

CANADA / JUDGMENT

Hoque v. Howard Carter Lease Ltd.

2020 BCSC 160

COURT

Supreme Court of British Columbia

DECIDED

10 February 2020

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2020 BCSC 160 Hoque v. Howard Carter Lease Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hoque v. Howard Carter Lease Ltd.,

2020 BCSC 160

Date: 20200210

Docket: M187004

Registry: New Westminster

Between:

MD Shamsul Hoque

Plaintiff

And

Howard Carter Lease Ltd., Xpert Mechanical and J.K. Lillie Ltd.

And Brian Golub

Defendants

Before: The Honourable Mr. Justice Jenkins

Reasons for Judgment

Counsel for the Plaintiff:

N. Mulholland

Counsel for the Defendants:

A. Haynes

Place and Date of Trial:

New Westminster, B.C.

July 8-10, 2019

Place and Date of Judgment:

New Westminster, B.C.

February 10, 2020

- [1] The plaintiff claims damages for injuries suffered in a motor vehicle accident which occurred on February 13, 2015 on Boundary Road in Burnaby, B.C. The damages sought are non-pecuniary damages for pain and suffering, loss of income and special damages. Liability is in issue and hotly contested.
- [2] The defendant, Howard Carter Lease Ltd., is joined as a defendant as it was the lessor of the vehicle involved in the accident leased by the defendants Xpert Mechanical Ltd. and J.K. Lillie Ltd which was being driven at the time of the accident by the defendant, Brian Golub. The defendants' vehicle was a GMC Savana van.
- [3] Testimony regarding the circumstances of the accident was adduced from the parties, the wife of the plaintiff and a witness to the accident called by the defence.
- [4] These reasons will firstly refer to the issue of liability.

Liability Witnesses

Shamshul Hoque

- [5] Mr. Hoque is currently 36 years old, 32 years old at the date of the accident. Up to the date of the accident, he testifies as to having been physically healthy although, commencing in the fall of 2014, he suffered from depression which resulted in him applying for long term disability benefits causing him to leave his employment temporarily in September 2014. Up to the time he went on disability, he was employed as a customer service supervisor by Fortis B.C. which was primarily an office position requiring him to train employees to handle consumer complaints.
- [6] At approximately 1:30 p.m. on February 13, 2015, Mr. Hoque was driving a Toyota Yaris north bound in the right travel lane on Boundary Road approaching Kitchener St. His wife, Samiyya Hoque, was sitting in the front passenger seat of the Yaris. Mr. Hoque testified that as he approached a traffic light at Kitchener St. there were likely two vehicles in front of him, the vehicle closer to the intersection being that of the defendants. Traffic was busy and on the green light the defendants' vehicle had started into the intersection with its front wheels having travelled over the east-west crosswalk on the south side of the intersection

and had stopped.

- [7] In that area, Boundary Road northbound consisted of two northbound lanes and an area approximately the width of another lane and the distance of approximately three car lengths or 40 feet towards the curb where no parking or stopping was allowed and permitted north bound vehicles to turn right onto Kitchener St. With the traffic held up in front of him, Mr. Hoque pulled into the far right area next to the curb to turn right onto Kitchener St. travelling slowly, likely 10 to 20 km/hr. He continued to state that as he pulled ahead and started into his turn, the defendant's vehicle made an abrupt right turn from in the intersection onto the eastbound lane of Kitchener St. which resulted in the collision between the back right corner of the defendant's vehicle with the front left side of the Yaris.
- [8] Mr. Hoque continued to state that at impact, he had not fully turned onto Kitchener St., that his front bumper had gone past the crosswalk and that after impact the Yaris stopped immediately. He stated he was able to see the rear lights of the defendant's vehicle prior to the accident. He also stated that the driver of the defendants' vehicle had not engaged the right-hand turn signal.
- [9] He testified that the defendants' vehicle was a pickup truck. It is apparent that he was wrong in that respect as the defendant's vehicle was a GMC van.
- [10] Mr. Hoque testified that at impact there was a "loud crash and his door jammed" such that he could not open the door, requiring him to exit from the front passenger door.
- [11] Photographs of the Yaris after the accident taken by Ms. Hoque indicated substantial damage to the front left corner of the vehicle.
- [12] Mr. Hoque also testified that following the accident he had a discussion with the driver of the defendant's van, Mr. Golub, who told Mr. Hoque he "had to go to Kal Tire" which was on the north-east corner of the intersection. There were entrances to Kal Tire on both Boundary Road and Kitchener St. He also testified that following the accident the van was either located on Kitchener St. or at the driveway into Kal Tire from Kitchener St.
- [13] At the scene of the accident, neither Mr. nor Ms. Hoque spoke to any witnesses nor were they approached by any possible witnesses to the accident.
- [14] On cross-examination, Mr. Hoque's testimony included:
- A statement that he was not distracted and that when making the right turn, he did not see the defendants' vehicle.
 - He had not passed the defendants' vehicle [on the right] while both were facing north on Boundary Road and both sets of the defendant's tires had crossed the southernmost line of the crosswalk across Boundary Road and the defendants' front tires were in front of the north side crosswalk line.

Samiyya Hoque

- [15] Ms. Hoque testified she did not see or notice the defendant's vehicle prior to the accident. She did testify that when they were approaching Kitchener St., Mr. Hoque turned into the curb lane, stopped, looked and then when about to turn another vehicle came from the left, i.e. the vehicle of the defendants.

Rick Chalmers

- [16] Mr. Chalmers was a witness to the accident called as a witness by the defence. He had no connection to or knowledge of any of the parties, either before or after the accident.
- [17] Mr. Chalmers testified he was driving northbound in the right hand travel lane on Boundary Road at approximately 1:30 p.m. on February 13, 2015. He stated traffic was "light to moderate" and that he had travelled past the intersection on many occasions.
- [18] Shortly before the accident, he was driving behind the plaintiff's Yaris which, he stated, was immediately behind the defendants' van. He noticed the right turn signal had been engaged on the van when the Yaris pulled over into the curb lane and sped up, tried to turn in front of the van, i.e. to turn right onto Kitchener before the van. Both vehicles were travelling at between 15 to 20 km/h. He added that the van began to make a turn by slowly moving over to the middle of the right or curb lane.
- [19] He witnessed the vehicles collide and the Yaris moved onto the side street, i.e. Kitchener St. and the van pulled into the Kal Tire parking lot which is where Mr. Chalmers pulled over.
- [20] Mr. Chalmers then got out of his vehicle, went up to Mr. Golub as driver of the van, gave Mr. Golub his contact information and said he could be contacted if a witness was needed. He then promptly left the scene and did not speak to the driver of the Yaris. Mr. Chalmers also testified that the traffic light on Boundary Road is a pedestrian controlled light, which flashes green until a pedestrian, activates a light to stop traffic on Boundary Road and that at all times he could recall, the light remained green on Boundary Road.

Brian Golub

- [21] Mr. Golub was driving the defendants' vehicle at all material times. His testimony as to what occurred in the accident was somewhat contrary to that of the witness, Mr. Chalmers. There was a passenger in Mr. Golub's van at the time of the accident, however, the court did not have the benefit of his testimony, as Mr. Golub had not been able to locate him since he had left employment with the company they were both working for at the time of the accident.
- [22] In addition, Mr. Golub admitted to having a poor memory, which was evident from his testimony and led the court to question the accuracy of his testimony.

- [23] Mr. Golub testified that as he approached the intersection northbound on Boundary Road at Kitchener St. the traffic light was red for northbound traffic and that westbound traffic on Kitchener St. were turning left while he waited in the right through lane. He was intending to go into Kal Tire by turning right onto Kitchener St. with a quick left turn to follow into the Kal Tire lot which he said he had frequented often.
- [24] Mr. Golub testified he believed the traffic lights at the intersection were a "full set", i.e. alternating red, green and amber and not a flashing green light with the ability for pedestrians to activate a red light before accessing a crosswalk, contrary to the testimony of Mr. Chalmers.
- [25] Mr. Golub's testimony also differed from that of Mr. Chalmers in that Mr. Chalmers testified that Mr. Golub's van had stopped in the Kal Tire lot whereas Mr. Golub testified he pulled the van over on the south side of Kitchener St.
- [26] He testified that while waiting, his right turn signal was engaged, he had stopped for between 30 and 45 seconds and his van was then located "away from the middle lane, closer to the curb". He saw an opening to turn to the right and started to turn onto Kitchener when he "felt a bump". He added that he had no indication of a vehicle on his right and after the impact looked to see what had caused the bump, eventually realizing the plaintiff's vehicle and his van had collided.
- [27] On cross-examination, Mr. Golub agreed that he knew he could not legally turn right from the middle or right through lane. He stated the front bumper of his van was near the crosswalk or "right on" the southernmost white line of the crosswalk. He also testified he had "briefly" looked in his rear view mirrors before turning but did not see Mr. Hoque's car.
- [28] Also on cross-examination, Mr. Golub stated that when stopping at the red light, he was half way into the curb lane, and later that he was "maybe two feet from the curb".
- [29] Mr. Golub testified that he then pulled over on Kitchener St. and parked facing east to get out of the way of traffic and the other car, i.e. that of the plaintiff, pulled in behind him.
- [30] After exchanging information with Mr. Hoque, Mr. Golub stated that he was approached by a witness, offering contact information who then promptly left. It is to be noted that when asked on examination for discovery if he was aware of any witness to the accident, he answered "no", "I have a terrible memory, I can't remember last week" and he had informed himself for trial by looking at some photos he had taken at the accident scene on his cell phone, photos which had been provided to his insurer but not produced.
- [31] Finally, Mr. Golub referred to the "curb lane" as the "turning lane", i.e. for right turns.

Applicable Legislation

- [32] I have been referred to several sections in Part 3 of the Motor Vehicle Act, R.S.B.C. 1996, c. 318 ("Act") submitted to be relevant to the issue of liability:

Definitions

119(1)

"laned roadway" means a roadway or the part of a roadway that is divided into 2 or more marked lanes for the movement of vehicular traffic in the same direction

Driving on laned roadway

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

....

- (e) when approaching an intersection intending to turn right must drive the vehicle in the lane nearest to the right hand side of the roadway,

Passing on right

158 (1) The driver of a vehicle must not cause or permit the vehicle to overtake and pass on the right of another vehicle, except

- (b) when on a laned roadway there is one or more than one unobstructed lane on the side of the roadway on which the driver is permitted to drive, or

Turning at intersections

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

Submissions on Liability

- [33] The plaintiff submits that it was likely that Mr. Golub was intending to enter the Kal Tire lot from the entrance off Boundary Road, that the traffic was heavy on Boundary Road and he had entered the intersection when he decided, due to congestion on Boundary Road, to turn right onto Kitchener St. with the intention of then making a prompt left turn off Kitchener St. into the Kal Tire lot.
- [34] Further, the plaintiff submits Mr. Golub breached s. 151(e) by failing to drive in the lane nearest the right side of the road, the lane nearest the curb which, in Mr. Golub's examination for discovery he had referred to as the "turning lane".
- [35] In doing so, the plaintiff submits Mr. Golub failed to keep a proper lookout for vehicles which may have been to his right and failed to comply with the provisions of s. 165(1) of the Act.

- [36] Finally, the plaintiff submits that having entered the curb lane and signalling to turn right, he had no expectation the defendants' vehicle, which had already entered the intersection to proceed northbound, would make a right turn, not seeing the plaintiff's vehicle and striking the front left fender of the Yaris.
- [37] The defence submits the plaintiff passed or attempted to pass Mr. Golub's vehicle on the right contrary to s. 158 of the Act. Which is not a "laned roadway" as defined in s. 119(1).

Finding on Liability

- [38] Considering all of the testimony on liability, I find on a balance of probabilities that the version of events for this accident were more accurately described by Mr. Hoque. He testified to having moved into the curb lane when the traffic stopped on Boundary so as to make a right hand turn. I also find it likely that the van had pulled up to at least the north crosswalk line or slightly into the intersection while Mr. Hoque had moved into the turn lane. Mr. Hoque had to have been beside, perhaps slightly back of the van, when he was in the curb lane. If the van had been half way into the curb lane or two feet from the curb, Mr. Hoque could not have advanced so as to be able to start to make his right hand turn. At that point, Mr. Golub could have seen Mr. Hoque's car by looking in his right side rear view mirror but either did not look or failed to appreciate the Yaris was beside him or close to his van when Mr. Golub began to turn. With his vehicle mostly in the right through lane, Mr. Golub suddenly turned right at the time when Mr. Hoque was also attempting to turn right, with the right rear bumper of the van striking the front left of the Yaris.
- [39] Mr. Golub acknowledged that the curb lane was the turning lane, however turned when all of or most of his vehicle was still in the right through lane.
- [40] With the inconsistent testimony of Mr. Golub which was internally inconsistent and also at odds with that of Mr. Chalmers, I find the testimony of Mr. Golub to be unreliable and that he not only made an illegal turn from the right through lane, he failed to keep an adequate lookout for vehicles, specifically the Yaris, that could be placed at risk by the right hand turn of the defendant.
- [41] I also acknowledge there were inconsistencies in the testimony of Mr. Hoque, particularly in stating the defendants' vehicle was a pickup whereas it was a van. Although there were inconsistencies, I do not find the mistake regarding the type of the defendants' vehicle to go to the substance of the issue of liability. Mr. Hoque was consistent in what occurred in the accident.
- [42] I find Mr. Hoque had entered the curb lane to make a right turn as required by s. 165(1) of the Act, i.e. he made "the turn as close as practicable to the right hand curb or edge of the roadway".

- [43] I also find that Mr. Hoque did not pass the defendants' vehicle on the right. If he had passed the defendants' vehicle on the right and the defendant turned from the right through lane as I have found, the defendants' vehicle would have struck the rear of the plaintiff's vehicle, not the left front fender as occurred in this case. As a result, the submissions of the defence relying on cases where a party passed on the right, including *Smeltzer v. Merrison*, 2012 BCCA 13, *R. v. Dickson*, 2003 BCSC 437 and *Ali v. Surrey (City)*, 2016 BCSC 151, are inapplicable.
- [44] According to s. 151(1)(e), Mr. Golub when "approaching the intersection intending to turn right must drive the vehicle in the lane nearest to the right hand side of the roadway", which would be the curb lane, not the "laned" roadway which was furthest right. Mr. Golub turned right from the laned roadway which was not the curb lane. Section 151(1)(e) requires a driver to turn right from the right hand curb lane. Mr. Hoque would not have anticipated Mr. Golub, who had already entered the intersection in a through laned roadway, to suddenly turn right. In doing so, Mr. Golub was negligent in failing to keep a lookout to his right before making a right turn and in breach of s. 151(1)(e) as well as s. 165(1).
- [45] As a result, Mr. Golub was 100% responsible for the collision which ensued.

Damages

Non-Pecuniary Damages

- [46] The parties are in general agreement as to the nature of the injuries suffered by Mr. Hoque as a direct result of the accident which are soft tissue injuries to his neck, upper back and shoulder as well as his lower back. The defence agrees that the injuries were mild to moderate in severity and submit the injuries had a minimal impact on the life of the plaintiff.
- [47] Mr. Hoque's therapy consisted of four visits to a massage therapist and some physiotherapy and he agreed he did not seek out therapy once he moved to Dubai in August 2015, subsequently returning to the lower mainland of British Columbia.
- [48] The only medical evidence was a report of Dr. Salman Ali who confirmed the soft tissue injuries and stated Mr. Hoque had fully recovered from his injuries by the time of his last visit to Dr. Ali in May 2018. He also testified to having attended on Dr. Paproski, a psychologist, on two occasions, regarding his mood following the accident, however, there is no expert evidence he suffered cognitive injuries in the accident. It was likely that the pain and suffering he experienced would have exacerbated his depression which had been present prior the accident.
- [49] Ms. Hoque testified as to the effect on Mr. Hoque's social activities, contributions to the household and his recreational activities. It was acknowledged Mr. Hoque had problems with his mood, however, it was not clear whether the concerns regarding his mood were directly a result of the accident.

- [50] A friend of the family, Ms. Rai, added little to her observations of the plaintiff after the accident but did note he was having back pain and she had seen him less often since the accident.
- [51] The plaintiff submits that an appropriate figure to compensate Mr. Hoque for pain and suffering arising from the accident taking into account the duration of the injuries and the effect on his lifestyle is \$50,000. He relies on the decisions of *Randhawa v. Chiang*, 2014 BCSC 631 [Randhawa] and *Parker v. Martin*, 2017 BCSC 446 [Parker]. In *Randhawa*, the injuries were similar, the plaintiff missed minimal time from work and her recreational activity and social life suffered and resulted in an award of \$40,000. In *Parker*, the court awarded \$45,000 in non-pecuniary damages to a plaintiff with similar injuries whose symptoms were mild as of trial.
- [52] The defendants submit that an award for non-pecuniary damages of \$20,000 to \$30,000 would adequately compensate Mr. Hoque for his injuries.
- [53] The defence referred to the decisions in *Dolha v. Heft*, 2011 BCSC 738, *Bae v. Vasquez*, 2013 BCSC 542, *Zhibawi v. Anslow*, 2015 BCSC 1824, *Mather v. MacDonald*, 2016 BCSC 948, *Lessey v. Canuel*, 2013 BCSC 455 and *Bay v. Wollard*, 2019 BCSC 1073, all being cases where the plaintiff suffered similar injuries with similar effect on the plaintiff's life. Those awards ranged between \$10,000 and \$30,000.
- [54] I find an award to Mr. Hoque in the circumstances of this case should fall towards the upper end of the awards referred to by the defendants and less than those referred to by the plaintiff and award an amount of \$35,000 in non-pecuniary damages.

Past Wage Loss

- [55] The plaintiff seeks \$5,200 past wage loss stating Mr. Hoque would have returned to work three months earlier than he did due to the accident. He had been off work prior to the accident.
- [56] I find that it is likely Mr. Hoque's return to work was delayed by the injuries suffered in the accident, however, I find it was more likely that his return was delayed by no more than one month, the value of which approximates \$2,000 and award that sum for past wage loss.

Special Damages

- [57] The plaintiff claims \$522.25 in special damages for the \$300 deductible for repair to his vehicle and the balance being the expense of massage therapy. I find the cost of massage therapy was most likely reasonably incurred as a result of the injuries. I therefore award a total of \$522.25 for that cost and the deductible as sought by the plaintiff.

Summary

- [58] I find the plaintiff is entitled to the following awards of damages:

- \$35,000 in non-pecuniary damages
- \$2000 for past wage loss
- \$522.25 in special damages

For a total award of \$37,522.25.

Costs

The court suspects that there are factors which are unknown to the court which may affect an award of costs. As a result, the parties may make written submission on costs within 30 days of the date of this decision should they fail to agree on costs.

"Jenkins J."

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