
CANADA / JUDGMENT

MacDonald v. Goertz

2008 BCSC 394

COURT

Supreme Court of British Columbia

DECIDED

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2008 BCSC 394 MacDonald v. Goertz

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

MacDonald v. Goertz,

2008 BCSC 394

Date: 20080407

Docket: M044453

Registry: Vancouver

Between:

Kristy MacDonald, an infant,

by her Litigation Guardian, Anne-Lise MacDonald

Plaintiff

And

Jessica Goertz, Masoom Ahmad,

White Rock South Surrey Taxi Ltd.,

John Doe and John Doe Taxi Company

Defendants

- and -

Docket: M050816

Registry: Vancouver

Between:

Kaitlyn Chambers an infant,
by her Litigation Guardian Marilyn Chambers
Plaintiff

And

Jessica Goertz, Masoom Ahmad,
White Rock South Surrey Taxi Ltd.,
John Doe and John Doe Taxi Company
Defendants

Before: The Honourable Madam Justice Humphries

Reasons for Judgment

Counsel for the plaintiff

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Counsel for the defendant Jessica Goertz

P.M.E. Abrioux

Counsel for the defendants Masoom Ahmad, White Rock South Surrey Taxi Ltd., John Doe and John Doe Taxi Company

R. Hartshorne

Date and Place of Trial/Hearing:

January 14 - 18, 21 -25, 2008

Vancouver, B.C.

- [1] These two actions arise out of the same motor vehicle accident. Liability is in issue. Quantum of damages has been settled on the MacDonald action and that aspect of the Chambers action is set for trial later this year. The liability actions were tried together, with discoveries and documents applicable to both, and evidence on one considered as evidence on the other.
- [2] Much of the evidence is not in dispute. On September 6, 2003, Ms. MacDonald, then 15, and Ms. Chambers, then 16, attended a house party in Langley, B.C. The number of teenagers at the party was very large - estimated at perhaps 300 - and the police were called to break it up. They required the attendees to pour out all their alcohol and told them to go home.

- [3] Ms. MacDonald and Ms. Chambers met up with another friend, Ms. Tarcea, and two young men, Drew Jessiman and Kevin Douglas, both 18. They hung around the party a little longer until the police once again told them to leave.
- [4] Ms. MacDonald testified she had consumed one cooler during the party. Ms. Chambers and Ms. Tarcea had shared a bottle of raspberry vodka; Ms. Tarcea said she had had 2-3 drinks; Ms. Chambers said she could have had a few drinks and could have been drunk. Mr. Jessiman testified that the boys had drunk about six beers each. Mr. Douglas did not testify.
- [5] Ms. MacDonald's cell phone records indicate she made a couple of calls about the time the party was breaking up. She could not recall why she made the calls, but assumed she was trying unsuccessfully to get a ride. Her parents were always ready to come and pick her up, and she occasionally obtained rides from her older sister as well. The group turned down at least one ride from teenagers whom they were concerned might have been drinking.
- [6] Ms. MacDonald said she was not sure where the party was, and thought it would be best to walk to an intersection to get her bearings. The five teenagers started walking south on 202A Street. They did not hurry, taking their time and socializing on the way. They took some pictures of each other with a disposable camera. All of them but Ms. Tarcea, who was wearing red, were wearing white sweaters or tops; Ms. MacDonald had a black vest over her white long-sleeved top.
- [7] It took the teenagers about half an hour to reach the intersection of 202A Street and 72 Avenue, which runs east/west. This is a T intersection, with a stop sign on 202A Street. The area was undeveloped at that time. There was a fire hall on the northeast corner of the intersection, but that was the only building in the vicinity. There was a street light at the northeast corner of the intersection. There was no marked crosswalk at the intersection. 72nd Avenue is paved, with one lane in each direction, a narrow shoulder on the north side, a somewhat wider one on the south side, and faded centre lines.
- [8] Once reaching the intersection, the teenagers discussed their ride options. Ms. MacDonald tried her parents again. Her parents told her they had just come in from an evening out, had had a couple of drinks and were in the hot tub. They suggested she try to find a safe way home. Ms. MacDonald called her sister. She was unsuccessful in obtaining a ride.
- [9] Ms. MacDonald called her parents back and they gave her the number of the defendant, White Rock South Surrey Taxi. Ms. MacDonald called the company and ordered a taxi. This was at 00:19 hours, according to her cell phone records. The teenagers settled in to wait on the northwest corner of the intersection, some sitting on a concrete abutment, others standing around.

- [10] During the walk up to the intersection, it had started to drizzle or rain lightly. Mr. Jessiman said it had been raining lightly for 20-25 minutes by the time Ms. MacDonald called for a taxi. Ms. MacDonald agreed with this estimate. One of the pictures taken of the teenagers that night shows Mr. Douglas at the intersection holding a newspaper over his head, although the newspaper does not appear to be wet.
- [11] A few minutes later, the taxi, driven by the defendant Ahmad, arrived, travelling west to east along 72nd Avenue, that is in the lane farthest from the teenagers. The taxi stopped in the eastbound lane across from the teenagers who were still in a group on the northwest corner. They crossed the road to the cab and began to try the door handles.
- [12] Mr. Ahmad said he could see the teenagers as he approached the intersection. He intended to ensure they were his customers before he decided on the safest way to pick them up. He said they surrounded his car almost immediately, before he could even get his window down. Mr. Ahmad admitted he was almost sure the group at the intersection had to be his passengers since the intersection was in the middle of an undeveloped area and they were the only people at it. However, he testified that he has often been called to pick up people at a certain location, arrived to find a number of people there but the one who had called him already gone. He has learned that it is much more difficult to get people out of his cab than it is to refuse entry, so he keeps his doors locked until he is ready to let his customers in. He could not take a group of 5 as he had only 4 seatbelts. He told the teens that he would call a larger vehicle for them. He focussed on talking to a young man, that is, Mr. Jessiman, through the open driver's window, which required him to look to the side. After refusing entry to the teenagers, he began to move off, calling his dispatcher and ordering a larger vehicle.
- [13] Upon being unexpectedly refused entry to the taxi, the teenagers turned to go back across the road to the northwest corner of the intersection.
- [14] Meanwhile, the defendant Ms. Goertz, then in her early 20's, had attended a family function nearby. She had consumed only a couple of sips of wine as she had been in charge of the photography at the function. She headed home around midnight to make up a bed for her brother who had come in from out of town. She was driving westbound along 72nd Avenue.
- [15] She had driven the road hundreds of times before and knew the area was undeveloped. She had never seen pedestrians in the area.
- [16] As she crested a small hill on 72nd Avenue, around 204th Street, she had a clear view down to the 202A intersection. She could see a car with its high beams on. She said she dimmed her own lights, and then flashed them, hoping to prompt the other driver to dim his, but they remained on bright.

- [17] The posted speed on 72nd Avenue was 60 kph. Her own speed was 50-55 kph when she crested the hill, and she assumed she had picked up speed since she last looked at the speedometer. She said it had begun to drizzle and she clicked her windshield wipers up a couple of notches as she drove along. She said the surface of the road was glossy from the rain.
- [18] As she approached the fire hall, Ms. Goertz realized the oncoming car was stopped in the middle of its lane. This struck her as irregular so she took her foot off the accelerator and covered the brake, allowing her car to decelerate on its own. Her vision was impaired by the car's high beams, but she saw the roof light, although she did not recall if it was lit or not, and noticed the distinctive white and red colours on the car and realized it was a taxi. She thought the driver might be receiving a call or looking for directions. She said she did not honk her horn as she had no reason to expect pedestrians in the area. She did not flash her lights again as she did not wish to impair the taxi driver's vision.
- [19] Ms. Goertz said she had her eyes on the road, trying to see past the taxi's lights. As she passed the front of the car, she saw a white object in her lane. She slammed on the brake, and her windshield shattered. She could not see, brought the car to a stop, and saw a girl lying in the middle of the road behind her. This was Ms. Chambers.
- [20] Meanwhile, Mr. Ahmad had continued to drive forward, and testified that as he got a few hundred feet further on, he heard screaming, looked in his rear view mirror and realized there had been an accident. He radioed the dispatcher to call the police and an ambulance. He was never aware of the Goertz vehicle until he saw it in his rear view mirror.
- [21] Ms. MacDonald testified that, upon realizing they were not going to be let into the cab, she turned to go back to the northwest corner of the intersection. The next thing she remembers is lying on the road by the stop sign on 202A Street. Mr. Jessiman came rushing over and she told him she was okay, gave him her cell phone and told him to call 911, which he did at 00:27, according to the cell phone records.
- [22] Ms. Chambers remembers nothing after the group first reached the intersection. Ms. Tarcea did not recall exactly where she was when the car passed her. She became hysterical upon seeing her friend hit and began to scream and continued for a long period of time.
- [23] Mr. Jessiman testified that he looked both ways before crossing the street and noticed the lights of the Goertz vehicle as it crested the hill, when the group was walking across the westbound lane of 72nd Avenue to get to the cab, which had stopped in the eastbound lane. However, he was confident that they would all be in the cab and gone before the car reached them.
- [24] When they were unable to get into the cab, Mr. Jessiman stood by the driver's window trying to convince Mr. Ahmad to let them in. Realizing it was futile, he turned, intending to cross the road and the Goertz vehicle brushed passed him two or three feet away. He saw Ms. Chambers come up over the vehicle and land on the roadway. He saw Mr. Douglas run to

her. Mr. Jessiman went to get Ms. MacDonald's cell phone. He found her lying near the stop sign. He said he did not realize she had been hit as well until Ms. Goertz told him not to leave Ms. MacDonald, although Ms. Goertz testified she was not aware that two girls had been hit until some time later.

- [25] Ms. Goertz testified she got out of the car and ran back to the girl on the road, that is, Ms. Chambers. She noticed a young man calling 911. Another man ran up and began to administer first aid. He told Ms. Goertz to hold the girl's head, which she did until the paramedics arrived.
- [26] The man who had come running up to administer first aid, Mr. Jackson, had been guarding a nearby construction site, and had been settling down for the night in his trailer a little distance along 72nd Avenue, past the fire hall. He heard the sounds of the accident and Ms. Tarcea screaming. He ran to the scene with his first aid kit, and asked Ms. Goertz to hold Ms. Chambers' head steady. He did not notice Ms. MacDonald. He said the pavement was dry but it started to rain heavily after the accident. In cross examination he admitted he was not focussed on the weather as he ran to the scene, but he knew it wasn't raining noticeably. He said the real rain started later.
- [27] Cst. Hill and Cst. Appel attended the scene. Once they ascertained that the injuries were not life-threatening, they conducted a routine investigation. Unfortunately, Cst. Hill's notes have been lost but she retained a diagram of the skid mark left by Ms. Goertz's vehicle, and measured it at 29 meters. When Cst. Appel arrived, he saw a person on a stretcher on the road about 10 meters behind the Goertz vehicle. He did not recall if he measured or estimated the 10 meters.
- [28] Both Ms. MacDonald's mother and Ms. Chambers' mother testified, as might be expected, that they emphasized many times to their daughters as they grew up to look both ways before crossing the street. Both knew there was liquor at teenage parties, but both expected their daughters to call them for rides home at night. Mr. MacDonald testified that he assumed a taxi was the safest way to get his daughter home if he was not picking her up himself.
- [29] The plaintiff called Mr. Sandhu, who organizes courses for taxi drivers at the Justice Institute, to testify about the standards expected of a taxi driver. He testified that there are no regulated minimal standards for taxi drivers, but the industry itself decided to set up courses to provide basic training. He said the taxi drivers who take their basic course are taught that their primary responsibility is to transport their passengers safely; they are to drive defensively and obey the rules of the road. Drivers are taught to pick up and drop off passengers safely, that is on the curb side, and not into traffic. He said drivers should plan ahead and try to anticipate situations that might arise when picking up passengers, but there are many scenarios that cannot be anticipated and drivers must use their best judgment.

- [30] Mr. Ahmad is an experienced driver and took the basic course offered at the institute several years ago. He admitted he had been taught to drop off his passengers in a safe area, but did not recall being taught to pick up safely. He said he obviously tries to pick up passengers in safe places but he does not have control over the passengers before they get in the cab. He agreed that it is best to try to pick up and drop off from the curb side of the taxi.
- [31] He agreed that it would have been better to turn around at some place on 72nd Avenue or 202A Street, and come and pick up the passengers on the north side of the street, but said he wanted to ensure that these were indeed his passengers, and they crossed to his cab before he had time to roll down his window. He said he pulled over to the right of the travelled lane, although there was a very narrow shoulder so he could not pull off. The teenagers and Ms. Goertz said he was stopped in the middle of the lane. Not much turns on this, given the width of the lane and the very narrow shoulder on the north side of the road.
- [32] It is admitted that the posted speed on this stretch of road was 60 kph, and that the nearest cross street to the crest of the hill on 72nd Avenue is 204th Street, slightly to the west of the crest.
- [33] No evidence was adduced of the injuries suffered by each of the plaintiffs, although the plaintiff's accident reconstructionist, Dr. Toor, was asked to assume certain injuries for Ms. Chambers: fracture of right elbow, fracture of right leg, thoracic compression fractures, left ankle sprain, and brain injury. He was told that Ms. MacDonald sustained a fractured leg, although he does not specify which one. The Statement of Claim alleges the right leg.
- [34] Photos of the Goertz vehicle show a large dent in the middle of the hood, very slightly to the driver's side.

The speed of the Goertz vehicle

- [35] Dr. Toor estimated the pre-braking speed of the Goertz vehicle by the length of the skid mark measured by Cst. Hill. Depending on whether the road was wet or dry, he calculated the speed to be about 61 km/h if wet, and 68 km/h if dry, and the pre-skidding speed to be 58 and 63 km/h for wet and dry respectively.
- [36] Dr. Toor was of the view that it was more likely the road was dry because pictures taken shortly after the accident, when everyone agrees it had begun to rain heavily, show the patches of pavement under the vehicles to be dry. As well, a wet road will not generate skid marks. However, Dr. Toor estimated the speed for a wet road in any event because he could not predict what finding the court would make about the road surface. For his purposes, it did not matter how long it had been drizzling unless the road was wet. He testified that there are no friction numbers for damp roads. He can deal only with wet or dry roads.

- [37] It is unfortunate that there are no figures for damp roads, because all of the evidence points to that being the state of the road at the time of the accident. Both Mr. Jessiman and Ms. MacDonald said it had been drizzling lightly for at least 20 minutes. Mr. Jackson's evidence was that the road was dry; at least it was not raining noticeably, but he was not focussed on the weather as he ran to the scene. Ms. Goertz said the road surface was "glossy."
- [38] It is probable the surface was indeed slightly damp, allowing some light to be reflected from the road surface so that it appeared glossy to Ms. Goertz, but still dry enough to allow a skid mark to be deposited and to appear dry under the car in the pictures. What this does to Dr. Toor's figures is not clear, but in any event, even at the highest speed Dr. Toor arrived at, Ms. Goertz was not travelling much over the speed limit. Ms. Goertz does not contend that she slowed her vehicle down, other than by simply taking her foot off the gas. The more important consideration is whether, given all the circumstances, her actions were in breach of the standard of care demanded of her as a driver.

Lighting/headlights

- [39] The plaintiff called an expert in lighting to testify that the ambient and luminent light was sufficient to allow Ms. Goertz to see the teenagers from some distance away and to take appropriate action. The ambient light relied upon was the streetlight; the luminent light was the reflection of the Goertz headlights onto the white clothing of the teenagers. The expert placed an assistant at various places on the road at night and measured the two types of light from a series of distances.
- [40] Unfortunately, the assumptions initially provided to the expert required him to provide an opinion based on the taxi having its low beams on, and although he was later asked to repeat his experiments using high beams, he did not do so. In fact, the lights of the taxi did not feature in his experiments at all although he measured the distance at which an oncoming driver would be expected to see the taxi roof light. He parked a car in the eastbound lane with its lights on low beam, but he testified that he discounted the glare from the low beam lights as being a significant factor in visibility, as he was asked to assume that the teenagers were in the westbound lane. In the result, his report is of no assistance because of the differences between his assumptions and the evidence at trial.
- [41] There was no evidence regarding the intensity of the taxi's headlights except Ms. Goertz' testimony that they were on high beam. There was no evidence from Mr. Ahmad on this subject.
- [42] Though the only evidence before the court is from Ms. Goertz in respect of the taxi headlights, I am not required to accept her evidence, even if uncontradicted. She testified that she recognized the vehicle as a taxi by its distinctive red and white markings, and she saw the taxi roof light, although she could not recall if it was lit or not. The plaintiff says she could not have seen these things if blinded by high beams, so it is likely the headlights were on low, and Ms. Goertz should have seen the teenagers. There was, of course, the overhead

light from the street light which would fall upon the roof of the cab.

- [43] Ms. Goertz was a very straightforward witness who was not self-protective. She did not try to excuse or minimize her actions. Saying that the taxi headlights were on high beam does not necessarily serve her well - it explains why her vision ahead was restricted but it also raises the question of why she would keep driving into an area where she could not see. She recalled flashing her lights at the driver to try to get him to lower his beams. The area was undeveloped and dark. It would be reasonable to have the high beams on. Mr. Ahmad's attention was diverted to the teenagers almost immediately and he never saw Ms. Goertz's vehicle approaching, which may explain why he did not address his attention to his lights.
- [44] Ms. Goertz said in cross examination that it was the shape of the bulb on the roof and the white paint that made her think the vehicle was a taxi. She maintained that the reason she was certain the headlights were on high beam was that she could not see beyond them into her lane, and low beams would not impair her vision that way.
- [45] I accept Ms. Goertz's evidence that the taxi headlights were on high beam.

Issues:

- (a) Was the defendant Ahmad negligent? If so, liability is asserted against White Rock South Surrey Taxi vicariously, and directly for failing to ascertain how many passengers required pickup and sending an appropriate vehicle.
- (b) Was the defendant Goertz negligent?
- (c) Were the plaintiffs negligent?

Statutory provisions

- [46] The following provisions of the Motor Vehicle Act R.S.B.C. 1996 c. 318 and Motor Vehicle Regulations are relevant:
- s. 179 Rights of Way between vehicle and pedestrian
 - (1) Subject to s. 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 that it is impracticable for the driver to yield the right of way.
 - s. 180 Crossing at other than crosswalk

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.

s. 181 Duty of Driver

Despite sections 178 (repealed), 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 observing a child or apparently confused or incapacitated person on the highway.

Motor Vehicle Act Regulations

Section 4.06(5) A person who drives or operates a motor vehicle must not illuminate the upper beam of a headlamp if another motor vehicle is within a distance of 150 m from that vehicle, unless the driver has overtaken and passed the other vehicle, so that the high intensity portion of the beam does not strike or reflect into the eye of the other driver.

- (6) Whenever a motor vehicle is parked or standing on a highway, the upper beam of the motor vehicle headlamps must not be illuminated.

[47] Also relevant is s. 1(1) of the Negligence Act:

If by the fault of 2 or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree to which each person was at fault.

Positions of the parties

(a) The Plaintiffs

[48] The plaintiffs submit that the greatest portion of liability rests with Mr. Ahmad and White Rock South Surrey Taxi.

[49] They allege that Mr. Ahmad was negligent in failing to take reasonable measures to pick up the plaintiffs safely, failing to direct the teenagers to move off the travelled portion of the road before speaking to them, failing to notice the approaching Goertz vehicle at any time, and failing to put on his flashers once stopped. The plaintiffs contend that by stopping on the far side of the highway, Mr. Ahmad lured them onto the road knowing that entry into the cab could well be denied.

[50] They allege that the taxi company is vicariously liable for the actions of Mr. Ahmad, and is also directly liable for failing to inquire about the size of the group in order to send an appropriate vehicle. There are a number of allegations of negligence contained in the Statements of Claim but this is the only one that was specifically addressed at trial.

- [51] The plaintiffs allege that Ms. Goertz was negligent in travelling too fast, and in continuing to drive blindly into the area behind the high beams of the taxi. They say they had left a place of safety and established their presence on 72nd Avenue long before the Goertz vehicle arrived; however she sped past the taxi, striking the plaintiffs whom she should have been able to see or avoid striking, had she driven with due care. They also allege that she should have sounded her horn or flashed her lights again.
- [52] As for any contributory negligence by the plaintiffs, they point to *Cempel v. Harrison Hot Springs Hotel Ltd.* [1997] B.C.J. No. 2853 (B.C.C.A.):
- a. if an act is to constitute contributory negligence, it must be carelessness in relation to the risk which made the actual harm which occurred foreseeable
 - b. the task of the trier of fact is to assess the nature of blameworthiness of the parties.
- [53] Thus it is the degree of fault that is relevant, not the degree of causation of damage. The plaintiffs say they could not reasonably foresee a risk of harm from their consumption of alcohol. Nor was their crossing of 72nd Avenue a negligent act as they had plenty of time to get into the cab before the oncoming vehicle seen by Mr. Jessiman would arrive. Once at the cab and unexpectedly denied entry, they were returning to a place of safety - the northwest corner or the intersection from whence then had come.

The Defendant Goertz

- [54] The defendant Goertz says the plaintiffs have not proven that she breached any standard of care.
- [55] Ms. Goertz says it was the plaintiffs' own negligence which caused the accident. She had the right of way. The plaintiffs were crossing a highway at a point not in a crosswalk, and had an obligation to yield the right of way to her. Ms. Goertz was entitled to assume others would obey the law, and had a duty to take precautions only when it became clear they had not done so. It was not foreseeable that the plaintiffs would disregard the law. The plaintiffs, through their own inattention, impaired judgment and annoyance at not being let into the taxi, failed to take basic steps for their own safety. Ms. Goertz says she exercised due care to avoid colliding with the pedestrians once their presence and disregard of the law - that is entering into her lane - became known. At that point she complied with her duties at common law and under the Motor Vehicle Act.
- [56] Ms. Goertz says the plaintiffs have a fundamental problem because their case depends on their assertion that had Goertz looked, she would have seen them and concluded they were going to ignore her right of way and cross into her lane in front of her oncoming vehicle. However, Goertz says the plaintiffs cannot say where they were at the time they assert she should have seen them, because they never saw the Goertz vehicle which was there to be seen. It is not clear what side of the taxi the plaintiffs were on as Ms. Goertz approached, nor is it clear if they had crossed the centre line into the westbound lane.

- [57] On this point, Mr. Ahmad said the group were trying to get into the rear doors on both sides of the cab. Ms. MacDonald said the whole group was ready to get in, with their hands on the handles. She said she was around the centre line herself, but could not remember if she was at the front or rear of the cab. She thought they were all on the same side of the cab. Mr. Jessiman was speaking to the driver; he knew Mr. Douglas was beside him, and believed the girls were behind him but could not say for sure where they were, or what side of the centre line they were on. Ms. Tarcea adopted her discovery evidence in which she said they had crossed into the eastbound lane. She said she remembered them all around the car and could not recall if they had crossed the centre line or not.
- [58] I am satisfied that all the teenagers crossed the westbound lane, over the centre line, and were around the taxi as it sat in the eastbound lane. I accept, based on Mr. Ahmad's evidence, which is supported to some extent by Ms. MacDonald, that one or more of them, probably Ms. Chambers, was on the far side of the taxi, trying to get in the rear door on the passenger side, before deciding to return to the northwest corner of the intersection. Not much turns on this, except to offer a possible explanation as to why Ms. MacDonald was almost across the lane and Ms. Chambers was still in the middle of it when the Goertz vehicle intersected their paths.
- [59] Although the plaintiffs say it would be reasonable to expect people to be around a taxi, Ms. Goertz says it was not reasonable to foresee that a taxi would be picking people up at a deserted intersection late at night.
- [60] Then the issue still arises of whether, even if Ms. Goertz should have anticipated that there might be people around the taxi when she could not see into her lane beyond the taxi's high beams, she should have foreseen that they would cross into her lane in front of her oncoming vehicle. Ms. Goertz says that even if she were negligent in continuing to drive past the high beams, there is no causation because at the point when she could have become aware that the situation was dangerous, there was nothing she could do to avoid the accident (see *Brewster (Guardian ad litem of) v. Swain* 2007 BCCA 347).
- [61] Ms. Goertz submits that some liability could be attributed to Ahmad for stopping where he did, with his high beams on.

The Defendant Ahmad

- [62] Mr. Ahmad says he owed the teenagers no duty of care. He did not know they were his passengers. He had no control over them. He was not provided with sufficient time to react to the situation - the teenagers were at his taxi trying to get in almost immediately. To visit liability upon him is to make him an insurer of potential customers.
- [63] Mr. Ahmad says he legitimately refused entry to the teenagers. He could not lawfully take five passengers. He submits that stopping on a highway is not negligent per se. He stopped only momentarily, and this was not the proximate cause of the injury to the plaintiffs anyway. Even if he should not have stopped in the eastbound lane, the harm to the plaintiffs

resulted only from their decision to cross from a place of safety, that is the vicinity of his taxi, and re-enter the westbound lane in the path of the Goertz vehicle, which was there to be seen. Mr. Ahmad argues that any chain of causation resulting from his negligence is therefore broken.

- [64] Mr. Ahmad says Goertz should be found liable for failing to slow down once she recognized the highly irregular situation ahead of her, or for failing to sound her horn or flash her lights. As well, if his headlights were on high and she was blinded, she should not have continued to drive forward at or near the speed limit.

Liability

- [65] The classic statement of tort liability is set out in *Donoghue v. Stevenson*, [1932] A.C. 562, and repeated in countless decisions thereafter, including *Arnold v. Teno* [1978] 2 S.C.R., a case relied on by the plaintiffs:

You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injury your neighbour. Who, then, in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

- [66] Added to this common law duty are those contained in the Motor Vehicle Act, set out above. The plaintiff alleges that taxi drivers are under an additional duty to pick up passengers safely.
- [67] Mr. Ahmad stopped in the middle of the eastbound lane. This may have been to ascertain if the teenagers were his passengers or it may have been to tell them there too many for him to take. This is not of great importance because the teenagers crossed the road and tried to get into his cab almost immediately. Mr. Ahmad did not invite the teenagers across the road or suggest they should come across to get in the cab, but he clearly intended to engage them in conversation, which is why he stopped and began to lower his window. He admitted he was almost certain they were the passengers he was to pick up, and in that sense he should have foreseen that they would likely cross the road to get to the cab, once he stopped in the far lane. This created some risk.
- [68] Mr. Ahmad also had his high beams on while stopped on the highway, without regard for oncoming traffic. The lights of the Goertz vehicle were clearly visible to Mr. Jessiman as they crossed the road. They should have been visible Mr. Ahmad, as well, had he looked, but he testified that he never saw the Goertz vehicle. He did not keep a lookout for oncoming traffic and he left his high beams on. This constitutes a departure from the standard of care expected of a prudent driver and was a contributing cause of the accident. I find that Mr. Ahmad was negligent.

- [69] Ms. Goertz had an obligation, once she knew a pedestrian was on the highway, even if she had the right of way, to exercise due care to avoid the pedestrian (s. 178(a)). While counsel for Ms. Goertz argues correctly that no duty arose under this section until she could see the pedestrians, and by that time it was too late to do anything, her fault is more general.
- [70] She approached the area at or near the speed limit, taking her foot off the accelerator and letting the car decelerate on its own. She continued to drive when she could not see ahead into her lane beyond the high beams of the taxi. She was alerted by the taxi being stopped to the irregularity of the situation; she knew taxis pick up and drop off passengers. She did not expect people to be in the area but admitted that the presence of a taxi could signal the presence of people. Despite not being able to see the area into which she was driving in this irregular situation, she continued on without braking or sounding her horn. She took some precautions, taking her foot off the accelerator and covering the brake, but they were insufficient to prevent her from driving blindly beyond the high beams at a speed somewhere around the speed limit of 60 kph. She had a common law duty to drive with due care for the safety of others that she could reasonably have in her contemplation, and she breached that duty by driving forward at that speed when she could not see into the lane ahead, an action that makes a clear risk of harm foreseeable. She should have slowed to a speed that would have allowed her to approach the blind area with appropriate caution for whatever lay ahead, including the safety of persons who could foreseeably be at or near a taxi. By failing to do so, she breached her duty to drive with due care for the safety of others. That breach was a contributing cause of the accident. If find that Ms. Goertz was negligent.
- [71] The plaintiffs were also negligent. They were trained from a young age to look both ways before crossing a street. They crossed to the taxi without looking for cars, even though the Goertz vehicle was there to be seen in the distance and was in fact seen by Mr. Jessiman, and more importantly, they headed back across the west bound lane into the path of the Goertz vehicle, again without looking.
- [72] Ms. MacDonald was calm and straightforward in her testimony, but her evidence respecting the second or two before and when she was struck is unclear. This is understandable, given the traumatic event that occurred. However, she displayed a curious notion of her responsibilities as a pedestrian on a highway. She testified on discovery that she did not have time to look for cars. She said she turned and was struck. She adopted this at trial, although when she repeated the answer, she said "I didn't even look." She was asked for an explanation why, if her practice was always to look both ways, she did not see the oncoming vehicle. She said she was trying to get to a place of safety, she was already in the middle of the road, and a person should not have to look once they are in the middle of the road; once in the middle of the road, their position is established.
- [73] Such a contention is not in accord with the Motor Vehicle Act, the common law duty of care, or common sense.

- [74] The consumption of alcohol may have played a part in the plaintiffs' negligence, especially for Ms. Chambers, who drank more than Ms. MacDonald did. However, the important factor is that, for whatever reason, both plaintiffs crossed the road without looking, into the path of an oncoming vehicle that was there to be seen.
- [75] On all of the evidence, the plaintiffs failed to take reasonable care for their safety and were negligent.

Apportionment of fault

- [76] The respective degrees of fault of Mr. Ahmad, Ms. Goertz and the plaintiffs must be assessed by considering the risk created by each of the parties, the effect of this risk, and the extent to which each party departed from the standard of reasonable care.
- [77] In *Aberdeen v. Langley (Township)* 2007 BCSC 993, 35 M.P.L.R. (4th) 233 (S.C.), Groves J. provided a helpful review of the principles relating to apportionment of fault, setting out the principles from a number of appellate cases:
- (a) In the apportionment of fault there must be an assessment of the degree of the risk created by each of the parties, including a consideration of the effect a potential effect of occurrences within the risk, and including any increment in the risk brought about by their conduct after the initial risk was created. The fault should then be apportioned on the basis of the nature and extent of the departure from the respective standards of care of each of the parties. (Cempel, *supra*).
 - (b) Fault or blameworthiness evaluates the parties' conduct in the circumstances, and the extent or degree to which it may be said to depart from the standard of reasonable care. Fault may vary from extremely careless conduct, by which the party shows a reckless indifference or disregard for the safety of person or property, whether his own or others, down to a momentary or minor lapse of care in conduct which, nevertheless, carries with it the risk of foreseeable harm. (*Alberta Wheat Pool v. Northwest Pile Driving Ltd.* (2000 BCCA 505), 80 B.C.L.R. (3d).
 - (c) Relevant factors have been summarized in *Heller v. Martens*, 2002 ABCA 122 , (2002) 213 D.L.R. (4th) 124, @ para. 34; and Chiefetz, *Apportionment of Fault in Tort* (Aurora, Ont.: Canada Law Book, 1981) @ pp. 102-104:
 - (1) The nature of the duty owed by the tortfeasor to the injured person.
 - (2) The number of acts of fault or negligence committed by a person at fault.
 - (3) The timing of the various negligent acts. For example, the party who first commits a negligent act will usually be more at fault than the party whose negligence comes as a result of the initial fault.

- (4) The nature of the conduct held to amount to fault. For example, indifference to the results of the conduct may be more blameworthy. Similarly, a deliberate departure from safety rules may be more blameworthy than an imperfect reaction to a crisis.
 - (5) The extent to which the conduct breaches statutory requirements. For example, in a motor vehicle collision, the driver of the vehicle with the right of way may be less blameworthy.
 - (6) The gravity of the risk created.
 - (7) the extent of the opportunity to avoid or prevent the accident or the damage.
 - (8) whether the conduct in question was deliberate, or unusual or unexpected; and
 - (9) the knowledge one person had or should have had of the conduct of another person at fault.
- [78] The greater fault lies with the plaintiffs. Ms. Goertz was in her lane of travel. According to Mr. Jessiman, the Goertz vehicle was already there to be seen, and this accords with the evidence of Ms. Goertz herself, as she could see the headlights of the stopped vehicle as she crested the hill on 72nd Avenue. The plaintiffs moved from the area of the taxi and the centre line and crossed into her lane in front of her car without looking. They have the responsibility, when crossing a highway at a place other than a crosswalk, to yield the right of way to a vehicle (s. 179(2)). They also have the responsibility not to move from a place of safety into the path of a vehicle in circumstances where it is impracticable for the driver to yield the right of way (s. 180). Given the risk of foreseeable harm from crossing the oncoming lane of traffic without looking, they were clearly at fault to a significant degree. Although Mr. Ahmad chose to stop in the far lane, they made the decision to cross the road, and then to return to the north side. Having made the decision, they had a responsibility to take reasonable care for their own safety. All that was required was to look both ways before venturing out into Ms. Goertz's lane of travel, something each had been taught since early childhood. Ms. Goertz's car was there to be seen. In crossing in front of it, they did not take reasonable care for their own safety. The risk arising from these actions was considerable; the consequences reasonably foreseeable.
- [79] Ms. Goertz assumed some risk and departed from the expected standard of care by failing to reduce her speed and by continuing to drive into the area behind the headlights when she could not see what was there.
- [80] Mr. Ahmad assumed some risk by stopping on the far side of the road, thus raising the potential for the teenagers to cross the street to get to him, which was not in accord with his duty to take reasonable care to pick up passengers in a safe manner. However his fault arising from this is lessened because the teenagers crossed to the taxi before he could communicate with them. He also assumed some risk and departed from the expected standard of care by keeping his lights on high beam in the face of oncoming traffic, and failing to keep a lookout for oncoming traffic.

- [81] I am of the view that Mr. Ahmad's degree of fault is less than that of Ms. Goertz because, although he did not fulfil the expected standards of care, his was a lapse arising from an unexpected situation and distracted attention, whereas Ms. Goertz knew she could not see beyond the beams but chose to keep driving forward at or near the speed limit. Her conduct fell short of the required standard of care to a more significant degree.
- [82] Considering the foreseeable risk of harm arising from the actions of each of the parties, and the extent to which their respective actions departed from a reasonable standard of care, I apportion liability 60% to each of the plaintiffs, 30% to Ms. Goertz and 10% to Mr. Ahmad.
- [83] The only separate action on the part of South Surrey White Rock Taxi that was alleged to be negligent, although it was not pled, was in failing to ask Ms. MacDonald, when she called, how many were in her party. A far-sighted customer in a large group would probably alert the company to the number, but these teenagers were unfamiliar with the use of cabs and it obviously did not occur to Ms. MacDonald to provide this information.
- [84] I am unable to conclude on the evidence before me that there is a duty on the taxi dispatcher to make such enquiries, although it might be prudent to do so in order not to waste the time of the driver and the potential passengers. Nor can I say the company should have reasonably foreseen any consequences as a result of this failure. The direct cause of action against the taxi company is dismissed.
- [85] If there is a reason to speak to costs, counsel may arrange to do so at their convenience.

"M.A. Humphries J."

The Honourable Madam Justice M.A. Humphries

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