [80] *Cooper* does not lay down a rigid rule that the Court ought not to consider whether and how the speed of a through driver might have played a causative role in an accident where it has been found that the other driver has failed to yield the right-of-way. In my view, the dictum in *Walker* does not extend that broadly and was not intended to have that reach. The Court in *Walker* speaks of avoidance action to be taken by a reasonably careful and skillful driver. It is difficult to imagine how a driver who is speeding significantly over the applicable limit can legitimately be portrayed as standing in the position of the reasonably careful and skillful driver contemplated by *Cartwright J.*
- [81] One can conceive of all manner of substandard or reckless driving conduct that might prevent a driver from taking evasive action in response to a servient driver's failure to yield the right-of-way. Based on the defence's reading of the breadth of the ratio in *Cooper* such flawed driving conduct is not a relevant consideration even where it is shown that it deprived the defective driver from being able to take reasonable evasive action. The analysis urged by the defence would give unrestrained licence to a through driver to speed excessively, fail to maintain a proper look-out and violate any number of the other rules of the road, and yet not be held responsible for negligence on his part, even where his

impugned conduct prevented him from taking reasonable avoidance measures and was a proximate cause of the accident. Resolving liability between two substandard drivers using that approach would effectively attach absolute liability on the driver who has failed to yield the right-of-way pursuant to s. 175. That approach is not sanctioned by s. 175 and seems incompatible with the basic tenets of the law of causation.

- [48] Justice Butler (as he was) reached the same conclusion, that Cooper has been erroneously cited for a broad proposition for which it is not authority, in *Gorman v. Meghji*, 2018 BCSC 1904, holding, at para. 117:

The statement [in Cooper] that, "there was nothing he could have done, driving at the speed he did, to avoid the collision" does not establish a principle that can be applied in all cases. Indeed, it would lead to an absurdity: every through driver, no matter what speed the vehicle was going, would not be found at fault.

- [49] After rejecting the broad proposition for which Cooper has been cited, Ballance J. in *Hynna* adopted the description of the standard of care set out by Catliff J. in *Santos* at paras. 11 and 15:
- [11] While travelling with other traffic over the speed limit does not itself constitute negligence in this case, it will constitute contributory negligence if excessive speed probably prevented the defendant from taking reasonable measures to avoid the accident.
- [15] ... All drivers who exceed the speed limit run the risk of being found liable if their speed has prevented them from taking reasonable evasive action to avoid an accident.
- [50] The jurisprudence does not, however, and should not go so far as to say that proof of causation in fact establishes fault. The standard of care enquiry should not be conflated with factual causation. A rule that a driver exceeding the speed limit is liable in negligence if it can be established that speed caused or contributed to a collision would impose strict liability upon drivers exceeding the speed limit. As the appellant acknowledges, and the trial judge correctly observed, while the relevant legislative standards inform the negligence analysis, a breach of a statutory provision does not in and of itself give rise to a cause of action: *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 at para. 29; *The Queen (Can.) v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205 at 226-227.
- [51] As Groberman J.A. for this Court observed in *Salaam v. Abramovic*, 2010 BCCA 212 at para. 21:
- [21] In the end, a court must determine whether, and to what extent, each of the players in an accident met their common law duties of care to other users of the road. In making that determination, a court will be informed by the rules of the road, but those rules do not eliminate the need to consider the reasonableness of the actions of the parties. This is both because the rules of the road cannot comprehensively cover all possible scenarios, and because users of the road are expected to exercise reasonable care, even when others have failed to respect their right of way. While s. 175 of the Motor Vehicle Act and other rules of

the road are important in determining whether the standard of care was met, they are not the exclusive measures of that standard.

- [52] It is true, however, that the factual enquiry with respect to causation in speeding cases is clearly assisted by evidence that a driver with perception/response time at the 50th percentile could have avoided the collision by driving at an acceptable speed. In the absence of evidence that the respondent was more or less able to perceive and react to hazards on the road, causation in fact may have been established as the appellant suggests. In *Benhaim v. St-Germain*, 2016 SCC 48, Wagner J. summarized the circumstances in which an inference of causation may be drawn:
- [54] Causation need not be proven with scientific or medical certainty, however. Instead, courts should take a "robust and pragmatic" approach to the facts, and may draw inferences of causation on the basis of "common sense": *Snell* [*Snell v. Farrell*, [1990] 2 S.C.R. 311], at p. 330-331; *Clements* [*Clements v. Clements*, 2012 SCC 32], at paras. 10 and 38. The trier of fact may draw an inference of causation even without "positive or scientific proof", if the defendant does not lead sufficient evidence to the contrary. If the defendant does adduce evidence to the contrary, then, in weighing that evidence, the trier of fact may take into account the relative ability of each party to produce evidence: *Ediger* [*Ediger v. Johnston*, 2013 SCC 18], at para. 36.
- [Emphasis added.]
- [53] In *Walker v. Brownlee and Harmon*, [1952] 2 D.L.R. 450 at 461 (S.C.C.) (applied in *Pacheco (Guardian ad litem of) v. Robinson* (1993), 75 B.C.L.R. (2d) 273 (C.A.); and *Gautreau v. Hollige*, 2000 BCCA 390), the causation question posed by the court is whether the dominant driver "had in fact a sufficient opportunity to avoid the accident of which a reasonably careful and skillful driver would have availed himself".
- [54] An individual's perception/response time will always be an unknown variable in accident reconstruction. Median perception/response times are of some relevance in the absence of evidence suggesting the defendant's was shorter or longer than the median. Trial courts have properly relied upon such evidence in the causation inquiry although, as this court noted in *Haase v. Pedro* (1970), 21 B.C.L.R. (2d) 273 (C.A.); and *Kerr (Litigation Guardian of) v. Creighton*, 2008 BCCA 75, it should be used with care.
- [55] If the judge had found the respondent to be at fault for exceeding the speed limit at the material time and place, then, in my opinion, it would have been an error, when addressing causation, to have discounted Dr. Toor's opinion on accident avoidance for the sole reason that Dr. Toor relied on median perception/response times. However, as noted above, the trial judge concluded that the respondent was not negligent. It was not an error to do so for the reasons given by the judge. In my view, the case did not turn upon the fact that Dr. Toor's opinion with respect to accident avoidance was given little weight. I would not accede to the appeal on this ground.

Treatment of the Balance of the Evidence

[56] The appellant advances two distinct arguments with respect to the evidence generally. He contends the judge made findings of fact inconsistent with the evidence of an independent witness, Megan Hunter; and he argues the judge failed to consider evidence of fault on the part of the respondent.

Consideration of the Evidence of the Witness

[57] The trial judge found the respondent did not have an opportunity to appreciate the hazard posed by the appellant's vehicle until he was so close to the vehicle as to be unable to avoid an accident. The appellant contends the judge placed some weight upon the respondent's evidence that he was approximately two car lengths away from the appellant's vehicle when he first appreciated the appellant was about to move forward into his path of travel. He says this view of the evidence is so inconsistent with the evidence of Ms. Hunter, that the trial judge must have misapprehended her evidence.

[58] Ms. Hunter testified that after she had to stop for the appellant's vehicle she continued to drive south on Main Street and was about one quarter of the way down the block before she heard the impact of the collision. Appellant's counsel contends some significant amount of time had to pass between the time at which Ms. Hunter came to a stop and the time at which the accident occurred, in order for her to travel that distance. He submits she could not have been able to continue on her way south on Main Street until the appellant's vehicle moved forward into the northbound lanes of travel. He asks us to draw this conclusion by examining the diagrams of the accident scene, and finding there would not have been room for Ms. Hunter to advance until the appellant moved into the respondent's path of travel.

[59] There are a number of weaknesses in this argument, which was not advanced at trial. It is based upon assumptions with respect to the width of the southbound lanes on Main Street at this intersection that are inaccurate. The middle southbound lane on Main Street widens and becomes two lanes in this intersection. It is certainly not evident that Ms. Hunter would have been unable to drive behind the appellant's vehicle while it remained stopped at the centre of Main Street. Perhaps for that reason, counsel at trial did not ask the trial judge to draw any inference from Ms. Hunter's evidence with respect to when the appellant's vehicle began to move across the centreline. In my view, there is no apparent inconsistency between the evidence of the respondent and the evidence of Ms. Hunter that the trial judge had to resolve in making the critical findings of fact with respect to the sequence of events leading to the accident.

[60] In my view there is no merit to this ground of appeal.

Assessment of the Whole of the Evidence

[61] Finally, the appellant submits the trial judge erred in his assessment of the evidence of fault. He says the judge did not address significant conflicts in the evidence, and:

95. While [the trial judge] was correct in resisting an automatic finding of negligence merely because the Respondent was speeding, in breach of s. 146 of the Motor Vehicle Act, the learned judge ignored other circumstances of the accident he ought to have considered, such as the fact that it was rush hour and traffic was very heavy in the oncoming direction. This is particular [sic] so if the Respondent was in the leftmost northbound lane, as he believes he was; he would have been immediately adjacent to slow-moving or stopped vehicles, where it was foreseeable that a vehicle or pedestrian may attempt to cross, should a gap in traffic present itself.

[Appellant's Factum at para. 95.]

[62] This, in my view, does not amount to an argument the judge did not apply the correct standard of care or failed to deal with evidence of fault but, rather, an argument he ought to have come to a different conclusion on weighing the facts, of which he was clearly aware.

[63] In my view, this case, like *Walter v. Plummer*, 2011 BCCA 335, is one to which the view expressed by Chief Justice McEachern in *Trac v. Sangra* (1995), 17 B.C.L.R. (3d) 92 (C.A.) at para. 9 applies:

[T]his is a case that could be won, if at all, only at trial. For us to interfere would require us in effect to retry this case and to take a different view of the facts from that of the trial judge. That we are most reluctant to do.

Apportionment of Fault

[64] In light of my conclusion that the judge did not err in dismissing the case against the respondent, in my view it is not necessary to address the submissions with respect to apportionment.

[65] I would dismiss the appeal.

"The Honourable Mr. Justice Willcock"

I agree:

"The Honourable Madam Justice Bennett"

I agree:

"The Honourable Mr. Justice Goepel"

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Prepared on 29 October 2026 · Esheria