

CANADA / JUDGMENT

Facher v. Bismellah

2020 BCSC 2211

COURT

Supreme Court of British Columbia

DECIDED

22 September 2020

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2020 BCSC 2211 Facher v. Bismellah

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Facher v. Bismellah,

2020 BCSC 2211

Date: 20200922

Docket: M193097

Registry: New Westminster

Between:

Fawad Facher

Plaintiff

And

Shafiqullah Bismellah and Sung Lee

Defendants

Before: The Honourable Mr. Justice Veenstra

Oral Reasons for Judgment (Liability)

Counsel for the Plaintiff:

J.M. Green

J. Kiedrzyn, Articled Student

Counsel for the Defendant, Shafiqullah Bismellah:

C. Bolan

Counsel for the Defendant, Sung Lee:

S. Grewal

Places and Dates of Trial:

New Westminster, B.C.

September 11, 2020

Vancouver, B.C.

September 16, 2020

Place and Date of Judgment:

Vancouver, B.C.

September 22, 2020

- [1] THE COURT: The plaintiff, Mr. Facher, seeks damages for injuries he suffered in a motor vehicle accident that occurred on July 9, 2016. Mr. Facher was a passenger in a vehicle driven by the defendant, Mr. Bismellah, which collided with a vehicle driven by the other defendant, Ms. Lee.
- [2] The issues of liability and damages have been severed. These reasons for judgment result from a trial of the liability issue, which occurred on September 11, 2020. Each of the three parties testified that day with Mr. Bismellah testifying by video link from Saint Petersburg, Russia. The parties presented their closing submissions on September 11 and 16, 2020.

Facts

- [3] Mr. Facher was born in Afghanistan in 1977. He moved to Canada in 1996. Mr. Bismellah was born in Afghanistan but at about nine years of age was moved to the Soviet Union. In 2008, at the age of 34, he moved to Canada. He had obtained a driver's licence in the Soviet Union, and after moving to Canada obtained a licence here.
- [4] Mr. Facher and Mr. Bismellah had met a year or so before the accident and saw each other periodically through a mutual friend. On the day of the accident, they were travelling together from Burnaby to do painting work at a construction site near UBC. They had stopped for coffee at a Tim Hortons restaurant and were continuing on to work. Mr. Bismellah was driving, and Mr. Facher was in the front passenger seat. Two others were sitting in the rear of the vehicle.
- [5] I was provided photographs of various views of the location of the collision taken from Google Maps. It appears from these photographs and from the evidence that Mr. Bismellah's vehicle (a 2002 Chevrolet Cavalier) was travelling on Southpoint Drive in Burnaby. That road

proceeds down a hill with parkland on the left and residences on the right. At the bottom of the hill there is a 90-degree right turn at which point the road becomes Southwynde Avenue. Ms. Lee was driving her 2013 Subaru XV along Southwynde Avenue toward the same corner from the opposite direction - when she reached the corner, she would have turned left onto Southpoint Drive. The road in both forms (Southpoint and Southwynde) has a single solid yellow dividing line.

- [6] Mr. Facher's evidence was that as they came down the hill on Southpoint, Mr. Bismellah was alternately accelerating and braking. Mr. Bismellah was "a little bit speeding, a little bit juggling the car." When asked to explain the "juggling" reference, he identified it as a swerving behaviour. He thought that Mr. Bismellah was trying to "show off." Mr. Facher said that he asked Mr. Bismellah two or three times to stop playing with the vehicle, but that Mr. Bismellah simply smiled and continued in the same manner.
- [7] Mr. Facher's evidence was that as they approached the corner, Mr. Bismellah was driving too quickly and lost control, crossing over the centre line and crashing into Ms. Lee's vehicle. Mr. Facher said that he did not see the other vehicle until just before the collision. His evidence was that at the time of the collision, Mr. Bismellah was braking. While Mr. Facher did not know how many kilometres per hour Mr. Bismellah was driving, he estimated at the time of the collision the speed was at least 20 kilometres per hour.
- [8] Mr. Bismellah's evidence was that, on the day of the collision, he was driving on a route that he had driven many times in the past. It was a route he traditionally took on days when they were buying paint on their way to work. He confirmed that the weather was sunny and that the road was dry, but said that in one area the road was wet (presumably from lawn watering at one of the residences). The wet area was on the right side of the road and lasted for perhaps 5 or 6 metres. Mr. Bismellah did not recall exactly how quickly he was driving, but he acknowledged that because he was driving by a park, the speed limit was 30 kilometres per hour, and he did not think he was exceeding the limit.
- [9] Mr. Bismellah's evidence was that when he was approaching the corner, he applied the brakes in order to slow down. He estimated that he began applying the brakes at least 30 metres from the corner. His evidence was that although his wheels stopped turning, the vehicle began to skid. He let go of the brakes and then pressed them again, but the vehicle continued to skid and would not stop. He said that as they approached the corner, about 10 to 15 metres away, he could see Ms. Lee's vehicle approaching. His evidence was that he honked his horn at the vehicle. At various times in his evidence, he alternately said that the Lee vehicle stopped or that it slowed down. Mr. Bismellah said that he waved at the Lee vehicle with his left hand to tell them to get out of the way, but they did not. He estimated that he was honking and waving at them for a good 5 seconds before the collision. All this time, the vehicle continued to skid and he continued his efforts to brake. Mr. Bismellah attempted to negotiate the corner, but his vehicle crossed the centre line and struck Ms. Lee's vehicle. Mr. Bismellah's evidence was that if Ms. Lee had seen him and done what he suggested (i.e., get out of the way), the collision would not have occurred.

- [10] Ms. Lee's evidence was that on the morning of the collision, she was driving home from a Tim Hortons restaurant. She was familiar with the road - she had lived in the area for some ten years and had driven that road many times in the past. She estimated that she was driving approximately 30 kilometres per hour but was slowing down to about 20 kilometres per hour as she approached the corner. Her evidence was that she did not see the other vehicle and was about one or two car lengths from the turn when her vehicle was struck by the other vehicle. She estimated that she was travelling at about 20 kilometres per hour at the time of the collision. She did not hear any honking and did not see the other driver waving at her. Her evidence is that she was in her own lane at the time of the collision.
- [11] After the collision, she was unable to open her door and had to wait until someone opened it from the outside. I was provided with several photographs of Ms. Lee's vehicle. Those photographs indicate substantial damage along the left side of the vehicle, including both the driver's door and the rear passenger door on that side. It was admitted the vehicle damage was valued at \$9,159.83. I was not provided with photographs of Mr. Bismellah's car, but according to both Mr. Facher and Mr. Bismellah, the damage was primarily to the front left corner of the car.

Positions of the Parties

- [12] Although both defendants pleaded, in identical terms, that the plaintiff was contributorily negligent as a result of the failure to properly use his seatbelt and headrest, the uncontested evidence was that both the seatbelt and the headrest were being properly used. Mr. Bismellah withdrew his plea of contributory negligence at the start of the trial. Neither defendant argued at this hearing that Mr. Facher should be found contributorily negligent.
- [13] Mr. Facher's position is that one or both of the defendants are entirely at fault in this matter. He argues that an accident could not have happened if both drivers had remained in their respective lanes.
- [14] The parties drew my attention to two provisions of the Motor Vehicle Act, R.S.B.C. 1996, c. 318. The first is s. 144, which mandates that:

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.

[15] The second is s. 151, which provides that:

Driving on laned roadway

151 A driver who is driving a vehicle on a laned roadway

(b) must not drive it from one lane to another if that action necessitates crossing a solid line

[16] The parties concur that the applicable law is as summarized in *Hale v. MacEwen*, 2011 BCSC 1404. In that case Mr. Hale argued that, notwithstanding that the collision occurred on the defendant's side of the centre line, the defendant was nonetheless negligent for having driven too close to the centre line given the sharpness of the curve. Mr. Hale relied on two Court of Appeal judgments, *Gates v. Hodgson*, [1945] 2 W.W.R. 137, and *Watson v. Monfils*, 1999 BCCA 312.

[17] I note that the judgment in *Watson* (para. 15, quoted at para. 57 of *Hale*) cited the following proposition from the judgment of Justice Ritchie in *Adams v. Dias*, [1968] S.C.R. 931, 936:

It is true that a driver is in no way relieved from the liability which flows from a failure to take reasonable care simply because another user of the highway is driving in such a fashion as to violate the law, but in my opinion, no motorist is required to anticipate, and therefore keep on the look-out for, such an unusual and unexpected violation as was manifested by the appellant's course of conduct in the present case.

[18] To similar effect is the following provision from *Ali v. Fineblit*, 2015 BCSC 1494 at para. 20:

[20] Drivers are entitled to expect other drivers to obey the rules of the road. They are not required to anticipate another driver's negligent manoeuvre. As noted in *Carvalho v. Angotti*, 2007, BCSC 1760, at para. 23:

[23] The principle in *Walker v. Harmon*, [1952] 2 D.L.R. 450 at 461 (S.C.C.), has been cited in countless cases, including *Keen v. Stene*, 44 D.L.R. (2d) 350 at 367 (B.C.C.A.):

If he seeks to case any portion of the blame upon B, the driver with the right of way, A must establish that after B became aware, or by the exercise of reasonable care should have become aware, of A's disregard of the law, B had in fact a sufficient opportunity to avoid the accident of which a reasonably careful and skillful driver would have availed himself; and I do not think that in such circumstances any doubts should be resolved in favour of A, whose unlawful conduct was fons it origo mali;

[19] The conclusion in *Hale* on this issue is at paras. 58 to 66:

[58] In *Gates*, the Court of Appeal split liability when it appeared the trial judge had not made findings of credibility sufficient to determine the location of the accident relative to the lanes of travel. The majority concluded both drivers were travelling unreasonably close to the centre line and failed to provide reasonable clearance to the other of them. Accordingly, liability was equally apportioned between the plaintiff and defendant.

- [59] Here I am able to say with some precision where the accident occurred and the distance of the defendant's container from the centre line. As noted, I am satisfied he was within his lane of travel. The negligence of the plaintiff has been made out. He failed to maintain his vehicle within the travelled portion of the roadway for his direction of travel.
- [60] The remaining question is this: was the defendant so close, as was the case in *Watson*, as to make his actions unreasonable?
- [61] In concluding that he was not, I distinguish the situation from that which occurred in *Watson*, to the facts here. Here, the violation by the plaintiff was both unusual and unexpected.
- [62] Neither driver testified to a situation which should have caused the defendant to consider that the plaintiff would fail to negotiate the corner. His speed was not an issue and he seemingly, according to all witnesses, had control of his vehicle as he entered the curve.
- [63] As was stated in *Tucker (Guardian of) v. Asleson*, [1993] 6 WWR 45, 102 D.L.R. (4th) 518 by Southin J.A.:

35 Having concluded that the answer to the question which I posed at page 19 is "yes", the next question is whether Mr. Asleson's response upon sighting the Tucker vehicle was a breach of his duty of care to Mrs. Tucker and the plaintiff.

- [64] A driver's conduct must be judged by the standards of normal persons and not by applying the standards of perfection: *Freedman v. City of Côte St. Luc*, [1972] S.C.R. 216.
- [65] A driver is bound to anticipate on the part of the other drivers, only those follies which according to the teachings of experience commonly occur: *Provincial Transport Co. v. Dozois*, [1954] S.C.R. 223.
- [66] Nothing in the driving of the plaintiff forewarned the defendant of the possibility that he would fail to maintain his vehicle within his lane.
- [20] Ms. Lee argued that there was no evidence that indicates that Ms. Lee breached her duty of care. There was no evidence to suggest that she was driving too close to the centre line, nor was there any reliable evidence to suggest any error on her part - that there was anything she did or did not do that she should or should not have done. Rather, Ms. Lee was familiar with the road and was using appropriate and reasonable driving standards, driving on the well-travelled part of her lane.
- [21] Mr. Bismellah accepted that he was primarily responsible for the collision. He admitted that the vehicle he was driving crossed over the centre line and collided with Ms. Lee's Subaru somewhere on the other side of the dividing line. However, he argued that Ms. Lee should have been aware that the Chevrolet Cavalier being driven by Mr. Bismellah was angling toward the centre line in an unconventional fashion, and that had she been watching carefully, she would have had several seconds in which to respond to that threat by veering slightly to the right. He suggested that Ms. Lee be found 40% responsible for the collision.

The submission was premised on various assumptions as to the speed of each vehicle, the distance from each vehicle to the centre of the curve at key times, and the ability of each driver to see around the corner. Counsel presented various calculations, including a calculation as to the "closing speed" of the vehicle. These submissions were made in the absence of any expert evidence.

Analysis

- [22] As noted in *Bergeron v. Malloy*, 2020 BCSC 963, at para. 7, in reviewing the evidence in a case like this I must consider both the accuracy of each witness' evidence and its truthfulness:
- [7] A witness who is giving truthful evidence may not be giving reliable evidence. A witness who is not truthful is also not reliable. .
- [23] Ms. Lee is approximately 85 years of age. She has had a Canadian driver's licence for some 45 years. She gave her evidence through a Korean language interpreter. She was confused when presented with Google Maps photographs that showed a vehicle other than hers. Her recollection of events was limited. However, I generally found that she was careful to limit herself to what she actually recalled and that the evidence she gave was reliable. Similarly, I found Mr. Facher's evidence straightforward and direct.
- [24] I have concerns with Mr. Bismellah's evidence. He gave evidence that he was driving within the 30-kilometre per hour speed limit. I find that difficult to accept in light of the length and extent of the skidding that he described, his assertion that he began to brake at 30 metres or more from the corner, his inability to negotiate the curve and the damage caused to Ms. Lee's vehicle. His evidence as to the behaviour of Ms. Lee's vehicle - whether it was stopped or slowing - seemed to change over the course of his testimony. Where Mr. Bismellah's evidence differs from the other two witnesses, it is the evidence of the latter that I prefer.
- [25] I do not accept the various assumptions underlying the calculations presented by counsel for Mr. Bismellah. Fundamental to his calculations is an assumption as to the speed at which Mr. Bismellah approached the corner. His calculation as to the "closing speed" appears to assume that the two vehicles were approaching head on, when in fact they were approaching on the perpendicular. I accept the evidence of both Ms. Lee and Mr. Facher that the other vehicle was not visible until just before the collision.
- [26] I find that Mr. Bismellah breached his duty of care by driving too fast for conditions and as a result, being unable to negotiate the curve within his own lane.
- [27] With respect to Ms. Lee, I conclude that this was not a case where she ought reasonably to have seen Mr. Bismellah's vehicle, recognized that he was unable to control the vehicle, and taken action that would have avoided the collision.

[28] In the result, I find that the collision occurred wholly as a result of the negligence of the defendant Bismellah. As a result, the action should be dismissed as against the defendant Lee.

[29] These reasons for judgment are delivered orally. I reserve the right to edit should a transcript be ordered. However, the substance and the result will not change.

"Veenstra J."

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