
CANADA / JUDGMENT

Graham v. Carson

2015 BCCA 310

COURT

British Columbia Court of Appeal

DECIDED

26 June 2015

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2015 BCCA 310 Graham v. Carson

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Graham v. Carson,

2015 BCCA 310

Date: 20150626

Docket: CA41789

Between:

Grant Watt Graham

Respondent

(Plaintiff)

And

Primrose M. Carson and Victoria Ford Alliance Ltd.

Appellants

(Defendants)

Before:

The Honourable Mr. Justice Donald

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Savage

On appeal from: An order of the Supreme Court of British Columbia, dated April 8, 2014 (Graham v. Carson, 2014 BCSC 726, Victoria Registry Docket 122847).

Oral Reasons for Judgment

Counsel for the Appellant:

R. Lambert

Counsel for the Respondent:

S. Finn

Place and Date of Hearing:

Vancouver, British Columbia

June 26, 2015

Place and Date of Judgment:

Vancouver, British Columbia

June 26, 2015

Summary:

A cyclist was injured in a motor vehicle accident while riding to work. A motorist pulled into traffic quickly without using her turn signal. This threw the traffic behind into disarray. The cyclist braked and steered to the right between the stopped vehicle in front and a car parked on the curb. In doing so he hit the parked car, was spilled from his bicycle and injured. The court below found the motorist 100% liable. Held: Appeal Dismissed. The court below has not been shown to have made any palpable and overriding error. S.158 of the Motor Vehicle Act is not engaged on facts where, in the agony of the moment, a vehicle takes evasive action by veering to the right to avoid a collision brought about by another's negligent act. Cases turning on a quick decision made in the agony of the moment are not restricted to instances where vehicles are operating at highway speeds.

- [1] SAVAGE J.A.: This case concerns liability in a motor vehicle accident involving a cyclist. On the morning of October 22, 2010 the respondent Grant Graham suffered injury while cycling to work. The trial judge found that Mr. Graham was bicycling southbound on Blanshard Street in Victoria, B.C., when the appellant, Primrose Carson, pulled out into traffic from a nearby commercial loading zone too quickly and without using her turn signal. Behind Ms. Carson was an SUV, followed by Mr. Graham on his bicycle, followed by Nathan Enns in a car. Mr. Graham, Ms. Carson and Mr. Enns were witnesses at trial.

- [2] The trial judge found that as a result of Ms. Carson pulling out into traffic too quickly Mr. Graham and the two vehicle drivers were thrown into "disarray". The SUV driver had to stop very quickly and moved left, but remained within the right hand southbound lane. Mr. Enns veered his vehicle to the left into the left hand southbound lane to avoid collision. Mr. Graham braked and steered to the right into a metre-wide space between the stopped SUV and a car parked at the curb. In doing so he hit his elbow on the mirror of the parked car, was spilled from his bicycle and injured, giving rise to this claim.
- [3] The trial judge found that Mr. Graham "had a matter of seconds to decide what to do". He knew from experience that he risked being rear-ended by the following vehicle. Instead he steered his bike to the right. The judge found that Mr. Graham was an experienced cyclist and did not act unreasonably in taking the evasive action. He found that given the emergency situation, Mr. Graham could not be expected to have exercised his judgment perfectly, and that the jurisprudence requires courts to assess decisions of drivers and cyclists in light of the context in which decisions are made.
- [4] The trial judge rejected Ms. Carson's argument that Mr. Graham should have brought his bike to a stop behind the SUV, and was negligent for not attempting to do so. He noted that while following drivers will generally be at fault for failing to avoid a collision due to a car that has stopped too quickly out front, the analysis must always be based on the circumstances in each specific case. Ultimately, the judge found Ms. Carson fully liable for Mr. Graham's injuries, and found Mr. Graham not contributorily negligent.
- [5] The appellant in her factum submits that the trial judge erred in:
- (1) Failing to apply the appropriate causation analysis;
 - (2) Failing to give effect to the common law authorities and the relevant provisions of the Motor Vehicle Act, S.B.C. 1996 c. 318 (MVA), governing cyclists in the position of the respondent;
 - (3) Failing to apply to the plaintiff cyclist the same responsibilities as would be expected of the driver of a car operating in the same position as Mr. Graham; and
 - (4) In the alternative, that the trial judge failed to consider apportioning responsibility, as Mr. Graham was contributorily negligent.
- [6] The judge found that the appellant failed to signal her turn into traffic and moved into traffic too quickly. Failing to signal he found was not material in light of how Ms. Carson "darted out into traffic". He held:
- [8] Having found as I have regarding the turn signal, I add that the failure to signal is not the central concern in this case. If Ms. Carson had signalled at about the same moment she pulled out and drove into the traffic, the signal would have been of little or no assistance to anyone. The main problem was that Ms. Carson's car darted out into traffic too quickly. The traffic was proceeding south on Blanshard immediately behind or beside her car when her car had been stopped in the commercial zone moments before that. She should have waited

for a safe opening in the traffic, which might have entailed waiting where she was until the light changed so as to stop the southerly flow on Blanshard before cars started south onto Blanshard from Fort Street.

[Emphasis added.]

[7] With respect to causation the judge said this:

[11] Proceeding through the green light southward on Blanshard were, first, the SUV, second, the plaintiff on his bicycle, and third, Mr. Enns in his car. The SUV, the plaintiff's bicycle and the Enns car were thrown into disarray by the defendant driver pulling out too suddenly, immediately in front of the SUV.

[12] I noted above that the SUV stopped before hitting the defendant's car, but avoiding that collision was a near thing. The SUV had to stop very quickly. Mr. Enns veered his car toward the left; that is, toward the centremost of the southbound lanes on Blanshard, in order to avoid a collision. Meanwhile, the plaintiff on his bike had a matter of seconds to decide what to do. He was conscious from past experience that he risked being rear-ended by the Enns vehicle if he stayed his course and simply braked, hoping to stop in time to avoid hitting the SUV. Instead, he steered his bike, to the right, into what appeared as a metre-wide opening between the stopped SUV and a car parked on Blanshard, just south of the commercial zone.

[13] As I noted above, Mr. Graham is an experienced cyclist, and hoping to avoid injury by driving into the space between the SUV and the parked car was not unreasonable in that dire circumstance, when there was no time and little opportunity to do anything else.

[Emphasis added.]

[8] With respect to contributory negligence the judge made this finding:

[16] My view of the evidence and my resulting findings of fact lead to my conclusion that the defendant driver is fully liable for the plaintiff's injuries. The plaintiff was not contributorily negligent. He acted promptly and not unreasonably in a desperate situation, which was brought about entirely by Ms. Carson's re-entering traffic when her car should have stayed where it was until there was a safe opportunity to proceed.

[Emphasis added.]

[9] The judge considered the appellant's argument at trial, repeated here, that Mr. Graham should have simply slammed on his brakes on the wet or damp road:

[17] The defence invites the Court to conclude that Mr. Graham should have brought his bike to a stop behind the suddenly-stopped SUV, and that he was negligent for not attempting that. No one can be certain of what would have happened with that course of events, but as I have found above, the evasive action which Mr. Graham did undertake was not unreasonable in the circumstance, particularly when the decision to act had to be formulated probably within one or two seconds, all because of a change of events authored by the defendant

driver alone. To fully succeed here, the plaintiff must show, on the balance of probabilities, that his injuries were the result of the defendant driver's negligence, and not his negligence.

[21] I do not find from the facts stated above that Mr. Graham was contributorily negligent. A person is guilty of contributory negligence if he ought reasonably to have foreseen that if he did not act as a reasonable, prudent man he might be hurt himself. That was the reasoning of Denning L.J. in *Jones v. Livox Quarries*, [1952] Q.B. 608 (C.A.), at page 615, which was adopted by the Supreme Court of Canada in *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210, at paragraph 76.

[22] Acting in the emergency caused by the defendant driver's negligence, as Mr. Graham was compelled to do, he cannot be expected to have exercised his judgment perfectly.

[23] Freedman C.J.M. said in *Neufeld v. Landry* (1974), 55 D.L.R. (3d) 296 at page 298:

The conduct of the plaintiff driver must be assessed in the light of the crisis that was looming up before her. If in the "agony of the moment" the evasive action she took may not have been as good as some other course of action she might have taken -- a doubtful matter at best -- we would not characterize her conduct as amounting to contributory negligence. It was the defendant who created the emergency which led to the accident. It does not lie in his mouth to be minutely critical of the reactive conduct of the plaintiff whose safety he has imperilled by his negligence.

Of course, the gender references in that quotation are to be reversed for the case at bar, but the reasoning has direct application here.

[24] I was shown the reasons of K.J. Smith J.A., in *Chambers v. Goertz*, 2009 BCCA 358, at para. 56(c), where he set out factors for apportioning fault where contributory negligence is at issue. I do not address those factors here individually, because they are, I believe, subsumed by findings of fact earlier in these reasons, which support my conclusion that Mr. Graham has no contributory fault from trying to protect himself as he did.

[Emphasis added.]

[10] In my opinion, as the above passages show, the judge was alive to the question of causation and contributory negligence. The argument of the appellant was that Mr. Graham had another alternative open to him which he was negligent for not taking was rejected by the trial judge. There was evidence to support that finding, namely the evidence of Mr. Graham and that of Mr. Enns.

[11] In submissions before us the appellant reiterates his argument at trial that Mr. Graham was negligent in passing to the right and following too closely. The trial judge referred to the factors in *Chambers v. Goertz*, 2009 BCCA 358, para 56(c) which reads:

(c) Relevant factors have been summarized in *Heller v. Martens*, 2002 ABCA 122, (2002) 213 D.L.R. (4th) 124, @ para. 34; and Chiefetz, *Apportionment of Fault in Tort* (Aurora, Ont.: Canada Law Book, 1981) @ pp. 102-104:

- (1) The nature of the duty owed by the tortfeasor to the injured person.
 - (2) The number of acts of fault or negligence committed by a person at fault.
 - (3) The timing of the various negligent acts. For example, the party who first commits a negligent act will usually be more at fault than the party whose negligence comes as a result of the initial fault.
 - (4) The nature of the conduct held to amount to fault. For example, indifference to the results of the conduct may be more blameworthy. Similarly, a deliberate departure from safety rules may be more blameworthy than an imperfect reaction to a crisis.
 - (5) The extent to which the conduct breaches statutory requirements. For example, in a motor vehicle collision, the driver of the vehicle with the right of way may be less blameworthy.
 - (6) The gravity of the risk created.
 - (7) the extent of the opportunity to avoid or prevent the accident or the damage.
 - (8) whether the conduct in question was deliberate, or unusual or unexpected; and
 - (9) the knowledge one person had or should have had of the conduct of another person at fault.
- [12] As the judge noted, those factors are subsumed in his discussion quoted above, which support his conclusion " that Mr. Graham has no contributory fault from trying to protect himself as he did" (RFJ para 24) in a situation where the precipitous acts of the appellant threw "[T]he SUV, the plaintiff's bicycle and the Enns car into disarray " (RFJ para 11).
- [13] The appellant's argument that Mr. Graham was in breach of s. 158 of the Motor Vehicle Act, by passing on the right, is without merit. Prior to these events the cyclist had been travelling in the centre of the right hand south bound lane. Mr. Graham's steering to the right was not an attempt to pass but an evasive movement. The only independent witness, Mr. Enns, said this [T p.11 line 24 to p.12 line 22]:

Q Now, my question was, after the yellow SUV hit his brakes and came to a stop, what did you observe to happen next?

A I saw a chain reaction, a consequence of the cyclist having to brake hard in terms of trying to come to a controlled stop.

Q And then what happened?

A And then the cyclist went to the right-hand side, attempting to go in between the vehicles that had stopped in front of him and the parked vehicles.

Q How much time elapsed from the time that you saw the yellow brake lights -- the yellow vehicle's brake lights come on and the cyclist reacting and going to the right, how much time elapsed?

A It would have been a very quick -- a very quick response. A matter of several seconds. I was behind the cyclist. I myself had to take action in terms of changing lanes and moving to the left-hand lane but for the cyclist it would have been a very quick response.

Q And this grey car that pulled out, did it signal?

A No.

Q How do you remember that? How do you know that?

A I remember seeing the -- seeing this unfold as I was coming into the intersection here, that the car was wanting to pull out, was -- was -- the car had started and the car was occupied, it had started, and then without further warning, without any signalling, it pulled into the intersection -- or not into the intersection, into the lane of traffic.

Q Were you surprised by the actions of the cyclist?

A By the actions of the cyclist?

Q Yes.

A No.

Q What do you mean by that?

A It didn't seem unreasonable. I wasn't -- at the time, I wasn't thinking in terms of surprise of the cyclist. The surprise component was with regards to the car pulling out. The cyclist -- in terms of the response of the cyclist, it wasn't -- I didn't give that any thought in terms of a surprise. In terms of the options available of stopping hard or impacting with the vehicle or veering to the right and attempting to avoid the vehicles. That seemed reasonable.

[14] The trial judge found that the vehicles behind Ms. Carson were thrown into disarray by her precipitous act. In my view s. 158 of the Motor Vehicle Act is not engaged on the facts of this case where, in the agony of the moment, a vehicle, including a bicycle, takes evasive action by veering to the right to avoid a collision brought about by another's negligent act.

[15] The appellant argues that the cases turning on a quick decision made in the agony of the moment are restricted to instances where motor vehicles are operating at highway speeds. Although many of the cases refer to such situations, in my opinion the common sense that informs this consideration, that a court does not judge with the benefit of hindsight or expect perfection in decision making in emergent circumstances, may apply equally to the operation of vehicles and bicycles at lesser speeds on our busy city streets.

[16] I do not accept the appellant's further argument that the decision below wrongly treats cyclists differently than motorists. The trial judge was alive to the decision of this court in *Skinner v. Fu*, 2010 BCCA 321, referencing this argument when he said:

[20] The defendants responded by noting para. 23 in Skinner, which reminds us that, generally speaking, the law remains that following drivers will usually be at fault for failing to avoid a collision with a vehicle which has stopped quickly in front. But of course, the analysis of who is responsible for an accident will depend on a close examination of the particular facts of that particular accident. Precedents are of substantial value, of course, for determining the guiding legal principles, but are of more limited value for assisting in finding the facts in a case at bar.

[Emphasis added.]

[17] The trial judge referenced and recognized the general principle, but found that a close examination of the particular facts of this matter called for a different analysis. It was open for him to so find.

[18] Of course it is not the role of this Court to retry the case on appeal. The standard of review in this court on questions of law is correctness, while on matters of fact the question for us to determine is whether the trial judge has been shown to have made a palpable and overriding error.

[19] I think Mr. Finn has said all that can be said for the appellant on this matter, but as no error has been shown I would dismiss the appeal.

[20] DONALD J.A.: I agree.

[21] NEWBURY J.A.: I agree.

[22] DONALD J.A.: The appeal is dismissed.

"The Honourable Mr. Justice Savage"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/CA/15/03/2015BCCA0310.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/graham-v-carson-2015>

Prepared on 28 October 2026 · Esheria