
CANADA / JUDGMENT

Johnson v. Jamieson

2014 BCSC 1192

COURT

Supreme Court of British Columbia

DECIDED

30 June 2014

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2014 BCSC 1192 Johnson v. Jamieson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Johnson v. Jamieson,

2014 BCSC 1192

Date: 20140630

Docket: M141273

Registry: New Westminster

Between:

Edwin Lyndon Johnson

Plaintiff

And

Travis Jamieson, and

Olivia Mackay Heatley-Jamieson

Defendants

Before: The Honourable Mr. Justice N. Brown

Reasons for Judgment

Counsel for Plaintiff:

J.C. Guglielmucci

Counsel for the Defendants:

B.D. Home

Place and Date of Trial:

New Westminster, B.C.

May 26 - 30, 2014

Place and Date of Judgment:

New Westminster, B.C.

June 30, 2014

I. Introduction

- [1] These reasons for judgment address liability for a motor vehicle accident.
- [2] In short, I have found that the plaintiff has not proven that the defendant's actions caused his injuries. Therefore, I am dismissing the plaintiff's claim against the defendant.

II. Facts

- [3] On Thursday, April 1, 2010, at probably around a 5:15 p.m., Mr. Johnson, the plaintiff, and his girlfriend, Cathy Moses, wanted to cross from the south side of East Hastings Street to the north side at its intersection with Columbia Street, in Vancouver, British Columbia.
- [4] As they crossed the intersection, Ms. Moses got ahead of Mr. Johnson. He had almost finished crossing the width of six lanes, when, about three feet from the sidewalk, he decided to cut the corner so he could catch up with Ms. Moses. He would just have to walk a short way in the curb lane beside the sidewalk to do that, but could not step onto the sidewalk from the curb immediately because a metal signal post on the sidewalk and some cardboard boxes stacked beside it and alongside the curb blocked the way a short distance.
- [5] Mr. Johnson testified he was never able to carry out his plan because he had gotten only so far as to plant a foot on the stop line, at a spot that looks to be about three feet north of the curb. Meanwhile, Travis Jamieson, the defendant driver, had stopped the Toyota Corolla he was driving about three to four feet from the curb. He was waiting in his vehicle for the lights and traffic to give him a safe opportunity to complete a right turn onto Columbia Street. Mr. Jamieson says he saw the plaintiff and a female companion crossing within the bounds of the marked crosswalk. The Toyota's front tires were at rest just before the marked stop line, which is about three feet east of the line that marks the eastern boundary of the marked crosswalk.
- [6] He was on the way to pick up his wife, who would be off work at 5:30 p.m., from her workplace located one block north of Hastings Street on Cordova Street. Because it was hard to find empty parking spaces in that area, he always left himself extra time.

- [7] Mr. Johnson said he had enough space to walk along the gutter to a clear area where he could step up onto the sidewalk. But before he could take a step, Mr. Johnson testified that the Toyota's right side mirror grabbed his right hip, spun him around, forced him down to the pavement onto his buttocks, landing him somewhere between the stop line and the line that marks the east boundary of the crosswalk. Mr. Johnson said he heard no engine noise from the Toyota, and never saw it move before the mirror struck his right hip.
- [8] The parties' versions about what next happened differ in almost every material way.
- [9] The plaintiff called only one witness, Cathy Moses. Ms. Moses was not a reliable witness: her memory was admittedly poor, and her testimony was internally inconsistent. She seemed to have set her testimonial compass mostly in the direction she thought might aid Mr. Johnson, but her description of where she testified she saw Mr. Johnson after he fell down, about three feet east of the storm drain, supports Mr. Jamieson's description of events more than it does Mr. Johnson's description.
- [10] Mr. Jamieson testified he saw Mr. Johnson cross in front of him, and cut the corner out of the crosswalk at the side of his car. As the westbound Hastings Street light has just turned green, Mr. Jamieson took his foot off the brake. The car rolled slowly ahead without gas, to the point where its front rested at about the east boundary of the crosswalk, which would be a distance of about three feet. Fifteen to twenty pedestrians had gathered at the corner, waiting to cross Columbia Street. Shortly after stopping, Mr. Jamieson testified he felt his car move slightly. He noticed Mr. Johnson standing, facing east, and leaning against his car about where the trunk is situated in the space between the rear of the roof, the rear door and the rear window.
- [11] Setting aside the question of whether Mr. Johnson was on the ground or standing at the time, both parties agree that Mr. Jamieson lowered the back passenger-side window and asked the plaintiff, with concern, if he was okay.
- [12] Mr. Johnson, however, denies he replied that he was okay or that he said he had slipped on the storm grate and hurt his knee. Mr. Johnson's version is that he said he had hurt his knee.
- [13] Mr. Jamieson noticed someone helped Mr. Johnson "hobble" up onto the sidewalk. He then turned his attention to large group of pedestrians waiting to cross Columbia Street. After about an estimated 8 to 10 seconds, an opening in the Columbia Street crosswalk allowed him to move forward, complete his turn, drive 80 feet north on Columbia Street, and park his car on the right side of Columbia Street, where he could wait for his wife. He did not hear anyone at the corner shouting to take down the licence plate number, as Mr. Johnson and Cathy Moses contend.
- [14] Mr. Johnson disputes Mr. Jamieson's testimony that he had to wait as long as 8 to 10 seconds to complete his right turn onto Columbia. Mr. Johnson's version is that Mr. Jamieson took off right away, after they exchanged words and someone called out, "Get his licence plate."

- [15] Mr. Jamieson said it was not raining at the time of the incident, but it had rained earlier on, the pavement still wet from it.
- [16] A storm drain grate was at the incident's location; a grate typical of those seen in the curb lanes of many Vancouver streets. It had been set down into the asphalt, what looks to be a couple of inches. The north side of it joined with the bottom edge of the sidewalk. From photographs, it looks to be two feet by two feet, more or less. The surrounding asphalt's somewhat sloped edge looks roughly finished. The grate's west edge looks to be about a foot east of the edge of the stop line.
- [17] The grate could have no part to play in causation of Mr. Johnson's injuries if Mr. Jamieson drove ahead before Mr. Johnson could cut the corner beyond the point of putting his foot on the stop line, as Mr. Johnson contends: if correct, at that point, he would have been standing at the right front of Mr. Jamieson's car when it moved forward. And for the passenger side mirror to have struck him, as alleged, the Toyota would have had to have moved ahead at least five-and-a-half feet, which is the distance from the front of the Toyota to the passenger side mirror. But if Mr. Johnson cut the corner, as Mr. Jamieson says (and as Mr. Johnson said a few days later in his detailed statement to ICBC), then a wet storm grate or wet pavement likely posed a significant risk of a slip and fall to a preoccupied pedestrian wanting to catch up with a friend. The storm grate's presence also somewhat corroborates Mr. Jamieson's recollection of his verbal exchange with Mr. Jamieson.
- [18] After their brief verbal exchange, Mr. Johnson asserts that, Mr. Jamieson drove away from the accident scene without his having provided him information; at discovery however, he said the driver drove away as soon as someone on the scene called out, "get his licence plate number." As we have seen, Mr. Jamieson denies this assertion; he says he remained stopped for about 10 seconds because he had to wait for a break in the pedestrian traffic crossing Columbia Street.
- [19] Mr. Johnson testified at trial that he and Ms. Moses got the licence numbers and that a bystander supplied the missing letters. In his signed ICBC statement, he said he remembered seeing the license plate numbers, 337. Ms. Moses, three similar numbers. But Ms. Moses testified that it was her, who obtained and wrote down the licence plate number on a scrap of paper. The significance of Ms. Moses's writing down of the licence plate lies in the timing: she would have had little time to take note of and to write them down if Mr. Jamieson had taken off right after he and Mr. Johnson exchanged words, as Mr. Johnson contends. But, if Mr. Jamieson had to wait for pedestrians to cross Columbia Street, e.g., an eight to 10 second delay, as he says, Ms. Mosely likely would have had enough time to see and write down licence plate details - keeping in mind she testified she was shocked at the time and that she did not see the 'accident' happen.

- [20] Though a large group of people were standing around at the corner, Mr. Johnson and Ms. Moses never asked around for witnesses. Nor did they file a police report. Rather, they chose to carry on up the block to the Balmoral Hotel pub to drink some beer and watch the Canucks' game.
- [21] I should note the prequel to these events, that Mr. Johnson and Ms. Moses had met after work at another hotel located on the south side of Hastings Street. Ms. Moses arrived there first, and had a beer while waiting for Mr. Johnson to arrive. Mr. Johnson denied he had anything to drink there because the pub did not have a television to watch the Canucks' game; so they left for the Balmoral Hotel pub to see if they could watch the game there.
- [22] Although Mr. Jaimeson noticed Mr. Johnson and Ms. Moses were bumping into one another when he first noticed them, I do not find Mr. Johnson was impaired when he cut the corner.

III. Credibility Assessment

- [23] Assessing the parties' and Ms. Moses's credibility is obviously central to this trial's result.
- [24] For the parties' benefit, I will explain what a credibility assessment entails: credibility addresses the question of whether a witness's testimony is believable; deciding this may involve many considerations. Saying a witness's testimony is credible is different from stating they are a creditable person. The latter means they are a person deserving of acknowledgment or perhaps praise. Of course a witness's history, accomplishments, and reputation can be considered when determining a witness's credibility. But, importantly, a creditable person's testimony may still be found not credible.
- [25] In this case, the evidence shows both parties have lived productive and responsible lives.
- [26] Mr. Johnson has faced down notable challenges in his life. He graduated from high school in Aiyansh, Nisga'a territory. After graduation, he completed some post-secondary education, albeit with mixed success. Finding steady work in the north Pacific Coast can prove a challenge, but Mr. Johnson found what was available, and, when it ran out, moved to the Lower Mainland for construction work. He gained the respect of supervisors and coworkers; two of them (speaking to damages for loss of earnings) spoke credibly to his reliability, work ethic, and skills. He has also maintained family and Aboriginal ancestral cultural ties and traditions, which have helped him maintain a fairly positive outlook.
- [27] Mr. Jamieson also comes before the court as a responsible, employed person; and, he is an experienced driver.
- [28] In short, neither party presents with a discreditable past; rather, both parties have creditable pasts.
- [29] How a person presents themselves when they testify is also a relevant consideration. This consideration is called "demeanour".

- [30] Assessing demeanor does not mean the court regards a charismatic, smooth talking witness credible, and a nervous or shy and hesitant one not credible. Nervous witnesses can be as honest as smooth-talking ones are dishonest.
- [31] In this case, both parties were somewhat reserved. Mr. Jamieson was somewhat more anxious, but both parties were respectful.
- [32] A more important aspect of demeanour and one that also speaks to their reliability as a witness, is the way a person answers questions. The court will ask:
- a) Are their answers straight-forward, responsive?
 - b) Are they evasive, argumentative, and flippant?
 - c) What is their tone of voice: is their inflection and tone of voice appropriate to the subject matter and their answers' content?
- [33] The most important aspect of credibility is how well a witness's testimony withstands critical scrutiny of its contents when considered objectively. The court will ask:
- a) Is it logical; does it make sense?
 - b) Does it match up with what a reasonable person would expect to find and see in the circumstances presented?
 - c) Is the testimony internally consistent, consistent with other testimony, and consistent with other documents and facts the court has accepted?
 - d) Does the witness honestly acknowledge inconsistencies in their testimony, or do they try to explain them away with speculation and improbable scenarios that do not hold up?
 - e) Were they in a position to see what they say they saw?
 - f) How richly detailed are their observations?
- [34] Such considerations also address what is commonly called the reliability of a witness's testimony.
- [35] A witness can be honestly intentioned, but be a nonetheless unreliable historian of events, perhaps due to poor memory or other infirmities, misperception, premature judgment, personal biases, unconscious or conscious, etc.
- [36] In *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 187, aff'd 2012 BCCA 296, Dillon J. suggested three of the more key questions judges should consider when determining a witness's testimony credibility:
- 1) Standing alone, is the witness's testimony believable?
 - 2) Does it consist with other witnesses' testimony and other accepted evidence?

- 3) Which version of the evidence most consists with what a practical and informed person would readily recognize as reasonable in that place and in those conditions?
- [37] These questions, as well as the ones I mentioned previously, are the thinking tools I have kept in mind when assessing credibility in this case.
- [38] Mr. Johnson has to prove that it is more likely than not that:
- a) Mr. Jamieson drove in a negligent manner;
 - b) assuming success on point "a", the negligent driving caused him injuries that he would not have suffered but for that negligence; and
 - c) that Mr. Jamieson's proven injuries caused him to suffer the damages alleged in the Notice of Civil Claim.
- [39] I must answer these questions according to accepted legal principles, without sympathy for either party, based on those facts I find to be true.
- [40] Again, a finding that a witness's testimony is not credible is not equivalent to saying that witness is a dishonest person in their life. A witness's version of events may simply be mistaken.
- [41] Only the cumulative weight of all the evidence, when considered as a whole, determines whether the party carrying the burden of proof has met the evidentiary and legal burden.
- [42] Where a party to a civil action imputes morally blameworthy criminal or quasi-criminal conduct to a defendant, their burden of proof is still the balance of probabilities. In *Continental Insurance Co. v. Dalton Cartage Co.*, [1982] S.C.J. No. 116, Laskin C.J. said:

Where there is an allegation of conduct that is morally blameworthy or that could have a criminal or penal aspect and the allegation is made in civil litigation, the relevant burden of proof remains proof on a balance of probabilities. So this Court decided in *Hanes v. Wawanesa Mutual Insurance Co.*, [1963] S.C.R. 154. There Ritchie J. canvassed the then existing authorities, including especially the judgment of Lord Denning in *Bater v. Bater*, [1950] 2 All E.R. 458, at p. 459, and the judgment of Cartwright J., as he then was, in *Smith v. Smith and Smedman*, [1952] 2 S.C.R. 312, at p. 331, and he concluded as follows (at p. 164):

Having regard to the above authorities, I am of opinion that the learned trial judge applied the wrong standard of proof in the present case and that the question of whether or not the appellant was in a state of intoxication at the time of the accident is a question which ought to have been determined according to the "balance of probabilities".

[Emphasis added.]

- [43] And in examining the standard of proof in civil cases, the Supreme Court of Canada reaffirmed this concept in *F.H. v. McDougall*, 2008 SCC 53, at para. 49:

[49] I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

[Emphasis added.]

[44] In this case, the plaintiff contends Mr. Johnson left the scene of an accident knowing he had struck him without his having left identification information with him before leaving the scene. While this is a criminal or quasi-criminal allegation, and the burden of proof remains the balance of probabilities, the relevant evidence on such an allegation has to be looked at very closely to ensure the burden has been met.

[45] On this point, I find Mr. Johnson did not deliberately leave the scene without giving Mr. Johnson the information required. I find Mr. Jamieson did not believe he had struck Mr. Johnson, or that he immediately left the scene as alleged; two points that I will further discuss below.

[46] Mr. Johnson's credibility, therefore, can be assessed free of a finding that he is guilty of an offence under the Motor Vehicle Act, R.S.B.C. 1996, c. 318.

A. Reliability of plaintiff's evidence

[47] Mr. Johnson's testimony on some points was inconsistent or improbable; his memory was sometimes poor or implausibly absent on significant points of some significance; and his assertions were sometimes exaggerated.

[48] Mr. Johnson did not take the time or trouble to review his medical records before he testified, and he said he was not interested in what they had to say, which may account for some of the discrepancies in his testimony on the matters related to causation.

[49] I will briefly note a few areas of concern, primarily ones related to the accident:

- a) He said he was in great shape when the incident occurred: he weighed 208 pounds and wore jeans with a 32-inch waist. But his family physician's clinical notes three weeks post-accident show his weight at 246 pounds (albeit with steel boots on), and the doctor noted "obesity". Mr. Johnson insisted the doctor's information was wrong. I accept Mr. Johnson gained some weight after his surgeries, but witnesses, including his mother, indicate his weight is not that different now, compared to before the accident.
- b) At trial, he testified that although he intended to cut the corner, he never left the crosswalk and was struck before he could cut the corner. As we saw earlier, in his statement to ICBC, recorded five days after the accident, he said, "I cut the corner to catch up to my girlfriend." His statement to ICBC was quite detailed and acknowledged as true; his explanation for the inconsistency was unconvincing.

- c) Although Mr. Johnson said he was in considerable pain, he could still walk to the Balmoral Hotel pub after the incident and remain there watching the game for two hours. Neither he nor Ms. Moses asked any of the people standing around at the corner for witness information before going to the pub, and neither person ever phoned the police. Defendant's counsel fairly submits that it is not logically reasonable to expect a person in those circumstances, who truly believed that a driver had negligently injured them and left the scene illegally, not to do those things and chose just to go the pub to watch a hockey game. Mr. Johnson's explanation that he had previously recovered from an injured knee, that he did not think it was that bad, that he expected to recover, and that he had the licence plate number is problematic. And Ms. Moses's explanation that she did not help him with reporting the accident because it was Mr. Johnson's problem not hers is also problematic. Indeed, both explanations are individually and collectively inadequate explanations for failing to do what common sense so clearly called on a person in such circumstances to do. Given the close relationship between Ms. Moses and Mr. Johnson, one would expect her to want to help Mr. Johnson then, as she did after Mr. Johnson's knee surgery, assuming events occurred as they say.
- d) If Mr. Johnson was sitting on the ground and Ms. Moses was in a state of shock as they claimed, and assuming Mr. Jamieson took off immediately after their brief exchange, it seems highly unlikely they would have had their wits about them enough to accurately collect Mr. Jamieson's plate number in what little time would have been available to them on their own account. It is also difficult to see how Mr. Johnson could have seen Mr. Jamieson's licence plate number, positioned as and where he says he was. Moreover, it was Ms. Moses who took down the licence plate number. So Mr. Jamieson had to be stationery long enough for her to retrieve some paper, get something to write with, and get the numbers down. Their evidence conflicts with that reality, and it calls their credibility into question.
- e) Mr. Johnson denied he made statements to treating physicians that he most likely made or, at least, gave a basis for the doctor's impressions, that he was functioning considerably better at times than what he admitted at trial.
- f) Defendant's counsel rightly points out that Mr. Johnson was vague on the details and minimized the significance of an injury he sustained in November 2010, when he stepped off a curb and injured his knee; an injury that likely precipitated his need of a second surgery to repair his anterior cruciate ligament.
- [50] Mr. Johnson comes across as straight-forward, likeable, hard-working man. A former employee and co-worker spoke very well of him. His mother and sister were credible witnesses on the damages matters they spoke to. But as for the particulars of the accident, I find Mr. Johnson's explanation for how he came to be injured on April 1, 2010, improbable and unconvincing. He undoubtedly sustained an injury; one that Mr. Johnson apparently became convinced Mr. Jamieson's actions caused. But his testimony is not reliable in certain important aspects, and it lacks the objective hallmarks of consistency with the circumstances that a practical and informed person would readily recognize as reasonable

at that location and in those conditions.

- [51] As we have seen, for Mr. Johnson's recollection to be correct, he would have to have been standing in front of Mr. Jamieson before he moved the car forward five-and-a-half feet to bring the side mirror in contact with Mr. Johnson's hip; and being spun around at such a low speed, considering Mr. Johnson's weight, is not probable in the circumstances.
- [52] Mr. Jamieson watched Mr. Johnson and Ms. Moses as they crossed Hastings Street. He noted Ms. Moses got ahead of Mr. Johnson onto the sidewalk. It is highly unlikely that Mr. Jamieson, still facing a red light and seeing pedestrians gathered at the corner to cross Columbia Street and knowing Mr. Johnson was so close if not right in front of him, would have been so grossly careless as to just drive forward as alleged. It is a possibility, but the circumstances do not commend that as a realistic or probable one. I find it did not happen that way.
- [53] As Mr. Johnson he recalls it, Mr. Jamieson then rolled down his rear passenger window and asked him in a concerned voice if he was okay. Mr. Johnson said Mr. Jamieson said: "No, my knee hurts." And upon hearing that answer, Mr. Johnson said Mr. Jamieson immediately completes his right and drives away or, at discovery, Mr. Johnson drove away right after someone on the corner called out "get his licence number". In either case, Mr. Johnson alleges that Mr. Jamieson drove away to evade legal responsibility. But neither Ms. Moses nor Mr. Johnson made any effort to see where Mr. Jamieson went. Nor, as we have seen did they involve the police. The circumstances do not commend that as a realistic or probable possibility.
- [54] I find it did not happen.
- [55] Further, that Mr. Jamieson was insured with \$3 million third party liability is a relevant circumstance. He had no reason to evade legal responsibility and 'taking off' does not consist with Mr. Jamieson seeing Mr. Johnson leaning against the car and asking him if was okay. Leaving the scene consists more with Mr. Johnson's having said more something along the lines of what Mr. Jamieson recalls Mr. Johnson saying, i.e., he slipped on a storm grate, was okay, but his knee hurt.
- [56] Moreover, Mr. Jamieson then drove a mere 80 feet north on Columbia Street, where he found a place to park. He had to wait there 15 to 20 minutes for his wife to get off work. Such circumstances do not suggest flight or that Mr. Jamieson believed he had knocked Mr. Johnson down and wanted to get away as soon as possible. Rather, they suggest that Mr. Johnson did nothing wrong and was not liable for any negligent breach.
- [57] Finally, Mr. Johnson testified that he saw the Hastings Street pedestrian walk signal on walk when he was sitting on the ground. But it is questionable that he could see the walk signal from that position. Moreover, he allegedly had a painful knee at that time, making it that much more questionable he would notice that small detail.

[58] Counsel ably represented Mr. Johnson. She referred the court to a letter dated May 12, 2014, from Engineering Services for of the City of Vancouver. She strongly submitted that the statement of light sequences for signalling at the Hastings and Columbia intersection set out in the letter calls into question Mr. Jamieson's estimates of the 10 to 15 seconds for how long it took for Mr. Johnson to cross Hastings Street; and, more especially, his having to wait 8 to 10 seconds for traffic to clear on Columbia Street to make his right turn after his having asked Mr. Johnson if he was okay. The report states:

SIGNAL INFORMATION -

COLUMBIA STREET & HASTINGS STREET

Interval

Description

Duration

1

North and southbound red

East and westbound green (Hastings St.)

North and south crosswalks walk (across Columbia St)

East and west crosswalks don't walk

29 sec.

2

North and southbound red

East and westbound green

North and south crosswalks flashing don't walk

East and west crosswalks don't walk

7 sec.

3

North and southbound red

East and westbound amber

All crosswalks don't walk

3.5 sec.

4

All directions red

All crosswalks don't walk

1.5 sec.

5

North and southbound green

East and westbound red

North and south crosswalks don't walk

East and west crosswalks walk

8 sec.

6

North and southbound green

East and westbound red

North and south crosswalks don't walk

East and west crosswalks flashing don't walk

11 sec.

7

North and southbound amber

East and westbound red

All crosswalks don't walk

3.5 sec

8

All directions red

All crosswalks don't walk

1.5 sec

[59] Mr. Johnson's counsel submitted that the report indicates the north and south crosswalk signal would be active for 29 seconds; it would then be followed by a flashing do-not-walk signal for 7 seconds, and a solid don't walk signal for 3.5 seconds.

- [60] She submits this information means the defendant would have faced a red light for a minimum time of 39.5 seconds, so that time accords with Mr. Johnson's evidence that when he fell, the white pedestrian walk signal likely was still activated. She submits this information further indicates that Mr. Jamieson would have completed his right turn while the red light was active, not on green, as he stated.
- [61] I do not read the information that way.
- [62] The 29 and some seconds refers to the north and south crosswalks that cross Columbia Street. The light was red was for east/west traffic, and it brought Mr. Jamieson to a stop, allowed north and south vehicular traffic, and made it safe for pedestrians to cross Hastings Street at either the west or east crosswalks, across Hastings Street.
- [63] I assume Mr. Jamieson could turn right on red, but there is no evidence on that point, and it is not determinative of the issues here anyway.
- [64] At the time, both vehicular traffic was north and south bound on Columbia Street and pedestrian traffic walking north in the crosswalk, including Ms. Moses and Mr. Johnson. As I read the information, the traffic lights for east and westbound traffic on Hastings are red for a total of 22.5 seconds. Pedestrians proceeding either north or south in either of the east and west crosswalks on Hastings have eight seconds before the signal turns to a flashing don't-walk, a further 11 seconds crossing with a flashing don't-walk signal, and a further five seconds before the sequence changes over.
- [65] These times accord with the expectation that east and west vehicular traffic on the Hastings Street, a heavily travelled east/west thoroughfare, would have greater priority. Mr. Jamieson's estimate of 10 to 15 seconds for Ms. Moses and Mr. Johnson to cross Hastings Street and his having to wait 8 to 10 seconds for pedestrian traffic to clear the Columbia Street crosswalk, accords well enough with the City's signal sequencing information.
- [66] Pedestrians crossing Columbia Street would have a matching long sequence to cross Columbia Street. This supports Mr. Jamieson's recollection of waiting an estimated 8 to 10 seconds before the waiting pedestrians crossed and opened up an opportunity for him to complete his turn.
- [67] If I have misread the tables' sequencing information, variables such as departure from the curb relative to when the walk-signal began, time for the verbal exchange between the parties, etc., let alone the accuracy of their time estimates, has to be considered.
- [68] Standing back and looking at the timing realistically, Mr. Johnson's estimates appear reasonable in the circumstances.
- [69] Mr. Johnson testified he took him nine seconds to cross, based on his having timed it before the trial. No evidence was presented about the width of Hastings Street at that location, but assuming six lanes, including curbs, of 8 to 10 feet, nine seconds to cover 50 to 60 feet is a brisk walk.

- [70] Mr. Jamieson recalled Mr. Johnson and Ms. Moses bumping into one another at some point of their crossing, and it appears Mr. Johnson had some difficulty keeping up with Ms. Moses. In any case, an estimate of 10 seconds or more to cross is reasonable.
- [71] In summary, the signalling information is not determinative of the major questions in this case.
- [72] Plaintiff's counsel stressed what she submitted was a significant inconsistency in Mr. Jamieson's evidence regarding whether he remained stationary at all times versus his testimony about rolling ahead two feet. How the question was posed at discovery weakens the submission on whether his testimony was inconsistent. Assuming an inconsistency ought to be found, it would be more significant if the time of the statements were reversed, with Mr. Jamieson denying he moved at trial. Assuming the statements were at clear variance, which they are not, Mr. Jamieson's evidence at trial is more helpful than Mr. Johnson's. I do not find this point sways the matter.
- [73] I should include a note that when Mr. Johnson saw his family physician, Dr. A. Racic, for the first time on April 4, 2010, he reported a left knee injury, left ankle, and bruised right forearm. He reported he had just stepped out onto the road and a car turning right off Hastings Street hit him in the right hip area with his mirror and spun him around on his fixed left leg, and he fell down. He also reported immediate pain in left knee, post an ACL and an MCL tear one year ago. There is no note of bruising of the right hip, but Mr. Johnson's description is mostly congruent with his testimony at trial, which gives some weight to it, which I have considered even if it may not be admissible as part of the plaintiff's case.

IV. Discussion and Conclusion

- [74] Considering the parties' and Ms. Moses's testimony, I find Mr. Jamieson's testimony more credible and more consistent with the place, the circumstances, and the parties' actions.
- [75] Ms. Moses admitted to a poor recall of what occurred, but what she recalled did not assist Mr. Johnson very much. For example, she placed Mr. Johnson's location, when she saw him, on the ground in the curb lane, east of the gutter, not by the crosswalk as Mr. Johnson had suggested.
- [76] While Mr. Johnson remained in the marked crosswalk, he enjoyed the right of way pursuant to ss. 127(1) and 132(1) of the Motor Vehicle Act. Further, given Mr. Jamieson had come to a stop, Mr. Johnson was entitled to assume Mr. Jamieson would yield the right of way to him: *Han v. Chahal*, 2013 BCSC 1575.
- [77] I find Mr. Johnson did not remain within the marked crosswalk. He stepped clear of it into the gutter area of the curb lane. He intended to walk along it several feet in the three to four foot space between the edge of the sidewalk and the right side of the Toyota.

- [78] In so doing, he thereby immediately lost the statutory right of way, but is a concept that, to some extent, becomes irrelevant at this point. Mr. Jamieson still owed Mr. Johnson a duty of care, irrespective of Mr. Johnson's cutting of the corner. This case does not turn on rights of way. Both parties were aware of the location of the other. Mr. Jamieson owed a duty of care to Mr. Johnson; Mr. Johnson a duty to take precautions for his own safety: *Loewen v. Bernardi*, [1994] B.C.J. No. 1169 (C.A.) at para. 15.
- [79] Assuming Mr. Johnson rolled forward two feet, Mr. Jamieson should have taken the extra precaution of remaining where he was until Mr. Johnson was out of the curb lane. But assuming for the sake of discussion that moving in these circumstances constituted a breach of his duty, the plaintiff still cannot meet the burden of proving that Mr. Jamieson's action of taking his foot off the brake and letting the car move ahead one to two feet caused Mr. Johnson's knee injury.
- [80] Mr. Johnson testified that Mr. Jamieson was moving slowly when the car mirror caught his hip and spun him around. It is difficult to see how that would generate enough force to spin him around as Mr. Johnson recalled. Mr. Johnson weighed approximately 240 pounds. There is no evidence of damage to the Toyota's right side mirror. There is no evidence of Mr. Johnson shouting anything to Mr. Jamieson.
- [81] Considering all the evidence, I find it more likely that Mr. Johnson slipped, as he told Mr. Jamieson at the scene, fell, got up, and for a few moments leaned against the trunk area of the Toyota where Mr. Jamieson saw him leaning against it. It is also possible that Mr. Johnson slipped and fell against the Toyota, but it is not necessary for me to make a specific finding as to the sequence of events.
- [82] Mr. Jamieson testified he was stopped when he felt the car move. One could argue that the motion in the car Mr. Jamieson said he noticed was the side of the Toyota rubbing up against Mr. Johnson, as opposed to say, leaning against it when he got to his feet, or even falling against it when he slipped. Such analysis becomes unduly speculative and does not really assist, the assumptions failing to accord with Mr. Johnson's description of what happened.
- [83] In summary, I can only conclude that Mr. Johnson has failed to prove on the balance of probabilities that Mr. Jamieson's actions caused his injuries.
- [84] As mentioned, Mr. Johnson strikes me as a hard-working, honest individual, but I find his recollection of events is flawed and unreliable. I must decide the issue based on the evidence, and reasonable inferences and findings based on that evidence, not on sympathy.
- [85] Assuming I have erred in my conclusion that the plaintiff has failed to prove the plaintiff's actions caused his alleged knee injury, I should note I found the witnesses called by the plaintiff who spoke to damages credible. There is sufficient medical evidence, testimony, and submissions on which medical legal causation and damages could be assessed if necessary.

[86] Plaintiff's counsel ably said all that could be usefully said on the plaintiff's behalf, but the weight of evidence falls short, and, given my conclusions, I must dismiss the plaintiff's claim.

"N. Brown J."

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