
CANADA / JUDGMENT

McQuillan v. Dean

2014 BCSC 2578

COURT

Supreme Court of British Columbia

DECIDED

9 October 2014

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2014 BCSC 2578 McQuillan v. Dean

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

McQuillan v. Dean,

2014 BCSC 2578

Date: 20141009

Docket: M123619

Registry: Vancouver

Between:

Todd Jacob McQuillan

Plaintiff

And

Robert William Dean

Defendant

-AND-

Docket: M146439

Registry: Vancouver

Between:

Robert William Dean

Plaintiff

And:

Todd McQuillan and Valerie Angela Marie Hebert,

also known as Valerie Herbert

Defendants

Before: The Honourable Madam Justice Gray

Oral Reasons for Judgment

Counsel for the Plaintiff, Action M123619:

S. Ferguson

Counsel for the Defendant, Action M123619:

Counsel for the Plaintiff, Action M146439:

Counsel for the Defendants, Action M146439

M. Howard

K. Gardner

E. Liu

Place and Dates of Trial:

Vancouver, B.C.

October 6 to 9, 2014

Place and Date of Judgment:

Vancouver, B.C.

October 9, 2014

- [1] THE COURT: There was a collision on June 11, 2011 between a Dodge Caliber driven by Mr. Dean and a Chevrolet Aveo driven by Mr. McQuillan. Mr. McQuillan's common law spouse, Ms. Hebert, was the owner of the Aveo. Mr. McQuillan sued Mr. Dean, and Mr. Dean sued Mr. McQuillan and Ms. Hebert, for damages arising from the accident. Mr. McQuillan's position is that Mr. Dean was wholly at fault for the accident, while Mr. Dean's position is that Mr. McQuillan was wholly at fault for the accident.
- [2] Counsel made the sensible arrangement that the issue of liability in both lawsuits would be heard together at one trial. That trial occupied two and a-half days of evidence and one-half day of argument. I am grateful to all counsel for their very efficient and focussed presentation of the case. I appreciate the high level of cooperation between counsel, including agreement to items like an Agreed Statement of Facts, an opening statement by

both sides at the start of the trial, and a witness called out of sequence to set the scene.

These steps shortened and focussed the trial for the benefit of all parties. It has also enabled me to give oral reasons for judgment in the afternoon following the closing submissions.

- [3] The accident occurred on Quarry Road in Coquitlam, B.C. Quarry Road is an unpaved road, the surface of which was generally described as hard packed gravel. The road itself is about five kilometres long, from about the parking lot for the Minnekhada Trail to a quarry. The road is oriented generally northeast and southwest, but most of the evidence simply referred to it as being oriented east and west. The road travels along the border of the park, with the park on the south side, being the right side when eastbound.
- [4] Quarry Road is about six metres wide. That is more than enough for two lanes of traffic, meaning one lane going each way. There are no painted lines at the place where the accident occurred. The speed limit is not marked on Quarry Road but the parties agree that it is 50 kilometres per hour.
- [5] Quarry Road has many hills, bends, dips and curves, and there are locations along Quarry Road where visibility is limited when driving around corners and over hills. Local residents such as the two drivers here know that on occasion vehicles will park along the side of Quarry Road and that wildlife is a common sight in the area.
- [6] The accident occurred about 700 metres northeast of the Minnekhada Trail parking lot at about 6:00 p.m. The road was dry, it was still light out, and visibility was good.
- [7] In that area there is a rocky shoulder on both sides of the road. The rocky shoulder on the south side, being the right side eastbound, is about one and a-half metres wide. Beyond the rocky shoulder on the south side there is a grassy shoulder which is about two and a-half metres wide. On the north side, being the left side when travelling east, there is a rocky shoulder about 0.8 metres wide and a small grassy shoulder with a ditch.
- [8] The evidence conflicted about the length of the grass on the grassy shoulders at the time of the accident. The available photographs of the accident scene were taken almost two years after the accident and therefore did not capture the height of the grass at the time of the accident.
- [9] Both drivers lived on Quarry Road at the time of the accident. Both of them had lived on Quarry Road for a number of years before the accident. Both drivers travelled along Quarry Road at least twice on most days.
- [10] It is common ground that Mr. Dean's Dodge came from behind the Aveo travelling east and that there was contact between the right front part of the Dodge and the left rear part of the Aveo. It is also common ground that the accident occurred shortly after Mr. Dean's Dodge had passed the crest of a hill and was on the downward slope.
- [11] The parties differ on these four questions in particular:

- First, whether the Aveo was reversing or was stopped at the time of the collision.
- Second, how far east the Aveo was from the crest of the hill at the point of contact.
- Third, how quickly Mr. Dean was driving.
- Fourth, whether the Aveo was on the roadway or on the shoulder or partly on each at the time of the collision.

- [12] Mr. McQuillan's position is that Mr. Dean was driving carelessly and too fast and the Aveo was stationary when it was struck by the Dodge. Mr. Dean's position is that the Aveo was reversing when it was struck by the Dodge and that Mr. Dean could have avoided the Aveo if the Aveo had not been reversing.
- [13] The drivers and Mr. McQuillan's passenger, Ms. Hebert, gave evidence and each side also called the evidence of an expert witness.
- [14] I will say the more about the evidence in the context of each of the questions. I will give some general background as well.
- [15] This is a case in which the relevant events occurred in a matter of seconds, and the evidence is in conflict.
- [16] Mr. McQuillan and Ms. Hebert are common law spouses. Mr. McQuillan was driving Ms. Hebert's Aveo which she had purchased about two weeks before. The Aveo was about two years old at the time of the accident. They were travelling eastbound going home with some fast food for dinner.
- [17] Mr. McQuillan testified that he saw a bear cross the road from his right to his left and that he stopped the Aveo intending to take a picture of the bear. Mr. McQuillan testified that he drove the Aveo onto the shoulder which was on the south side of the road, being on his right side while travelling east. He testified that he drove so that all four wheels of the Aveo were on the grassy shoulder, and that at the time the grass was so short it was almost as though there was no grass there. He testified at trial that he parked about 30 metres (being about 90 feet) east of the crest of the hill, although at examination for discovery Mr. McQuillan estimated that he stopped only about 30 feet from the crest of the hill. Mr. McQuillan explained the difference on the basis that he had returned to the accident site and taken measurements.
- [18] Mr. McQuillan testified that he parallel-parked the Aveo against the shoulder. He said that he did not expect Ms. Hebert to get out of the vehicle and so he was not concerned about leaving room for her to get out of the car. He said that he got out of the Aveo and asked Ms. Hebert for a camera from the glove box, apparently not knowing if one was there because of the fact that the Aveo had been purchased only recently.

- [19] Mr. McQuillan testified that Ms. Hebert told him there was no camera in the glove box. He testified he heard the sound of a vehicle travelling toward him on the gravel and he got back into the Aveo to let the vehicle pass. Mr. McQuillan testified he got ready to drive, perhaps moving the automatic transmission gearshift from park to drive, which would involve moving it through reverse.
- [20] Mr. McQuillan testified that he saw Mr. Dean's Dodge pass the crest of the hill, seeing the undercarriage in the mirror and seeing the front wheels three to four inches off the ground. Mr. McQuillan testified that he felt the Dodge collide with the Aveo and push it forward about ten feet. He testified that the Dodge came to rest on its side in the ditch on the north side of the road.
- [21] Mr. McQuillan testified that he went to assist the occupants of the Dodge, which turned out to be Mr. Dean and his nine-year-old daughter. Mr. McQuillan testified that he told Ms. Hebert to call 9-1-1. He testified that around the time he heard fire trucks arriving, he drove the Aveo about ten feet further east so that it would be easy for the fire personnel to access the Dodge.
- [22] Mr. McQuillan testified that Mr. Dean said, "That was not a good place to park," and that Mr. McQuillan responded, "I was pulled over to the side and you hit us."
- [23] Ms. Hebert testified that she thought the Aveo was parked about five car lengths from the hill crest, which would be about 75 feet east. I will say more about her evidence with respect to each question.
- [24] Mr. Dean testified that he was driving at the speed limit of 50 kilometres per hour. He testified that he came over the crest of the hill, saw the Aveo and could not tell if it was moving, that he swerved left and ended up in the ditch. He estimated that the Aveo was about 20 feet from the crest of the hill. At the examination for discovery, he testified that he thought the Aveo was stopped.
- [25] Mr. Dean testified that following the accident he said to Mr. McQuillan that it was the wrong part of the road to be parked, and that Mr. McQuillan said he was not parked, but was backing up and made some reference to bears.
- [26] It appeared at the trial that Mr. McQuillan, Ms. Hebert, and Mr. Dean all tried to give their honest recollection of what occurred. I expect witnesses to have trouble recalling exactly what occurred during an event which lasted only a matter of seconds.
- [27] I also recognize the difficulty for these witnesses in estimating distances and in orienting themselves to two-dimensional photographs of the hilly accident location and in orienting themselves on a roadway which does not have landmarks on it like buildings or traffic lights.
- [28] Those three witnesses also had different manners of expressing themselves and they were not always clear. Overall, I found the three of them to be credible and in my view, the real issue was the reliability of their evidence.

- [29] Both sides called expert evidence from accident reconstruction engineers. Coincidentally, both engineers have the same last name so I will refer to them by their full names. Mr. Robin Brown testified at the request of Mr. McQuillan, and Mr. Craig Brown testified at the request of Mr. Dean.
- [30] Neither expert gave an opinion about the speed of the vehicles at or prior to impact. The experts were generally in agreement about the perception and the response time, swerve calculations and site visibility. The experts differed in their opinions about whether the Aveo was in reverse at the time of the accident and on their calculations of braking distances. The basis of their differences on braking distance calculation was their estimate of the applicable coefficient of friction for the road surface in question.
- [31] Craig Brown concluded that the transmission of the Aveo was in reverse at impact or immediately before impact. He came to that conclusion on the basis of the condition of the filament in the Aveo's left rear backup light. In Craig Brown's opinion, the condition of the filament indicated hot shock, meaning that the filament was lit at the time that the Aveo was struck.
- [32] Robin Brown's evidence included evidence about site visibility and braking and swerving times. In his opinion, the condition of the filament in the Aveo's backup bulb was likely age sag or distortion from repeated cycling during the two years of use. In Robin Brown's opinion, the condition of the filament was not consistent with hot shock and Craig Brown's conclusion that the Aveo's transmission was in reverse at or immediately before impact is not correct.
- [33] Craig Brown also provided a reply opinion that included the opinion that if the Aveo was 15 to 35 metres past the crest of the hill in question, Mr. Dean could have stopped before impact if he were travelling 50 kilometres per hour but not if he were travelling 60 kilometres per hour.
- [34] I first consider the question of whether the Aveo was reversing at the time of the impact.
- [35] Mr. McQuillan and Ms. Hebert say that the Aveo was not reversing at that time. As I said, Mr. Dean said at discovery that he thought it was stopped. At trial, Mr. Dean was not sure whether the Aveo was stationary or reversing.
- [36] The only basis for concluding that the Aveo was reversing was Craig Brown's opinion about the hot shock in the backup bulb and Mr. Dean's recollection that Mr. McQuillan said that the Aveo was not parking but was backing up.
- [37] Craig Brown's opinion was based on the examination of the Aveo bulb which had been removed from the Aveo about a week after the accident and provided to Craig Brown about two years later. Craig Brown compared that bulb to a newly purchased bulb which Craig Brown agreed was not likely manufactured in the same country, let alone the same plant. His opinion was based on some testing his firm did about 20 years ago. The testing has not been subjected to peer review or become part of accepted accident reconstruction science. I

note that the testing in question referred to eight lamp impact tests which is not a large number of tests.

- [38] At best, Craig Brown's opinion supports the conclusion that the Aveo was in reverse gear because that is when the light would be on. It does not demonstrate that the Aveo was moving while in reverse gear or established whether it was in reverse gear for a fraction of a second, as it might have been while changing gears, or for a long period, such as if it was driven for a distance in reverse.
- [39] Mr. McQuillan's evidence made sense. He appeared to have a genuine concern about safety in stopping on Quarry Road and in particular near hills and curves. As a frequent traveller down Quarry Road who often saw wildlife, including bears, he would not likely be so desperate to photograph a bear that he would risk reversing uphill to a blind crest in order to obtain a photograph. It is more likely that the Aveo was stationary at the time of collision than that it was in reverse. I reject the allegation that the Aveo was reversing at the time of the collision. It is unlikely that Mr. McQuillan would have said following the accident that he was backing up and I expect that Mr. Dean is simply mixed up in that recollection.
- [40] I next consider how far the Aveo was from the crest of the hill.
- [41] Mr. Dean's evidence was that he saw the Aveo only very briefly before the collision. He went to the accident site almost two years following the accident and estimated that the Aveo was about 20 feet east of the crest of the hill. I do not expect that his recollection of the location in comparison with the crest of the hill is particularly reliable because of the short period he had to make observations, the nature of the terrain and the absence of landmarks.
- [42] Based on the expert evidence, the Aveo would have been visible more than 75 metres away if it had been stopped about 20 feet from the crest of the hill and if that were so, Mr. Dean would have had plenty of time to stop, assuming he was watching where he was going.
- [43] I reject the evidence that the Aveo was that close to the crest of the hill. Mr. McQuillan's evidence at trial was that the Aveo was about 30 metres east of the road crest. As I have said he at estimated 30 feet at examination for discovery but said that after making some measurements following the accident, he thought it was 30 metres.
- [44] I note that in Craig Brown's report, he refers to making a site visit and noting that there was a widened grassy area located about 15 to 25 metres past the crest of the hill. It would make sense for Mr. McQuillan to have parked in that spot.
- [45] I accept Craig Brown's evidence that if the Aveo were 50 metres east of the crest of the hill, the Aveo would have been visible to Mr. Dean 50 metres away and that if the Aveo were 25 metres east of the crest of the hill, the Aveo would have been visible to Mr. Dean 43.1 metres away.

- [46] Mr. Robin Brown estimated that at 50 kilometres per hour, the total time to perceive the hazard and to brake to a stop would be about 32 metres. Craig Brown's estimate was 39.9 metres. Both of those estimates are within the visibility distance of 43.1 to 50 metres applicable to the Aveo being 15 to 25 metres east of the crest of the hill.
- [47] The experts were not able to estimate the speed of the vehicles. Both Mr. McQuillan and Ms. Hebert only saw the Dodge for a matter of seconds before the collision and I do not consider that they were in a position to reliably estimate speed. Mr. McQuillan made some of his comments about speed based on the sound of the vehicle on the gravel but that is not a reliable basis for estimating speed.
- [48] Mr. Dean testified that he was driving at 50 kilometres an hour, saying that he looked at his speedometer from time to time although not precisely in the period between seeing the Aveo and hitting the Aveo.
- [49] Mr. Dean testified at examination for discovery that he assumed the speed limit was in the range of 50 or 70 kilometres per hour, but did not know for certain what it was. As I have said, it was 50 kilometres an hour. What I infer from the whole of Mr. Dean's evidence is that he thought he was travelling around the speed limit, but he is not entirely sure what his speed was at the time of the accident.
- [50] Mr. Howard objected on behalf of Mr. Dean that Mr. McQuillan's counsel ought to have clearly indicated in cross-examination that Mr. Dean's evidence about his speed was in question. Mr. Howard referred to the case of *Browne v. Dunn* (1894), 6 R. 67 (H.L.) to the effect that it is a principle of fairness that a witness ought to have an opportunity to explain evidence that will be challenged.
- [51] In my view, the questions in cross-examination referring to Mr. Dean's uncertainty about the speed limit were adequate to alert Mr. Dean to the issue that there was a question about the speed at which he was travelling, particularly in the context of the specific allegations in the pleadings that Mr. Dean was speeding, and in the context of the questions about the difficulty in seeing what was on the downward side of the hill.
- [52] It probably would have been better if Mr. Dean had been directly challenged about the speed at which he was travelling. However, in my view, Mr. Dean had an adequate opportunity to address the evidence about the speed of his vehicle at the relevant time.
- [53] The best estimate I can give on the basis of all the evidence is that the Aveo was stopped about 15 to 25 metres east of the crest of the hill when it was struck by the Dodge. The best estimate I can give on the basis of all the evidence is that the Dodge was travelling above the speed limit of 50 kilometres per hour at the time of the accident.

- [54] Mr. McQuillan concedes that if he were stopped on the roadway, he would have been in breach of s. 187(1) of the Motor Vehicle Act, R.S.B.C. 1996, c. 318. Mr. McQuillan's position is that even if he were stopped on the roadway, he would not have been responsible for the accident because Mr. Dean ought to have been able to stop in time to avoid the Aveo in any event.
- [55] Both Mr. McQuillan and Ms. Hebert testified that the Aveo was on the shoulder or substantially on the shoulder at the time of the collision. There was some discrepancy about the length of the grass and whether it was on the grassy part of the shoulder or the rocky part of the shoulder and how much on each part of the shoulder. Mr. Dean's evidence was that the Aveo was right in front of him, suggesting that it was in the south half of the roadway, being essentially the lane which would be used by eastbound vehicles.
- [56] Mr. McQuillan appeared at trial to be a careful driver who was concerned about the risks on Quarry Road. He testified that he pulled over as far as he reasonably could onto the right shoulder and that he was waiting for the car he heard to pass before he was going to pull out. Mr. McQuillan referred to the fact that he did not expect Ms. Hebert to get out of the car and so he could go quite far to his right on the shoulder.
- [57] In the circumstances, it is reasonable that Mr. McQuillan would have pulled onto the shoulder. Again, the sight of a bear was not so unusual that Mr. McQuillan would likely have taken dangerous steps to take a photograph. He could safely pull the Aveo onto the shoulder which was reasonably wide in the area in question.
- [58] I conclude that the Aveo was substantially on a light gravel or grass shoulder at the time of the collision and that if any part of it was on the roadway, it was a very small part.
- [59] As a result, I conclude that Mr. McQuillan was not negligent at the time of the collision. I conclude that Mr. Dean was driving too quickly, at a rate which was both greater than the speed limit and inappropriate for the visibility obstruction arising from the hill. I conclude that Mr. Dean is entirely responsible for the accident.
- [60] So, counsel, is there anything else?
- [61] MR. FERGUSON: My Lady, just with respect to costs. There may be some different issues given the two actions. At least in one of the actions there was a formal offer exchanged on the issue of liability only, so perhaps it would be more appropriate to reserve the right to appear back before Your Ladyship on that issue.
- [62] THE COURT: All right. What do you say about that, Mr. Howard? Are you content to have liberty to appear back on the issue of costs?
- [63] MR. HOWARD: Yes.

[64] THE COURT: Okay. Well, that is fine. If that is what counsel think is appropriate, I will do that. You have liberty to apply in front of me. Hopefully I will not need all of this material to decide the issue of costs. Thank you again, counsel. This case was a model of a well-run trial.

"Gray J."

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