
CANADA / JUDGMENT

McKenna v. Andrews

2020 BCSC 1621

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Supreme Court of British Columbia

DECIDED

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2020 BCSC 1621 McKenna v. Andrews

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

McKenna v. Andrews,

2020 BCSC 1621

Date: 20201030

Docket: M144524

Registry: Victoria

Between:

Barry Michael McKenna

Plaintiff

And

Cody John Eley Andrews

Defendant

Before: The Honourable Mr. Justice Sewell

Reasons for Judgment

Counsel for the Plaintiff:

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Counsel for the Defendant:

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Place and Date of Trial:

Victoria, B.C.

October 7-9, 2020

Place and Date of Judgment:

Victoria, B.C.

October 30, 2020

Introduction

- [1] These reasons arise out of a motor vehicle accident that occurred just before noon on July 18, 2014 in Cobble Hill on Vancouver Island. The accident occurred on Highway 1 between Chapman Road and Hutchinson Road.
- [2] The plaintiff, Barry Michael McKenna, alleges that he suffered personal injuries caused by the negligent operation of a motor vehicle owned and driven by the defendant Cody Andrews.
- [3] The defendant, Cody John Eley Andrews, denies that the accident was caused by any negligence on his part.
- [4] By previous order of this court the issue of liability for the accident was severed from the assessment of any damages Mr. McKenna suffered. These reasons deal only with the question of liability.
- [5] For the reasons that follow I find that the defendant is solely responsible for the accident and must pay any damages found to have been caused by the accident on an assessment thereof.

The Accident

- [6] Between 11:00 a.m. and noon on July 18, 2014, Mr. McKenna was driving his motorcycle home from a gas station. He turned north on Highway 1, also known as the Island Highway, at Cobble Hill Road. The section of Highway 1 that is relevant to this action lies between Cobble Hill Road and Hutchinson Road, and consists of a four-lane divided highway. Mr. McKenna testified that he followed his normal practice of turning into the left hand or passing lane, which he occupied for a short time before moving into the right hand lane.

- [7] Mr. McKenna intended to turn left off Highway 1 at Hutchinson Road. He testified that at a certain point before he reached the intersection of Chapman Road, the last intersection before Hutchinson Road, he moved into the left lane in preparation for that turn. The evidence as to precisely where he did so is somewhat unclear. However, he is definite in his evidence that he was in the left lane before he reached Chapman Road.
- [8] At or about the same time, Mr. Andrews was driving his red Mitsubishi sports car in a northerly direction on Highway 1. He and his passenger, Kelsey Lageri, had entered Highway 1 in Langford and were driving to Shawnigan Lake to have lunch with Mr. Andrews' girlfriend and her family. Mr. Andrews testified that he drove mostly in the left lane of Highway 1 past where it becomes a four-lane highway at the end of the Malahat section.
- [9] At some point in the vicinity of Chapman Road, Mr. Andrews' Mitsubishi collided with Mr. McKenna's motorcycle in the left northbound lane of Highway 1. The collision occurred just north of a U-Turn Route sign on the highway. The issue in this case is whether that collision was caused by Mr. Andrews moving from the right lane and colliding with Mr. McKenna's motorcycle, or by Mr. McKenna moving suddenly into the left lane in front of Mr. Andrews' vehicle, forcing Mr. Andrews to attempt evasive action and causing the collision.
- [10] For the reasons that follow I find that Mr. Andrews moved into the left lane already occupied by Mr. McKenna's motorcycle and struck the motorcycle from behind.

Discussion

- [11] The outcome of this case turns essentially on the credibility and reliability of the evidence of six witnesses: the plaintiff; the defendant; Ms. Lageri, the defendant's long-time friend and passenger in his vehicle who testified on his behalf; and three witnesses who saw the accident and testified on the plaintiff's behalf.
- [12] The plaintiff also relies on the evidence of Mr. Kurt Isling, an accident reconstruction engineer, who presented a report. Mr. Isling was cross-examined by counsel for the defendant. While I found him to be a credible and reliable witness, Mr. Isling fairly conceded that the physical evidence he examined did not allow him to reach a conclusion as to the lane in which the defendant's vehicle was travelling immediately before the accident. Thus, I base my decision in this case largely on the evidence of the non-expert witnesses. However, there is one non controversial opinion contained in Mr. Isling's report that I found to be of assistance in assessing the credibility of Mr. Andrews' evidence.

The plaintiff's evidence

Mr. McKenna's evidence

- [13] Mr. McKenna's evidence was that, after entering Highway 1 in the left lane, he traveled for some distance in the right hand lane until he approached the vicinity of the Chapman Road intersection. A concrete traffic divider prevents left-hand turns onto Chapman Road from

the northbound lanes of the highway. Mr. McKenna testified that he moved into the left lane some distance before he reached Chapman Road and proceeded in the left hand lane, intending to turn left at the traffic lights at Hutchinson Road. He said that after he was established in the left lane, he heard a noise behind him and turned his head to see what was causing that noise.

- [14] Mr. McKenna testified that he then saw a red car sliding by him. However, he does not remember what happened between that moment and when he found himself on the hood of the red car, which was skidding at a right angle to the highway and pushing the motorcycle in front of it.
- [15] Mr. McKenna says that at some point he was thrown forward from the hood of the red car. He was able to get up and move back to the red car, which had pinned his motorcycle to the concrete median. He exchanged words with the driver of the red car and was eventually taken to the hospital for treatment. He was released the same day.
- [16] Mr. McKenna conceded that he had a poor memory of the accident but was firm in his evidence that his motorcycle had been established in the left lane for a considerable time before he heard the noise and became aware of the red car. At trial he testified that the red car was in front of his motorcycle at some point in the accident but no other witness gave similar evidence.
- [17] In addition, Mr. McKenna made a report to his insurer which could be interpreted as saying that the collision occurred immediately after he changed into the left lane of the highway. However, at trial Mr. McKenna testified that at the time the statement was made he was taking oxycodone to control pain from the injuries he suffered in the accident. In addition, the statement was somewhat ambiguous because it did not quantify a specific time interval between Mr. McKenna's changing lanes and the collision.

Susan Healey's evidence

- [18] Ms. Healey was the driver of a vehicle that was traveling behind the defendant's vehicle in the right lane of the highway. She testified that she observed the plaintiff's motorcycle in the left lane well before the collision, first noticing it in her left side mirror as it was overtaking her car.
- [19] Ms. Healey testified that she took particular note of the motorcycle because it was a nice day and the driver appeared to be enjoying himself. Her evidence was that the motorcycle was in the left lane of the highway from the time she first observed it up to the time of the collision.
- [20] Ms. Healey also testified that prior to the collision she observed the red car in the right hand lane approximately 8 to 10 car-lengths ahead of her vehicle. She said that she was driving at or about the posted speed limit of 90 km/h and that the red car was traveling at about the same speed. She also stated that she noticed the motorcycle in the left lane some distance behind her and that it was slowly overtaking her car. She remembered commenting on the

motorcycle to her sister, who was a passenger in the right front seat of her car. Ms. Healey said that the motorcycle was traveling at a speed that allowed it to cruise by her slowly. She was emphatic in stating that she would have noticed if the motorcycle had changed lanes at any time that she had it under observation.

- [21] Ms. Healey said that at a certain point she noticed the red car's brake lights go on. She stated that it slowed and began "fishtailing" northward in front of her while it was still about 8 to 10 car-lengths in front of her, moving into the left lane of the highway. She said that the next thing she saw was that the red car hit the median and the motorcycle rose up in front of it. At that point the motorcycle sunk back down. Her impression was that the red car had wedged the motorcycle against the median. She put on her flashers to pull over and then noticed that the driver of the motorcycle had "popped up" and shouted at the driver of the red car.
- [22] In cross-examination, Ms. Healey testified that the red car was in the right lane of the highway at all times she had it under observation before it moved into the left lane and collided with the motorcycle. She stated that if the red car had changed lanes before that she would have noticed it.

Caroline Caiger's evidence

- [23] Ms. Caiger is Ms. Healey's sister and was traveling with her in her vehicle at the time of the accident. She confirmed that her sister's vehicle was in the right lane of the highway proceeding north in the moments leading up to the accident.
- [24] Ms. Caiger testified that the first vehicle ahead of her sister's car was a red car, identified as the defendant's vehicle. She gave evidence that it was about 8 to 10 car-lengths, what she described as a comfortable distance, ahead of the car she was in. Based on the evidence of both sisters I conclude that there was no car between their vehicle and the red car immediately before the collision.
- [25] Ms. Caiger said that she had observed the motorcycle pass their vehicle in the left lane some time before the accident and at the same time that the red car was in the right lane. She said that the motorcycle was moving faster than her sister's car and the red car, and that when the motorcycle was almost parallel to the red car, the red car changed lanes quickly and collided with the motorcycle. Her evidence was that she thought the driver of the motorcycle was dead and closed her eyes at the moment of impact. However, she did observe the red car push the motorcycle into the median. While she couldn't see the driver of the motorcycle at first, she did see the driver get up and confront the driver of the red car.
- [26] In cross-examination Ms. Caiger confirmed that the red car was about 10 car-lengths in front of the vehicle she was traveling in immediately before the collision. She confirmed that the motorcycle was going slightly faster than the red car and was passing it immediately before the collision.

James Aspinal's evidence

- [27] Mr. Aspinal was employed as a sales manager at Arbutus RV & Marine Sales Ltd., a dealership located at the intersection of Chapman Road and Highway 1 on the west side of the highway.
- [28] Immediately before the accident he was standing on a wooden deck in the dealership overlooking the highway. He testified that he had a good view of the highway from that vantage point, though the median prevented him from seeing what happened behind and below it. From the photographs in evidence it appears that the median is about 50 cm in height. Mr. Aspinal testified that from where he was he could see the motorcycle from about the seat up.
- [29] Mr. Aspinal stated that he observed the red car and the motorcycle traveling side-by-side in the northbound lanes of the highway. The motorcycle was in the left lane and the red car was in the right lane. He estimated that they were traveling at roughly the same speed. He also estimated that he watched them for a short time, about 10 to 20 seconds. He said that he observed the red car move into the left lane and come into contact with the motorcycle, after which both vehicles slid along the median. During this time the motorcycle disappeared below the median under the red car. After the vehicles came to rest he observed the driver of the car get out and the motorcycle driver get up holding his arm. He was not aware of the red car braking.
- [30] In cross-examination, Mr. Aspinal agreed that he was not able say what happened on the highway south of Chapman Road. However, he reiterated that the red car and the motorcycle were in the right and left lanes respectively when he first saw them and that he saw the red car move over and hit the motorcycle.
- [31] In addition, Mr. Aspinal confirmed that he did not see any other vehicles in the immediate vicinity of the red car and the motorcycle in the moments leading up to the collision.

Defendant's Evidence

Mr. Andrews' evidence

- [32] Mr. Andrews testified that on the morning of July 18, 2014 he was driving his red Mitsubishi sports car northbound on Highway 1 towards Shawnigan Lake. He was accompanied by his childhood friend Kelsey Lageri, who was sitting in the passenger's seat.
- [33] Mr. Andrews testified that he entered the highway at Langford and drove predominately in the left lane after the highway became four lanes following the Malahat section. He had been driving for approximately 45 minutes before the accident. He testified that he was definitely in the left lane as he approached and passed the Chapman Road intersection. He stated that he was travelling at about 90 km/h and noticed that the lights at Hutchinson Road were green for traffic on the highway. He said there were no cars immediately in front of him in the left lane but that there was a car about one car-length ahead of him in the right

lane and a motorcycle in front of that car by about two car-lengths.

- [34] Mr. Andrews said that he wanted to overcome, by which I take it he meant overtake, the vehicles in the right lane and so he sped up his vehicle. He said that as he came up to the motorcycle it turned into the lane in front of him and that to avoid it he swerved into the right lane. However, he then noticed that the car that was behind the motorcycle was very close, so he turned back into the left lane. He stated that at this point he lost control of his car and "clipped" the motorcycle while his car was sliding sideways, totally out of control.
- [35] Mr. Andrews' evidence was that the motorcycle changed lanes very suddenly. He stated that he saw no suggestion that it had signalled or that the motorcycle driver had looked to his left before changing lanes.
- [36] In cross-examination, Mr. Andrews was asked about a statement he gave to the Insurance Corporation of British Columbia ("ICBC") dated January 11, 2015. In that statement he said that the car in the right lane had been in front of the motorcycle prior to the collision. He also said that he slammed on his brakes and swerved into the right lane, but that the car that had been ahead of the motorcycle was about two feet in front of him at that point, causing him to swerve back into the left lane and clip the motorcycle.
- [37] Mr. Andrews acknowledged discussing his statement to ICBC with Ms. Lageri prior to signing it.

Ms. Lageri's evidence

- [38] Ms. Lageri testified that Mr. Andrews remained in the left lane of Highway 1 from the point following the Malahat where it becomes four lanes up to the time of the accident. She testified that she first noticed the motorcycle at the location of a white SUV shown in photo 7 of ex 2A(d). The SUV in this photograph was some considerable distance north of what was referred to in the evidence as a U-Turn Route sign. However, on further questioning from Mr. Andrews' counsel, Ms. Lageri ultimately said she was unable to say where the defendant's vehicle was when she first noticed the motorcycle. She could be no more precise about the location of Mr. Andrews' vehicle than to say it was south of Hutchinson Road.
- [39] Ms. Lageri said that immediately prior to the collision, the plaintiff's motorcycle pulled in front of Mr. Andrews' vehicle. She stated that Mr. Andrews moved into the right lane to avoid it, but that there was a car slowing down in the right lane that forced him to move back into the left lane where he clipped the motorcycle. She also said that her impression was that the motorcycle was accelerating to get in front of the Andrews vehicle, which she said was going the same speed as the rest of the traffic.
- [40] She testified that she did not think Mr. Andrews was able to brake when he changed lanes because of a car in the right lane.

[41] In the preceding paragraphs I have not referred to Mr. Isling's report. I have reviewed that report but in view of my conclusions based on the evidence of the other witnesses I do not find it necessary to comment on it except to say that I am satisfied that its conclusions tend to provide more support for the evidence of the plaintiff than that of the defendant. However, in assessing the evidence I have taken into account Mr. Isling's evidence that Mr. Andrews' car was not equipped with anti-lock brakes and it would therefore have been impossible to steer it while the brakes were locked.

Legal Framework

[42] There is no dispute in this case that the determinative issue is whether the plaintiff's motorcycle was occupying the left lane of Highway 1 immediately before the chain of events that led to the collision. If I find that the plaintiff's motorcycle was so established and that the defendant moved into that lane subsequently, there can be doubt on the evidence that the defendant is solely responsible for the accident.

[43] Section 151 of the Motor Vehicle Act, R.S.B.C. 1996, c. 318, provides as follows:

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

- (a) must not drive it from one lane to another when a broken line only exists between the lanes, unless the driver has ascertained that movement can be made with safety and will in no way affect the travel of another vehicle;
- (b) must not drive it from one lane to another if that action necessitates crossing a solid line;
- (c) must not drive it from one lane to another without first signalling his or her intention to do so by hand and arm or approved mechanical device in the manner prescribed by sections 171 and 172;
- (d) when approaching an intersection intending to turn left must drive the vehicle in the centre lane or in the lane nearest the centre of the roadway on the right hand half of the highway;
- (e) when approaching an intersection intending to turn right must drive the vehicle in the lane nearest to the right hand side of the roadway;
- (f) must not pass a vehicle on the left if that action necessitates driving on that part of the highway designated for travel in the opposite direction; and
- (g) if a traffic control device directs slow moving traffic to use a designated lane, must when driving slowly drive the vehicle in that lane only.

[44] The law is well-settled that a driver of a vehicle has the right to assume that another driver will obey the applicable traffic laws and that a driver owes a duty to meet the standard of care imposed both at common law and pursuant to the Motor Vehicle Act: *Stewart v. Dueck*, 2012 BCSC 1729 at paras. 37-41; *Salaam v. Abramovic*, 2010 BCCA 212 at paras. 18-21, 25-29.

- [45] To reach a conclusion in this case I am required to assess the credibility of the witnesses in light of the surrounding circumstances. The principles relating to the assessment of credibility were reviewed by Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 at paras. 186-187, in which she referred to the well-known admonition from *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A), that the real test of the truth of a witness' evidence must be its harmony with the preponderance of the probabilities that a practical and informed person would recognize as reasonable.
- [46] That is the standard by which I have assessed the evidence in this case.

Findings of Fact

- [47] In this case I have no hesitation in preferring the evidence of the witnesses called by the plaintiff to that of the defendant and his only supporting witness.
- [48] I found Ms. Healey and Ms. Caiger to be credible and reliable witnesses who had a clear view of the events leading up to the accident. While there were minor discrepancies between their recollections, on the critical question of which vehicle was in the dominant position their evidence was entirely consistent. They both confirmed that Mr. McKenna's motorcycle was at all material times established in the left lane of the highway and that Mr. Andrews' vehicle crossed into that lane and collided with Mr. McKenna's motorcycle in that lane of traffic. Their evidence was in no way shaken or weakened in cross-examination.
- [49] I am of the same opinion with respect to the evidence of Mr. Aspinall. His evidence confirmed that Mr. McKenna's motorcycle travelled in the left lane for the entire time he had it under observation, which he estimated to be 10 to 20 seconds. The evidence was that Mr. McKenna's vehicle was travelling at least 90 km/h prior to the accident. At that speed it would have traveled 150 metres in ten seconds. The evidence of Ms. Caiger and Ms. Healey was that they observed the motorcycle traveling in the left lane for an even longer period. It is therefore consistent with Mr. Aspinall's recollection.
- [50] In contrast to the evidence adduced by the plaintiff, I have concluded that the evidence of Mr. Andrews and Ms. Lageri is unreliable.
- [51] Apart from the fact that his evidence was directly contradicted by independent witnesses, I have concluded that Mr. Andrews' description of the events leading up to the accident is improbable.
- [52] In his evidence in chief, Mr. Andrews stated that he was in the left lane of the highway when he first noticed Mr. McKenna's motorcycle in the right lane, about two car-lengths in front of another car that was also in the right lane. Mr. Andrews testified that initially he was driving at about the speed limit, but that he decided to speed up to get around the car and the motorcycle. He testified that, as he was accelerating, the motorcycle abruptly moved into his lane of traffic. This caused Mr. Andrews to swerve into the right lane to avoid hitting it. However, as he was moving into the right lane he noticed a car in that lane and swerved

back into the left lane to avoid it. Mr. Andrews also testified that when the motorcycle first came into the left lane he "stabbed" on his brakes and kept his foot firmly on the brake pedal for the whole time up to the collision. He said that his brakes started to screech as soon as he "stabbed" them on.

- [53] There are a number of problematic aspects to this account. The first is that in his 2015 statement to ICBC, Mr. Andrews stated that the car in the right lane was in front of the motorcycle as he began to overtake them. If this version of the facts is correct it would seem to me that that car would have been well clear of the section of the right lane when Mr. Andrews swerved into it. Secondly the evidence of Mr. Isling, on which he was not challenged or contradicted, was that Mr. Andrews' car was not equipped with anti-lock brakes and it would therefore have been impossible for Mr. Andrews to steer the car once the brakes locked. Mr. Andrews stated that his brakes began to screech and locked up as soon as he engaged them and that he continued to apply full pressure to the brake pedal up to the time of the collision. Despite this, he testified that he was able to swerve into the right lane, then swerve back into the left lane before the collision. This evidence is inconsistent with the brakes being locked up.
- [54] Finally, Mr. Andrews did not give any reason why he decided to accelerate to get around vehicles in the right lane. If those vehicles were in the right lane and he was in the left lane I can see no reason why he would have wanted to get around them.
- [55] I accept the submission of counsel for the plaintiff that Mr. Andrews changed his evidence with respect to the relative position of the car and motorcycle he says were in the right lane in part to present a version of events that was not contrary to Mr. Isling's written report. I also note that there was no indication of any skid marks in the right lane despite Mr. Andrews' evidence that his brakes were screeching and fully engaged from the time the motorcycle first appeared in front of him to the time of collision. I also take into account the fact that the motorcycle was positioned in the left side of the left lane at impact. In my view this is more consistent with it being in the left lane immediately prior to the events leading to the collision than it is with it moving into the left lane from the right.
- [56] I also found the evidence of Ms. Lageri to be problematic. At many times throughout her evidence she repeated that Mr. Andrews' vehicle had remained continuously in the left lane from the Malahat to the point of collision. This was contrary to Mr. Andrews' evidence that he had changed lanes a few times. I am concerned that Ms. Lageri was determined to persuade me that there was no possibility of Mr. Andrews being in the right lane prior to impact because he never left the left lane.
- [57] I also note that Mr. Andrews and Ms. Lageri did consult with each other before giving their statements to ICBC.

[58] While it is not strictly necessary to do so, I conclude that Mr. Andrews' vehicle was in the right lane behind a car prior to the collision, and that he pulled out to pass that car in order to reach the Hutchinson Road intersection while the light was green. His focus was therefore likely on "beating the light" rather than keeping a proper lookout before he changed lanes and hit Mr. McKenna's motorcycle.

[59] I therefore find that the defendant is fully responsible for the accident that has led to this litigation.

"Sewell J."

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