
CANADA / JUDGMENT

Hart v. Jacobsen

2014 BCSC 704

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Supreme Court of British Columbia

DECIDED

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2014 BCSC 704 Hart v. Jacobsen

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hart v. Jacobsen,

2014 BCSC 704

Date: 20140424

Docket: 1241795

Registry: Prince George

Between:

Tyler Hart

Plaintiff

And

Donald Bruce Jacobsen and Laureen Louise Jacobsen

Defendants

Before: The Honourable Mr. Justice McKinnon

Reasons for Judgment

Counsel for the Plaintiff:

D. Byl

K. Aimetz

Counsel for the Defendants:

K.J. O'Brien

Place and Date of Trial:

Prince George, B.C.

February 12, 13 and 14, 2014

Place and Date of Judgment:

Prince George, B.C.

April 24, 2014

- [1] The plaintiff claims damages for injuries sustained in a motor vehicle collision that occurred December 17, 2011 on Highway 97 North near Summit Lake, BC. In a consent order made June 3, 2013 the issues of liability and quantum were severed. I heard the issue of liability only.
- [2] The parties reside in Prince George. On December 17, 2011, the plaintiff, and a fellow employee, Jamie Landolt, were proceeding north from Prince George to the Grande Prairie area in Alberta where they were to commence their shift on an oil rig. In good driving conditions, the trip usually takes five to six hours. The conditions on this day were, according to all who testified, "terrible". It was for that reason the plaintiff and Mr. Landolt left early, allowing themselves more than double the usual time to ensure they would arrive for their 11:00 p.m. shift. The plaintiff was operating a 2007 GMC pickup equipped with one year old "Arctic Claw winter studded tires".
- [3] The defendant was also traveling north from Prince George to Dawson Creek, where he was to pick up his son and return him to Prince George. He was driving an "all wheel" 2009 Kia equipped with its original "all season" tires. The pictures filed as an exhibit at trial suggest these tires were quite worn and indeed the defendant testified that he planned to replace them the next year.
- [4] Although the witnesses were not completely in agreement about the road conditions, I accept that conditions were generally poor and considerable caution was called for, including operating vehicles that were properly equipped for northern winter travel.
- [5] Mr. Landolt was a passenger in the plaintiff's vehicle. He described conditions as follows:

On leaving Tim's (Tim Horton's in Prince George) the road was sheer ice, pretty much the worst I had ever seen. I knew we were in for a bad drive. It was raining and we were headed north to higher elevation. Conditions were the same right to the collision scene.

Visibility altered between fog and clear. Just before the collision we were going through fog patches but I don't think it was foggy at the actual scene.

The collision occurred just north of a service road about 25 to 30 Km north of Prince George. The road was sheer ice from the service road to the collision site.

There was a slight curve to the left and a hump or bump in the road that affected forward visibility.

Right around the time we came around the bend and hump I believe I saw a vehicle driving towards us then realized it was in our lane. There was a person outside the vehicle.

Tyler touched his brakes and made a turn I think. We started sliding on an angle and it was clear we were going to collide on my side. The nose of the car was facing the side of our truck.

- [6] Mr. Landolt said that the plaintiff was travelling at less than the posted speed limit of 100 KPH, "I would say maybe 80 KPH". He "normally felt safe with Tyler as he had a new truck with good tires".
- [7] The witness said he told the plaintiff to honk his horn to warn the pedestrian, which he believes happened as the pedestrian was seen to dive into the snow bank at the side of the road. Mr. Landolt said that following the collision, which caused the plaintiff's truck to spin into the snow in the west ditch and the car into the snow in the east ditch, he checked on the pedestrian who he said apologized saying, "sorry it was my fault".
- [8] During cross-examination of Mr. Landolt, counsel attempted to get the witness to place the car hard up against the bank so as to be out of the northbound lane. Mr. Landolt was adamant that the Kia was "in our lane". He was directed to his statement to the insurance adjuster where it was suggested he never told the adjuster the car was in the north lane. He replied that he merely answered what was asked of him. In fact, counsel's suggestion to the witness was wrong. Mr. Landolt did tell the adjuster that the Kia was in the northbound lane.
- [9] The plaintiff described his vehicle as in good condition. He said it was "perfect"; it had good brakes, lights, transmission, engine, and relatively new studded tires. He testified that on leaving Prince George he engaged the four wheel drive transmission option and was in four wheel drive at the time of the collision.

[10] He described the collision as follows:

There was some fog south of the Forest service road. None right at the intersection where that road meets highway 97. My speed was right around 80. There is a gentle curve westward and a small hump or raised area. This affected my visibility somewhat. Once I came out of the fog I noticed there was a vehicle with lights on but I didn't think much of it as I didn't know if it was stationary or travelling. Once past the service road I noted the vehicle stopped in my lane with lights on. I applied my brakes. It was overwhelming stuff going through my head.

I applied my brakes, gathered my thoughts, applied my brakes again and started to slide. I tried to turn but the steering was not responsive and a collision occurred. My front passenger tire struck the passenger side of the blue car. It wasn't a straight on collision.

I saw a man crouching by the driver's side tire poking it with a stick. I wasn't then very far from him, a second or two at most. I hit my horn and he appeared to hop up but I lost sight of him as I was fully occupied. The blue Kia was in the middle of my lane with his lights on facing me. No way was it off to the side. It may have been two years since but the image is very clear to me. I felt that if I hadn't honked I would have killed him.

- [11] The plaintiff said that after the collision he spoke with the Kia driver, Mr. Jacobsen, who told him, "I guess this is my fault, I'm sorry".
- [12] In a refreshingly candid admission, Mr. Hart conceded that in retrospect he was "probably" going too fast for the conditions but did not know whether he could have avoided the collision had he been going slower.
- [13] According to Mr. Hart, there were grooves in the northbound lane indicating the travel of northbound traffic and his truck was in this groove. The Kia, he said, was "in the middle of it", facing north.
- [14] Mr. Jacobsen offered a different version of events that portrayed him as the innocent victim who bore no responsibility for the collision. It was an astounding performance that apparently persuaded the insurance adjuster. I was not so persuaded.
- [15] In my view, Mr. Jacobsen was not a credible witness. He argued with plaintiff's counsel, dismissed the plaintiff's expert opinion about the Kia's woeful lack of winter readiness, and generally set himself up as an expert northern driver fully alert and ready for winter conditions.
- [16] It was somewhat telling that even the defendant's expert engineer was critical of the defendant's position that "all weather tires" were perfectly adequate for northern winter driving.
- [17] The defendant testified that he drove at a constant speed of 75 KPH, which clearly was too fast, given the state of his vehicle, particularly the condition of his tires. Before the collision at issue in this case, the defendant's vehicle began to slide as it rounded the curve referred to earlier and it ended up in the snow bank off the northbound lane. A passing motorist stopped to assist and pulled him out, leaving the Kia facing southbound in the northbound lane. According to Mr. Jacobsen he was "at most a foot away from the snow bank".
- [18] Unfortunately, the wheel wells were packed with snow and thus the Kia could not be steered. The defendant had no shovel and so was reduced to chipping away at the wheel wells with a snow scraper to free up the steering. Although his vehicle was equipped with four way flashers he did not turn these on but did have his head lights on.
- [19] He said that as he was close to completing this task, he heard a flashing or skipping noise, turned to his left and saw a silver pickup sliding toward him. He said he turned and leaped into the ditch, never taking any strides.

- [20] Mr. Jacobsen denied ever admitting to either Mr. Landolt or Mr. Hart that the collision was his fault, indeed he capped that denial by asserting that "I was parked, it wasn't my fault". As stated earlier in this judgment, I did not find Mr. Jacobsen to be a credible witness. I found that the plaintiff and Mr. Landolt were credible and prefer their evidence over that of the defendant Jacobsen.
- [21] As noted earlier in this judgment, when Mr. Jacobsen lost control of his Kia and became stuck in the snow at the side of the highway, an unknown motorist, referred to at trial as the "good Samaritan", pulled him out leaving the Kia facing southbound in the northbound lane. It is significant in my view that Mr. Jacobsen conceded this good Samaritan warned him he was then in a dangerous place. He conceded to counsel in cross-examination that his Kia then posed "a hazard on the highway".
- [22] Although the snow-packed wheel wells prevented a driver from properly steering the wheels, it was possible to move the Kia back or forward after some initial scraping. In his examination for discovery, Mr. Jacobsen said that he was able to move the Kia forward (toward the service road and curve) "a car to a car and a half-length".
- [23] In his submissions, counsel for the plaintiff says this is a critical point because if it was possible to move the Kia forward then it was possible to move it backward (away from the curve). Thus, Mr. Jacobsen could have backed up 80 feet and taken his vehicle out of what was acknowledged to be a dangerous position. He seems to have been completely oblivious to the hazard he created, opting to chip away at the wheel wells with his scraper for 15 minutes while his car was facing southbound in the northbound lane. Throughout that period he did not even have the common sense to turn on his "hazard flashers" and thus offer some kind of warning to oncoming northbound traffic. Both experts testified that this omission could have created confusion in the mind of a northbound driver such as the plaintiff, affecting his reaction time.
- [24] When cross-examined on the extent of the hazard he created, the defendant seemed to suggest that it was perfectly reasonable for him to leave his vehicle where it was so as to permit him easy access to the wheel wells on both sides of the vehicle. When it was suggested that he could have moved the car over closer to the snow bank he retorted that had he done so he would not have been able to access the wheel well.
- [25] When it was suggested to him that his vehicle facing south in a northbound lane was bound to create confusion for northbound traffic he replied, "maybe but not much". Counsel for the plaintiff described Mr. Jacobsen's testimony in the following terms:
- a. Evasive, avoiding answering questions, or inclined to give a non-responsive speech as opposed to a carefully thought out answer;
 - b. Argumentative in his answers;

- c. Prone to giving inconsistent answers between his testimony in chief, his cross-examination, his examination for discovery, and a statement given to ICBC;
 - d. Offered his own opinion evidence on tires and speeds which was contrary to that proffered by both engineering experts and when challenged he considered his opinion more worthy of belief than that of the plaintiff's expert since that expert had "never even been to the scene"; and,
 - e. Generally careless in his answers such as opining that the GMC covered 75 meters in a second and a half. When it was suggested this would put the GMC's speed at 270 KPH he changed the timing to two seconds which translated into an equally absurd speed.
- [26] I agree with that characterization of Mr. Jacobsen's evidence. It permitted me to easily conclude that that he was not a credible witness.

The Experts

- [27] The plaintiff called Mr. Craig Luker and the defendant called Mr. Gerald Sdoutz. Both were qualified as capable of proffering opinion evidence in respect to the dynamics of this collision.
- [28] Mr. Sdoutz attended the scene on two occasions and went to considerable lengths to try to position the vehicles using variations in tree lines and other background information. Mr. Luker did not attend the scene but did employ relatively sophisticated computer programming to position the vehicles.
- [29] They were both impressive witnesses who gave careful and well researched opinions. Indeed counsel for the plaintiff described Mr. Sdoutz's efforts at reconstruction as "heroic". However, as pointed out by counsel, given the presence of "foreshortening", reliance upon a tree line that was changing, and the use of a model of truck not similar to that of the plaintiff, his margin of error was simply too high to permit acceptance of his conclusions.
- [30] I relied upon the evidence of Mr. Hart and Mr. Landolt which was consistent with the opinions reached by Mr. Luker.

Findings

- [31] I have concluded that it is most likely Mr. Hart was travelling at somewhere between 80 and 85 KPH. Although the conditions were "terrible" that speed seems to have been fairly constant since leaving Prince George and he had encountered no difficulty. His vehicle was well equipped for northern travel and he had engaged his four wheel drive option which offered further control.
- [32] I acknowledge that Mr. Hart told the insurance adjuster he was travelling between 85 and 90 KPH. He provided this statement on December 19, 2011 two days after the collision. I would not put a great deal of weight on what he told the adjuster at that time because he was in obvious pain from his injuries and while he was not keen on giving the statement he

believed that he did not have an option to delay it. He testified that he was nauseous, on medication, was having difficulty with his memory, suffering headaches and possibly a concussion. Additionally, and adding to his emotional state, his wife had collided with another vehicle in the ICBC parking lot. The adjuster, Heather Nielsen, testified and while her memory of events was vague she did concede an entry in her notes to the effect that Mr. Hart was "coming across as confused".

- [33] Although Mr. Hart conceded in retrospect that he was probably going too fast for the conditions, that in my view is merely a sensible conclusion one makes when re-examining facts that were not known in the moments prior to the collision. All that tells me is that had Mr. Hart known when he approached the service road, that Mr. Jacobsen was parked in the northbound lane facing south and was scraping away at his wheel wells, he would have slowed to a crawl and thus moved safely past him.
- [34] Mr. Hart did not know the state of things until mere seconds before the collision. Given the curve and hump, he did not appreciate the danger posed by Mr. Jacobsen. Had it not been for the hazard posed by Mr. Jacobsen, it seems obvious to me that Mr. Hart would have rounded the slight curve and hump and carried on safely. I found the submission by counsel for the plaintiff in respect to this situation instructive and convincing. At para. 27 he stated:
27. The evidence of Mr. Sdoutz with respect to reaction time is probably correct as far as it goes, but it does not take into account the confusing situation that Mr. Jacobsen had created by having his headlights on and his four-way flashers off. Both Mr. Hart and Mr. Landolt gave evidence of this. Because of the curve to the left, the Kia would first appear to be heading south in the southbound lane. As the GMC rounded the apex of the curve, generally in the area where Hwy. 97 intersects the NFFSR, and the curve straightens the headlights would appear to be in the northbound lane, but heading south. There would be further confusion. Was the Kia straying into the northbound lane because of the driver inattention or to go around an obstruction on the road? Would the Kia head back into the southbound lane? How fast was he moving? Is he moving at all? And, the final epiphany, "oh no, he's stationary in my lane". It takes precious seconds to come to this realization. If Mr. Hart is travelling at 85 KPH, 4 seconds of scrutiny and confusion would result in Mr. Hart travelling about 92 meters (90 KPH = 25 meter/sec; 85 KPH = 23.6 meter/sec; 80 KPH = 22.2 meter/sec). Then, once this period of confusion passes, the 1.3 second response time of "detection/identification/decision/action" might apply. In one hypothetical, if Mr. Hart would have seen the Kia lights when he was at the NFFSR, and if he was proceeding at 85 KPH, and if the Kia was 130 meters north of the NFFSR, and it took Mr. Hart 4 seconds to ascertain where the Kia was, and what it was doing, the action of braking would have occurred 20 or 30 meters from the Kia. In this situation, which is likely not far off the mark, Mr. Hart had no chance to avoid the collision.

- [35] Mr. Jacobsen had his Kia parked in the northbound lane facing southbound. It is not entirely clear just how much of the Kia was in the northbound lane but it was to a substantial degree such that a northbound driver like Mr. Hart could conclude he was facing an immediate hazard.
- [36] The defendant was not just momentarily parked in this hazardous position but remained there for some 15 minutes, all the while scraping away at the wheel wells with a tool not designed for such work. Thus we have a vehicle, substantially in the northbound lane with a pedestrian walking around it posing an additional hazard to northbound traffic. The Kia's head lights were on but the hazard lights were not. Given the curve and hump, the true nature of the hazard would not be readily apparent to the driver of a northbound vehicle until he rounded the curve and was so close to the parked vehicle that a collision was inevitable.
- [37] I accept that the defendant was in breach of ss. 187, 144 and 190 of the Motor Vehicle Act, R.S.B.C. 1996, c. 318. The former states:
- (2) Subject to subsection (3), a person must not park a vehicle so as to obstruct the free passage of traffic on the highway.
 - (3) Subsections (1) and (2) do not apply when a vehicle is so disabled that it is not practicable to avoid stopping and temporarily leaving it on a highway.
- [38] In my view subsection (3) does not apply to the facts at bar as it was possible for Mr. Jacobsen to move his Kia forward or backward, he just could not fully steer the car. Thus he could have moved it back away from the curve.
- [39] Section 144 states:
- (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.
- [40] Section 190 states:
- Except when a municipality, a treaty first nation or the minister responsible for the administration of the Transportation Act permits, a driver must not stop, stand or park a vehicle on a roadway other than on the right side of the roadway and with the right hand wheels parallel to that side, and where there is a curb, within 30 cm of the curb.
- [41] The two experts both agree that Mr. Jacobsen ought not to have been driving on "all season" tires which they testified were completely inappropriate for northern driving.

- [42] In my view, Mr. Hart was faced with the "agony of collision" doctrine. Given the curve and hump that obscured any clear view of just where the Kia was, he could not appreciate just what hazard was facing him. By the time he was able to see that the Kia was in fact parked substantially in his northbound lane there was almost no time to react. He cannot be faulted for opting to brake as opposed to some other manoeuvre: see *Soto v. Peel*, 2013 BCSC 409; *Ayers v. Singh* (1997), 85 B.C.A.C. 307, 69 A.C.W.S. (3d) 207; and *Brook v. Tod Estate*, 2012 BCSC 1947.
- [43] I also accept that Mr. Jacobsen had a duty to warn oncoming motorists of the hazard he had created by at least operating his four way flashers. The better course would have been to flag the curve with emergency reflectors but he had no such equipment: see *Skinner v. Fu*, 2010 BCCA 321.

Conclusion

[44] In the result I find the defendant Jacobsen 100% responsible for this collision.

[45] Judgment accordingly.

"The Honourable Mr. Justice McKinnon"

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