
CANADA / JUDGMENT

Lemesurier v. McConnachie

2009 BCSC 89

COURT

Supreme Court of British Columbia

DECIDED

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2009 BCSC 89 Lemesurier v. McConnachie

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lemesurier v. McConnachie,

2009 BCSC 89

Date: 20090202

Docket: 13300

Registry: Nelson

Between:

Virginia Anne Lemesurier

Plaintiff

And

Lindsay Dawn McConnachie

Douglas Laurel Beetstra

Defendants

Before: The Honourable Mr. Justice McEwan

Reasons for Judgment

Counsel for the Plaintiff:

R.L. Spilker

Counsel for the Defendants:

G.L. Harrison Q.C.

Dates and Place of Trial/Hearing:

January 6, 7, and 8, 2009

Nelson, B.C.

- [1] This was a trial on the issue of liability for a motor vehicle accident that occurred on May 5, 2006 in downtown Trail, British Columbia.
- [2] At somewhere around 11 p.m. that evening the plaintiff was one of a group of young adults who had been socializing in conjunction with an annual event called "Silver City Days." After spending the day in Castlegar, the plaintiff had gone to a house party in Rossland for a few hours, then taken a ride with others down to Trail to attend a concert at the Trail Memorial Centre on Victoria Street. Victoria Street is the "downtown" name for Highway 3B, which runs from one end of the city to the other.
- [3] In the area just to the west of the Memorial Centre, Victoria Street is two lanes in each direction with a fully demarcated left turn lane on the east side (for westbound traffic turning south), and a painted tapered yellow "island" on the other side to guide traffic turning west from the northbound, inside, lane of Bay Avenue, which meets Victoria Avenue to form a "T".
- [4] The plaintiff and several of her friends and acquaintances decided to leave the concert after about an hour, and informally marshalled briefly outside the Memorial Centre to make their way to their cars. The vehicle the plaintiff rode to the event, and to which she expected to return, was in a parking lot on the opposite side of Victoria Avenue and opposite the western end of the Memorial Centre. It was, accordingly, necessary for the plaintiff to cross Victoria Street.
- [5] There is considerable evidence from the perspectives of several of the young people who were with or around the plaintiff that evening. What it comes down to reliably is that the plaintiff was attempting to cross Victoria Street in the area of the western crosswalk on Bay Avenue when she was struck by the defendant's vehicle in the eastbound inside lane. It is also clear that she was some distance west of that crosswalk, perhaps cutting the distance to the Dairy Queen parking lot, although it is not essential to establish why she was there.
- [6] None of the considerable evidence concerning the length of time the "walk" sign operated until the "don't walk sign" came on and the light on Victoria Street turned green is particularly helpful. For the sake of completeness, the evidence is that the cross-walk at the west side of the Victoria Street/Bay Avenue intersection was operated by a button. The "walk" sign operated for 7 seconds followed by a "don't walk" sign for 14 seconds. There was then a further 4½ seconds period before the light would change. Several witnesses remarked that, as a practical fact, the period during which pedestrians were authorized to cross was relatively brief.

- [7] Lorne Nedelec, one of the young men in the group that had been with the plaintiff, testified that he pressed the button and crossed when he was authorized to do so. He testified that he knew the plaintiff and her friend Nairn Bruce were just behind him because he heard them conversing. He says that the collision occurred just after he got to the other side. He was an apparently truthful witness but I conclude he was mistaken, either as to the proximity of the plaintiff behind him, or as to the timing of the incident relative to him reaching the south curb of Victoria Street, or both. This is because it is quite inconsistent with the other evidence, including that of a defence witness whose evidence I generally accept, Leonora Howes.
- [8] Ms. Howes was travelling west on Victoria Street intending to make a left turn onto Bay Avenue. She says she had a green light and drove into the centre of the intersection signalling her turn and pausing for through traffic to clear. While in this position she saw a group of people crossing the street, some of whom were running. She recalls seeing shadows in the path of an oncoming vehicle and forming the impression that someone would be struck, just before the plaintiff was. She left her vehicle with its hazard lights on in the intersection and attended the scene.
- [9] What this establishes is that several people were crossing contrary to the traffic signals at that intersection. Ms. Howes observed this while in the intersection, a position she would only have been in if the light in her direction were green. This means that the signal had to be against the plaintiff when she was struck and that it had been for several seconds before the collision occurred. Ms. Howes also places the impact to the west of the intersection and not in it.
- [10] The defendant's evidence is not entirely satisfactory. She has no reliable recollection of how she entered onto Victoria Street, whether at an intersection one, or two, blocks west of the Victoria Street/Bay Avenue intersection, or from the entrance of a 7-11 store between those intersections. This would have been of some assistance in assessing the timing and effect of various manoeuvres. She testified, for instance, that, because there were a good number of people about, she felt it was safer to get into the inside lane of travel. When and where she made that change, and whether its proximity to the collision was a factor, is not possible to gauge on her evidence, or on that of any other witness, or combination of witnesses. There is some reason to believe that there was a faster moving vehicle in the curb lane travelling in the same direction as the plaintiff, which may have drawn the attention of some of the witnesses away from the defendant's car somewhat further back.
- [11] The defendant cannot say more than that she was proceeding down Victoria Street below the speed limit because there were "people all around." Her lights were on low beam because there were "street lights all around". She says, of the plaintiff (and her friend Nairn Bruce), that "they came out of nowhere I seen the pedestrian and, like, bang."

[12] The evidence is, then, that the plaintiff was attempting to cross the road outside the crosswalk, and contrary to the traffic signal, when she was struck by the defendant, who had the right of way, and was not speeding or otherwise in obvious breach of the rules of the road.

[13] The statutory provisions which govern the situation are sections 179-181 of the Motor Vehicle Act. They read:

Rights of way between vehicle and pedestrian

179 (1) Subject to section 180, the driver of a vehicle must yield the right of way to a pedestrian where traffic control signals are not in place or not in operation when the pedestrian is crossing the highway in a crosswalk and the pedestrian is on the half of the highway on which the vehicle is travelling, or is approaching so closely from the other half of the highway that he or she is in danger.

(2) A pedestrian must not leave a curb or other place of safety and walk or run into the path of a vehicle that is so close it is impracticable for the driver to yield the right of way.

Crossing at other than crosswalk

180 When a pedestrian is crossing a highway at a point not in a crosswalk, the pedestrian must yield the right of way to a vehicle.

Duty of driver

181 Despite sections 178, 179 and 180, a driver of a vehicle must

- (a) exercise due care to avoid colliding with a pedestrian who is on the highway,
- (b) give warning by sounding the horn of the vehicle when necessary, and
- (c) observe proper precaution on observing a child or apparently confused or incapacitated person on the highway.

[14] In jaywalking Victoria Street the plaintiff was in breach of her statutory responsibilities and negligent as to her own safety. The issue comes down to whether, notwithstanding this, the defendant was in breach of her statutory responsibility under section 181, or otherwise negligent.

[15] The defence has tendered the case of *Melgarejo-Gomez v. Sidhu*, 2002 BCCA 19, as setting out the applicable law. There, the evidence of "lookout" was as follows:

19. A brief summary of the evidence relating to "lookout" is relevant here. Mr. Sidhu testified that when he first saw the pedestrian, he was approximately three to four car lengths away and was running from Mr. Sidhu's right to his left. He was between the second and third of the four lanes he was seeking to travel across. The pedestrian continued to run through the third lane and into the fourth - the lane in which Mr. Sidhu was travelling when he struck him.
20. Mr. Sidhu asserted that, immediately upon seeing the respondent pedestrian, he applied his brakes. He testified as follows: "I slammed on my brakes. And he kept on running. I kept on sliding and he basically we collided." Mr. Sidhu further testified that he let go of the brakes after the collision because the vehicle was out of control but that he was then able to come to a controlled stop. Mr. Sidhu also said that the pedestrian appeared to notice his vehicle for the first time just before impact.
- [16] The Court, per Braidwood J.A., endorsed the reasoning in *Wong v. West* (1959), 30 W.W.R. 526 (B.C.C.A.):
24. In the case of *Wong v. West* (1959), 30 W.W.R. 526 (B.C.C.A.), Des Brisay, C.J.B.C. articulated the duty of care required of an automobile driver proceeding on a green light. At p. 528 he wrote as follows:
- [The driver] owed no duty to traffic entering the intersection in disobedience to the lights, beyond a duty that, if he in fact saw such traffic, he ought to take all reasonable steps to avoid a collision.
25. No provision in law requires a driver to exercise a duty such that one could say that Mr. Sidhu ought to have seen the pedestrian earlier. Regardless of whether Mr. Sidhu applied his brakes before or after striking Mr. Melgarejo-Gomez, one can assume he applied them upon first becoming aware of the pedestrian. That is all that was required of Mr. Sidhu, as (according to the jury's finding) he was lawfully within the intersection and Mr. Melgarejo-Gomez was not.
- [17] In a concurring judgment, Southin J.A. cited *Swartz Bros. Limited v. Wills*, [1935] S.C.R. 628 per Cannon J., at p. 632, to the effect that the driver with the right of way "was entitled to assume that the plaintiff would follow the rule." She added, "only if the Appellant saw the Respondent in time to avoid him, and, in effect ran him down, could he be found at fault by a jury acting judicially."
- [18] Counsel (in urging this court's reliance on these observations) submits that it would be erroneous to speculate on the basis of what the defendant "should have seen" in the circumstances. The plaintiff had the right of way and the evidence is that she did not, in fact, see the plaintiff until she could not avoid hitting her. This, he submits, places this case squarely within the passage from *Wong v. West* (supra), cited in the defence submission.

- [19] The defence further submits that if the plaintiff's evidence is accepted, the court ought to infer that that evidence, taken together with the evidence of the other witnesses, should lead to an inference that the plaintiff ran right into the path of the defendant's car, as was the case in *Melgarejo-Gomez*. This is not specifically relevant to the duty articulated in *Wong v. West* (supra) but may bear on the question of the applicability of s. 181 of the Motor Vehicle Act in the circumstances.
- [20] *Melgarejo-Gomez* should be read as authority that, absent known circumstances which materially affect the reasonableness of assuming that others will obey the rules of the road, the court ought not to adjust the applicable duty premised on what a putative "reasonable person" in the position of the defendant ought to have seen.
- [21] Where, however, there are circumstances known to a motor vehicle operator, that render questionable the presumption that the rules of the road will be respected by pedestrians, the exercise of due care is not met by behaving in accordance with the presumption. One cannot be deemed to presume facts at odds with known circumstances. "Due care" on the night of this accident included the known, and (by the plaintiff), specifically observed circumstance that there were pedestrians about and, that given the nature of the event, they might not be taking all due care for their own safety. This required an extra degree of caution in the circumstances. The plaintiff acknowledged this herself in turning into the centre lane to avoid pedestrians.
- [22] The question then becomes whether the plaintiff has proved that the plaintiff's want of due care, applying s. 181, contributed to the collision. *Liston v. Streiger*, CA 18770, CA19363 Vancouver Registry (June 25, 1996) is a case in which the Court of Appeal apportioned negligence 60-40 against a pedestrian who was struck in Penticton during the "Peach Festival" in a somewhat comparable atmosphere, in that the exercise of due care included adjusting ones' driving habits to accommodate the possibility of careless behaviour by pedestrians. There the facts, as found by the trial judge and accepted by the Court of Appeal, included the plaintiff "running barefoot across a busy street at night, in a poorly lit area in a state of intoxication she glanced into the curb lane and proceeded to run into it"
- [23] The defendant's position is that apart from any discussion of legal presumptions and duties, the effect of the evidence is that the plaintiff simply ran into the defendant's car in circumstances where the defendant had no opportunity to avoid striking her. The widths of the lanes established in evidence suggest that the distance from the curb to the point of impact is not great and could be traversed in a matter of seconds by a person who was running. The defence submits that the plaintiff's evidence that she simply did not see the defendant until she was upon her may be attributed to the probability that the plaintiff was running.
- [24] The useful evidence is, again, that of the defence witness Ms. Howes. Apart from establishing that the collision occurred while the traffic signals were against the plaintiff, and that the plaintiff was not in the crosswalk, Ms. Howes' evidence is that she saw a large

group of people crossing the road from her vantage in the intersection. Some were running. Her evidence is that the plaintiff was among the last of that group attempting to cross. Ms. Howes saw shadows crossing the road and had enough time to form the impression that someone was going to be hit because approaching cars were not slowing down.

- [25] I accept that Ms. Howes probably saw the plaintiff running. It may well be, as the defence asserts that she ran right in front of the car leaving the defendant very little time to react to her specific presence. This does not, however, explain how the defendant could approach the intersection without slowing or without the utmost caution given that a large group of people had proceeded to cross moments before contrary to the traffic signal. The effect of Ms. Howes' evidence, which I accept, is that the presence of people on the road was manifest, and that the defendant should have been alert to that fact. She should not, in view of the circumstances, have been "surprised" by pedestrians behaving as the plaintiff did.
- [26] I am of the view that the plaintiff should bear the larger portion of the responsibility for what happened to her. With respect to the division of liability, I find it difficult to distinguish the relative degrees of responsibility here from those established in Liston (supra). Accordingly, I divide responsibility for what occurred 60% to the plaintiff and 40% to the defendant.

"McEwan J."

The Honourable Mr. Justice McEwan

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