
CANADA / JUDGMENT

Mitchell v. ICBC

2004 BCSC 983

COURT

Supreme Court of British Columbia

DECIDED

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2004 BCSC 983 Mitchell v. ICBC

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Mitchell v. ICBC,

2004 BCSC 983

Date: 20040721

Docket: M020316

Registry: Vancouver

Between:

Jordan Mitchell

Plaintiff

And

Insurance Corporation of British Columbia

Defendant

Before: The Honourable Mr. Justice E.R.A. Edwards

Reasons for Judgment

Counsel for the Plaintiff

R.V. Burns

Counsel for the Defendant

J.P. Adrian

Date and Place of Trial/Hearing:

July 7, 2004

Vancouver, B.C.

- [1] The plaintiff applies under Rule 18A for summary judgment on the issue of liability. A four-day jury trial is set for November 29, 2004.
- [2] This case arises from a motor vehicle accident at the traffic light controlled intersection of Granville Street and 16th Avenue, Vancouver, on September 26, 2001, about 9:00 pm.
- [3] The plaintiff's vehicle collided with a van which was southbound on Granville when the plaintiff was turning left from north to west.
- [4] The driver of the van left the scene of the accident immediately after it occurred. Neither the van's owner nor its driver has been identified. As a result, the Insurance Corporation of British Columbia (ICBC) is the defendant in this action.
- [5] The damages claimed are indicated by plaintiff's counsel to be in the range of \$40,000.
- [6] Counsel for both parties agree that the issue of liability is suitable for resolution under Rule 18A on the basis of the material before the Court. That material consists of the affidavits of the plaintiff and three eyewitnesses as well as a police report, photographs of the plaintiff's car, and the examination for discovery evidence of the plaintiff and of an ICBC representative, Ann Dowdell.
- [7] The plaintiff's position is that the only issue to be resolved is whether the negligence of the driver of the van was the sole cause of the accident. In support of this position, plaintiff's counsel refers to the November 13, 2002 examination for discovery evidence of Ms. Dowdell, and in particular question 24 and the following answer:

Q Okay. The only issue is whether or not the unidentified driver was negligent?

A Correct.

- [8] On November 20, 2002, the defendant filed an amended Statement of Defence which included allegations that "any injury, loss or damage suffered by the plaintiff was caused solely by her own fault and negligence", and in the alternative pleading the provisions of the Negligence Act, R.S.B.C. 1996, c. 333.
- [9] I find that the answer given by Ms. Dowdell to question 24 does not preclude the defendant from alleging that the plaintiff's negligence caused or contributed to causing the accident. Her answer is not evidence that the plaintiff was not negligent, so it does not contradict the Amended Statement of Defence.
- [10] According to the plaintiff's counsel, a coded entry on the police accident report reflects a conclusion by its author that the cause of the accident was "undue care and attention" by the unidentified driver of the van. Since ICBC has admitted only the authenticity of this

document and not the truth or accuracy of its contents, I give it no weight in the absence of explanatory testimony from its author as to the basis of the author's apparent conclusion. That basis was presumably information from police interviews of the plaintiff and witnesses whose affidavits are before the Court.

- [11] Plaintiff's counsel argues that the Court should infer, from the fact that the unidentified driver of the van left the scene of the accident, that the van driver had information which, if disclosed, would establish that his or her negligence caused the accident. I am asked to infer that the unidentified van driver did not stop in order to avoid providing that information and thus avoid liability.
- [12] No inference can be drawn about what information the unidentified van driver might have provided about the circumstances of the accident from the fact he or she left the scene without providing that information. Had the unidentified van driver been killed in the accident, no inference could be made about what information he or she might have given if available to testify.
- [13] While the unidentified driver in this case may have been motivated to flee the accident scene to avoid disclosing information which would demonstrate that his or her negligence caused the accident, other motives are equally plausible. For example, the van's driver might have sought to avoid the police for some other reason, such as driving without a license.
- [14] I decline to infer negligence on the part of the unidentified driver of the van caused the accident from the fact that he or she left the accident scene without stopping to provide information.

- [15] The plaintiff's version of the accident is set out in her affidavit of April 26, 2004, as follows:

This action arises from a motor vehicle accident which took place Wednesday, September 26, 2001 at the intersection of West 16th Avenue and Granville Street in Vancouver, British Columbia. I had proceeded northbound on Granville Street with the intention of turning left at 16th Avenue to go westbound.

After I entered the intersection I slowed almost to a stop to make sure there was no southbound traffic in the intersection. The light for Granville traffic changed to amber and then to red and I saw southbound vehicles slow down in response to the light. I then commenced to make my turn. I had proceeded only one or two feet into the first oncoming lane when I was struck by a dark coloured van or mini-van. The van was traveling at high speed and did not stop after the collision.

Before I commenced to make my left turn, I observed southbound vehicles slowing down and I was satisfied that they were in fact slowing down to allow me to safely complete my turn.

After I satisfied myself and commenced to make my left turn, I looked away from the slowing traffic to the direction I intended to go to ensure it was clear of vehicles and any pedestrians that may be crossing 16th Avenue on the west side of Granville.

At the time impact my vehicle was still in the northbound lane for traffic on Granville closest to the centerline except for the corner of my left front fender.

[16] Mark Wardell, an eyewitness, deposed in an affidavit sworn April 20, 2004:

The accident involved a red Hyundai 4 door sedan and a dark coloured van or a mini-van. The red Hyundai had proceeded northbound on Granville Street and intended to turn left onto 16th Avenue in order to travel west. I was driving eastbound on West 16th Avenue and was stopped at the light controlling traffic at the subject intersection. I don't believe I was first in line, but I had a good view of the intersection.

I observed the red Hyundai stopped at the intersection waiting to turn left. The light for traffic on Granville Street turned to yellow and the red Hyundai barely began to move forward when it was struck by a dark coloured van which was travelling southbound on Granville Street and which came through on the yellow light and struck the red Hyundai.

The dark coloured van did not stop after the collision, but rather kept going southbound on Granville Street and disappeared.

I did not have an opportunity to observe the license number of the van because it left the scene so quickly. I could not identify the driver of the said van.

[17] Isobel O'Connell, another eyewitness, deposed in an affidavit sworn April 23, 2004:

I witnessed a motor vehicle accident which occurred September 26, 2001 at the intersection of W 16th Avenue and Granville Street in Vancouver, BC. I was running for exercise on the north sidewalk of W 16th heading eastbound toward the intersection. I observed a collision between a red Hyundai four-door sedan and a dark colored van. The Hyundai was proceeding northbound on Granville Street and had stopped or almost stopped in the intersection with the intention of turning left to proceed westbound on W 16h Avenue. I observed other traffic heading northbound on Granville coming to a stop and I then observed the dark colored van in the intersection traveling at a significant speed then strike the red Hyundai. The van then sped away from the scene.

I am not able to comment on the conditions of the lights at the time of impact but I can say that to me, the red Hyundai did approach the intersection and slowed down in an appropriate fashion for a vehicle about to turn left.

I was not able to identify the exact make or model of the van nor its license number. I could not identify the driver.

[18] A third eyewitness, Wilson Chang, swore two affidavits, one dated April 20, 2004, the other June 18, 2004. In the April 20, 2004 affidavit he deposed:

The accident involved a red Hyundai 4 door sedan and a dark coloured van or a mini-van. The red Hyundai had proceeded northbound on Granville Street and intended to turn left onto 16th Avenue in order to travel west. I was one of the first cars stopped for the light on West 16th

Avenue heading eastbound. I observed the red Hyundai waiting for the light to change so that she could proceed west bound on 16th Avenue. When the light turned yellow for traffic on Granville, I observed the red Hyundai begin to move forward and when it got one or two feet across the imaginary center line for north and southbound traffic, it was hit by a van which came through the light heading southbound. It hit the red Hyundai and did not stop after the collision.

From my vantagepoint, the van was driving very fast.

As I recall, at the instant of impact, the light for Granville had just turned to red.

The van left so quickly that I was not able to observe the license plate nor could I identify the driver.

[19] In his second affidavit dated June 18, 2004, Mr. Chang deposed:

The first time I saw the van it was about 1 car length north of the intersection . At this time the red Hyundai was moving forward (west) very slowly into the southbound lanes of traffic on Granville Street.

Also at this time there was one other southbound car that was partially still in the south side of the intersection. The van was about 4 to 5 car lengths behind this car.

I do not recall any southbound vehicles stopped at the intersection at the time the van entered it.

[20] The plaintiff, Ms. O'Connell and Mr. Chang depose respectively that the van was travelling at a "high", "significant" or "very fast" speed. This evidence contradicts the plaintiff's version that all southbound vehicles slowed for the yellow light as she entered the intersection.

[21] Mr. Chang's evidence contradicts the plaintiff's version of the accident in two further respects. First of all, he observed the van moving at high speed one car length north of the intersection while the light was yellow. Second, he deposed that a car proceeded through the intersection ahead of the van and was still in the intersection, four to five car lengths ahead of the van, when the accident occurred.

[22] The plaintiff's evidence does not mention any southbound vehicles passing her before she started her left turn. Her evidence is that all of the southbound vehicles slowed as she entered the intersection and that they appeared prepared to stop before she proceeded to turn left on the red light.

[23] Mr. Chang deposed that he did not recall any southbound vehicles stopped at the intersection at the time the van entered it. According to Mr. Chang's evidence, one southbound car must have already passed the plaintiff's vehicle prior to her making her turn and the van was following it through the yellow light.

[24] If Mr. Chang is correct, then the plaintiff's evidence that the southbound vehicles approaching her as she entered the intersection appeared to slow down cannot be correct, since at least one southbound vehicle passed her.

- [25] I accept Mr. Chang's and Mr. Wardell's evidence that the traffic light was yellow when the van entered the intersection. It follows that the plaintiff must have turned between two southbound vehicles, the van and the car which preceded it through the intersection. This is inconsistent with her evidence that she did not turn until all southbound vehicles appeared to her to slow for the yellow light, and after the light turned red.
- [26] Clearly, the plaintiff did not see the van proceeding south at "high" or "significant" or "very fast" speed. There is no evidence to support the plaintiff's counsel's submission that the van first slowed and then sped into the intersection.
- [27] There is nothing in the plaintiff's affidavit or discovery evidence to support this theory. According to the discovery transcript (Q. 259) the plaintiff did not know how far from the intersection the van was when she first saw it, nor did she know (Q. 256) if the first vehicle approaching her stopped before she made the turn. This indicates she was not attentive to the car which, according to Mr. Chang, preceded the van through the intersection, or to the van.
- [28] I find the plaintiff proceeded to make her left turn without yielding to the van which was "so close as to constitute an immediate hazard", in light of its position and speed. I find the plaintiff did not comply with s. 174 of the Motor Vehicle Act, R.S.B.C. 1996, c. 318.
- [29] From that I conclude the plaintiff has not proved it is more likely than not that the negligence of the unidentified driver of the van was the sole cause of the accident.
- [30] The Statement of Claim does not plead the provisions of the Negligence Act. Nevertheless, I am obliged to determine if the evidence that the van was speeding leads to an inference that the negligence of the unidentified driver of the van was a contributing cause of the accident.
- [31] None of the evidence provides an estimate of the speed of the van. I take judicial notice of the fact that the speed limit at the intersection was 50 kph.
- [32] The plaintiff bears the onus of showing that the van driver's speed was excessive in the circumstances and contributed to causing the accident.
- [33] In *Gervais (Guardian ad litem of) v. Yewdale (Trustee of)*, [1994] B.C.J. No. 2280 (C.A.) there was a good deal more evidence about the speed of the vehicle proceeding straight through the intersection than there is in this case, but the Court of Appeal (per Finch J.A.), in dismissing an appeal from a judgment finding the left turning driver wholly at fault, noted at paragraph 46 "There is no direct evidence of the respondent's speed, from any witness, after the [respondent's vehicle] came into the appellant's view at a distance of about 490 feet".
- [34] Here, there is no direct evidence either of how far the van was from the intersection when first seen by the plaintiff or of the van's speed at that moment or subsequently.

- [35] The accident took place at 9:00 pm in late September at the intersection of two main thoroughfares where traffic could be expected to be steady. There is no evidence that inclement weather, lack of adequate illumination or other vehicles interfered with the plaintiff's ability or opportunity to see the van as it approached.
- [36] As noted at paragraph 40 of Gervais, "Whether the respondent was an immediate hazard at the time the appellant started her left turn, depends on both the proximity and speed of the [oncoming vehicle]."
- [37] In *Kokkinis v. Hall*, [1996] B.C.J. No. 1560 (C.A.), s. 133 of the Motor Vehicle Act was interpreted so as to absolve left turning drivers waiting to turn on a yellow light from any obligation under s. 174 to wait until "all approaching drivers have stopped". The Court of Appeal also stated that drivers approaching a light-controlled intersection "must expect" drivers who are indicating a left turn "will" turn on the yellow light.
- [38] This interpretation, explicitly made in the interests of avoiding traffic in "a busy city like Vancouver" coming to a standstill while left turning drivers wait to turn on the red light after all oncoming traffic has stopped, invites left-turning drivers to assume rather than determine that oncoming through drivers will stop as the light turns yellow, and requires through drivers to conduct themselves on the basis left-turning drivers will do so. In an environment where, as the Court of Appeal noted, the yellow light is regarded by many as a signal to accelerate through an intersection, this interpretation seems to endorse a hazardous assumption on the part of left turning drivers.
- [39] *Tejani (Guardian ad litem) v. Greenham* 2001 BCSC 803, is a case similar to the case at bar. In that case, the trial judge found the left turning driver's evidence "rather unhelpful" and found on the basis of *Kokkinis* that while the left turning driver did not, under s. 174 of the Motor Vehicle Act, "have an obligation to ensure all traffic has stopped before proceeding on a yellow light, he or she must still take into account manifest hazards". Liability was apportioned equally between the left turning and through driver (both defendants as the plaintiff was an occupant of one of the vehicles).
- [40] The apportionment in *Tejani* was based on findings that the collision occurred at the instant the light turned red, the yellow light lasted 4 seconds and the through driver was traveling at 60 kph and therefore must have been 67 meters from the point of impact when the light turned yellow. The court in *Tejani* found the through driver had time to stop safely, on the basis of speed and distance "tables" in evidence in that case.
- [41] I find on the evidence of Mr. Chang that the collision here occurred at the instant the light turned red. I find on the evidence that the unidentified van driver's speed was speeding that its speed was, more likely than not, over 50 kph. I infer that the unidentified van driver had time to stop after the light turned yellow, but did not stop, or was speeding so excessively that he or she could not stop safely. In either event, he or she was negligent.

- [42] As did the judge in Tejani, I find the left turning driver (here the plaintiff) had a duty to take account of "manifest hazards" and failed to see or react to the fact the van was approaching fast and not stopping. I find the plaintiff was negligent.
- [43] In light of the lack of any evidence estimating the speed of the van and all the circumstances of the case, I am unable to establish different degrees of fault. Accordingly, s. 1(2) of the Negligence Act applies and liability is apportioned equally.
- [44] The plaintiff's motion for judgment against the defendant is granted, with liability reduced to one half. The plaintiff is entitled to costs of the motion on scale 3.

"E.R.A. Edwards, J."

The Honourable Mr. Justice E.R.A. Edwards

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