
CANADA / JUDGMENT

Nguyen v. Busink

2018 BCSC 913

COURT

Supreme Court of British Columbia

DECIDED

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2018 BCSC 913 Nguyen v. Busink

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Nguyen v. Busink,

2018 BCSC 913

Date: 20180604

Docket: M163115

Registry: Vancouver

Between:

Thi My Tien Nguyen

Plaintiff

And

Evelyn Busink

Defendant

Before: The Honourable Mr. Justice Skolrood

Reasons for Judgment

Counsel for the Plaintiff:

T.F. Dennis

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Counsel for the Defendant:

B. Rowland

K. Rotheisler

Place and Date of Trial/Hearing:

Vancouver, B.C.

May 14-15, 2018

Place and Date of Judgment:

Vancouver, B.C.

June 4, 2018

Introduction

- [1] This action arises out of a motor vehicle accident that occurred on September 29, 2014 on 100 Avenue, close to the intersection with 140 Street, in Surrey, B.C. (the "Accident"). Both vehicles were travelling east on 100 Ave. intending to turn left onto 140 St., using a dedicated left turn lane on 100 Ave. The vehicles collided in or near that left turn lane.
- [2] The trial was limited to the issue of liability as the parties have agreed to the quantum of any damages that might be awarded.
- [3] There were only two witnesses to the Accident: the plaintiff and the defendant, who were the drivers of the two vehicles involved.
- [4] The plaintiff was the sole witness in her case. The defendant testified on her own behalf, and she also called as witnesses an accident reconstruction expert and the RCMP officer who attended the Accident scene.
- [5] The trial took place over two days and was run very efficiently by counsel. They are to be commended for that.

The Plaintiff's Evidence

- [6] The plaintiff, who testified through an interpreter, was born in Vietnam and has been in Canada since 1994. She is currently 53 years-old. She works full-time as a processor at a poultry plant.
- [7] On September 29, 2014, the plaintiff worked a 9:00 a.m. - 5:30 p.m. shift. After work, she went home and then to the gym. After the gym, she was intending to go to a bakery on 140 St. She was unsure of the time but said it was light out and the road conditions were dry.

- [8] She testified that she was driving east on 100 Ave. intending to turn left onto 140 St. She said that she activated her turn signal, made a shoulder check and then moved into the left lane. She then drove straight ahead towards the 140 St. intersection, moving at about 50-55 km/hr. She testified that as she was doing so, she was struck by another vehicle without warning. She did not see the other vehicle or hear any warning sounds, like a horn or screeching brakes. The impact took her by surprise.
- [9] The plaintiff said that at the time of impact, her foot was already on the brake pedal as she was slowing down to make her left turn onto 140 Street. When she was hit, she pressed down on the brake further.
- [10] The plaintiff identified photos of her vehicle, a white 2013 Toyota Rav 4, and the damage sustained by her vehicle. The damage was on the right passenger side towards the front of the vehicle.
- [11] She also identified an overhead Google Map photo of the stretch of 100 Ave. where the Accident occurred (Exhibit 2) as well as a photo of where the vehicles ended up after impact (Exhibit 3).
- [12] The Map shows 100 Ave. as a two-lane road running in an east-west direction. As 100 Ave. approaches the intersection with 140 St. from the east, there is a dedicated left turn lane.
- [13] Before the commencement of the left turn lane, the east and west bound lanes on 100 Ave. are separated by a stretch of pavement marked by one solid yellow line and a second broken yellow line on each side. It appears that this dividing section stretches back about 25 meters from the point where the left turn lane starts. At that point, the dividing section starts to narrow in order to accommodate the left turn lane. That is also the point at which yellow cross-hatch lines are painted in the dividing section, which continue right up to the intersection with 140 Street. It is common ground between the parties that the cross-hatch markings designate that area of pavement as a median, on which traffic is prohibited.
- [14] The plaintiff marked on the map (Exhibit 2) the point at which she says she moved into the left lane. She marked a point in the stretch of pavement marked by the solid yellow and broken yellow lines, well back from where the cross-hatch marks appear to designate the median.
- [15] In cross-examination, it was put to the plaintiff that she must have driven over the cross-hatch lines in order to get to the point where she was intending to turn left. At various points in her evidence, she denied that she drove over those lines, then acknowledged that she may have entered the left turn lane "a little early" but also said the yellow lines "were not clear".
- [16] Her examination for discovery transcript was put to the plaintiff. At her discovery, she said (at Q. 22-23) that she waited until the left-hand lane was present before turning into it and that she did not drive over the yellow staggered lines prior to the left-hand lane. At Q. 46, she reiterated that at no point did she ever drive over the yellow line prior to impact.

- [17] Towards the end of her cross-examination, counsel put to her directly that prior to impact she was driving over the yellow hatched lines, to which the plaintiff responded that she did not recall because "it was a long time ago".

The Defendant's Evidence

- [18] The defendant is currently 71 years-old and retired.
- [19] On September 29, 2014 she was driving east on 100 Ave. in her 2009 Mazda 5. She believes it was around 6:00 p.m. She was coming from her home on her way to deliver a meal to a friend who had broken her arm. Her intention was to turn left from 100 Ave. onto 140 St.
- [20] According to the defendant, she began to move left where the dedicated left turn lane began. She marked that spot on the Exhibit 2 map. As she did so, she heard a bang and realized she had collided with another vehicle. She did not see that vehicle before the impact.
- [21] The defendant identified photographs of the damage to her vehicle, which was on the front driver's side corner.
- [22] The defendant was uncertain how fast she was moving although she said her foot was on the brake pedal because she was slowing down as she moved towards making a left turn. When the impact occurred, she said she pushed all the way down on the brake pedal and brought her vehicle to a controlled stop.
- [23] She was also uncertain how fast the plaintiff's vehicle was going but her impression was that it was faster than her and that the plaintiff's vehicle overtook her.
- [24] She said that she did not check her driver's side mirror or rear view mirror, nor did she do a shoulder check, before commencing to move left. She made the point in response to a question from counsel that she was not making a lane change but was entering the left turn lane.
- [25] Bradley Heinrichs is an engineer who prepared an accident reconstruction report dated February 16, 2018 tendered by the defendant.
- [26] Mr. Heinrichs did not view the Accident scene nor did he inspect the vehicles involved in the Accident. In his report, he states that he relied on the following materials when preparing his report:
- a) Photographs of the plaintiff's Rav 4;
 - b) ICBC repair estimate for the plaintiff's vehicle;
 - c) One colour photograph of the Accident scene; and
 - d) Photos and repair estimate for the defendant's Mazda 5.
- [27] Mr. Heinrichs considered two possible versions of events:

- a) Version 1 - the defendant initiated a left-ward lane change at the start of the dedicated left-turn lane; around the same time, the plaintiff was eastbound on the painted yellow median just west of the dedicated left-turn lane and the vehicles collided as the defendant was making her lane change; and
- b) Version 2 - the plaintiff was eastbound on 100 Ave. in the dedicated left-turn lane and was established in that lane when she was struck by the defendant's vehicle.

[28] Based on the location of the final vehicle resting positions and the damage to the two vehicles, Mr. Heinrich opined that Version 1 was more likely. Thus, he was of the opinion that:

- a) The plaintiff's vehicle was travelling faster than the defendant's vehicle;
- b) The plaintiff's vehicle was in the painted median at impact; and
- c) The plaintiff's vehicle could not have been in the dedicated left turn lane at impact.

[29] In cross-examination, the plaintiff's counsel put a number of assumptions to Mr. Heinrichs and asked him to consider a Version 3. Those assumptions included the following:

- a) The defendant was travelling 45 km/hr;
- b) The plaintiff was travelling 50 km/hr;
- c) There was a .8 second perception response time by the drivers (that being the time it takes for a person to perceive a hazard and make a response); and
- d) The parties brought their vehicles to a controlled stop; defined as something between an emergency stop and a normal, gradual stop).

[30] Mr. Heinrichs acknowledged that using these assumptions, and working back from the final resting point of the vehicles, it is possible that the point of impact was further back or west of what was suggested in his Version 1. However, he noted that because the actual perception-response time of each driver and each person's actual braking force is unknown, the point of impact could be further west or further east. Mr. Heinrich also indicated that the model he ran for Version 3, which he did in the witness stand, showed a secondary contact between the vehicles which appeared inconsistent with the reported damage, although he did not have an opportunity to evaluate that completely.

[31] Constable Mulvihill of the RCMP also testified. She was the officer who attended the Accident scene. The only material aspect of her evidence was that she confirmed that the cross-hatch marking on the pavement before the left turn lane is treated as a median.

Legal Framework

[32] Both parties cite provisions of the Motor Vehicle Act, R.S.B.C. 1996, c. 318 [MVA] including the following:

144 (1) A person must not drive a motor vehicle on a highway

- (a) without due care and attention,
- (b) without reasonable consideration for other persons using the highway

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

- (b) must not drive it from one lane to another if that action necessitates crossing a solid line,

155 (1) Despite anything in this Part, if a highway is marked with

- (a) a solid double line, the driver of a vehicle must drive it to the right of the line only,
- (b) a double line consisting of a broken line and a solid line,
 - (i) the driver of a vehicle proceeding along the highway on the side of the broken line must drive the vehicle to the right of the double line, except when passing an overtaken vehicle, and
 - (ii) the driver of a vehicle proceeding along the highway on the side of the solid line must drive the vehicle to the right of the double line, except only when finishing the passing of an overtaken vehicle, and
- (c) one single line, broken or solid, the driver of a vehicle must drive the vehicle to the right of the line, except only when passing an overtaken vehicle.

159 A driver of a vehicle must not drive to the left side of the roadway in overtaking and passing another vehicle unless the driver can do so in safety.

The Parties' Positions

- [33] The plaintiff submits that the defendant was negligent in failing to check her rear-view mirror or her driver-side mirror or do a shoulder check prior to initiating her move to the left. The plaintiff notes that her vehicle was slightly ahead of the defendant's vehicle at the point of impact, which indicates that the plaintiff's vehicle was there to be seen.
- [34] The plaintiff submits further that under Version 3 put to Mr. Heinrich, it can fairly be assumed that the defendant started her lane change well back of the left turn lane, either before the cross-hatch marking or within them.
- [35] The plaintiff submits that if the impact occurred before the cross-hatch lines, then that portion of the pavement was a two-way left turn lane which the plaintiff was entitled to occupy. If the impact was within the cross-hatched area, then neither vehicle was permitted to be in that space but the plaintiff says the defendant should bear significantly more fault because she struck a vehicle that was beside and slightly ahead of her, and did so with doing any safety checks.

- [36] The defendant submits that Mr. Heinrich's Version 3 is at best speculative and is not consistent with the evidence adduced at trial.
- [37] She submits further that the evidence of the plaintiff lacks credibility given the differences between what she said at trial and on her examination for discovery, as well as her refusal to acknowledge that she drove over the cross-hatch marks. According to the defendant, the only credible and reliable evidence of what happened is her version.

Findings of Fact

- [38] Before turning to the liability analysis, it is useful to first set out my findings of fact. In doing so, I will start by addressing the evidence of Mr. Heinrichs.
- [39] At the outset, I will note that Mr. Heinrichs is clearly a qualified expert in the engineering and accident reconstruction field and he gave his evidence in a manner befitting of a true expert in the sense that he was objective and clearly strove to assist the Court. This included agreeing with the plaintiff's counsel where appropriate.
- [40] That said, his evidence is of little assistance to the Court in making my decision. His report, independent of the third scenario developed in cross-examination, is simply an opinion of what might have happened in the Accident based on the assumptions he was working with.
- [41] The Version 3 that counsel put to him in cross-examination is even more speculative in that it is based on a set of assumptions not proven at trial and, in certain respects, inconsistent with the evidence actually adduced. For example, neither party testified that the point of impact occurred prior to or even in the cross-hatched area yet this is a central element of Version 3 and the plaintiff's liability analysis.
- [42] I have no doubt that in certain types of cases accident reconstruction opinion evidence can be of considerable assistance to the Court. This, however, is not one of those cases. Rather, the determination of what happened can best be accomplished by reference to the evidence of the witnesses who were actually involved in the Accident.
- [43] With respect to the plaintiff's evidence, there were aspects that call into question the reliability of her account, specifically her failure to acknowledge that she drove over the yellow cross-hatch lines and her insistence that those lines were "not clear". She also could not explain how she was intending to get from the area bordered by the single solid line and broken line without going over the cross-hatched meridian. Further, when pressed, her tendency was to fall back on a claim that she could not recall because the Accident occurred a long time ago.
- [44] In contrast, the evidence of the defendant was clear and consistent and was not shaken on cross-examination. Where her evidence conflicts with that of the plaintiff, I accept the defendant's evidence.
- [45] With that in mind, I make the following findings of fact:

- a) The plaintiff was travelling east on 100 Ave. intending to turn left at 140 St.;
- b) The plaintiff entered the center area of pavement, bordered on each side by a single solid line and a broken line, before the cross-hatched marked median. I pause here to note that the plaintiff again submitted that the area before the cross-hatched median was a two way left turn lane which the plaintiff was entitled to be in. The plaintiff relies on an excerpt from an ICBC safe driving manual in support of this position. I am not satisfied that the evidence does in fact establish that to be a two way left turn lane, given the absence of left turn arrows on the pavement and the fact that there is no discernable road in any of the photos onto which an east bound vehicle could turn left;
- c) In any event, it is not necessary to decide that issue because I find that the plaintiff travelled through that area and over the cross-hatch median with a view to continuing on into the left turn lane;
- d) The defendant was also travelling east on 100 Ave. intending to turn left at 140 Street. I am satisfied that she began to move left at the point where the left turn lane commenced;
- e) In making that move, the defendant did not look in her driver side or rear view mirrors nor did she do a left shoulder check;
- f) Had she done so, the defendant likely would have seen the plaintiff's vehicle approaching on her left side;
- g) As the defendant moved left into the left turn lane, her vehicle collided with the plaintiff's vehicle that came up on her left side out of the cross-hatched median; and
- h) Given the point of contact between the two vehicles, it is clear that the plaintiff's vehicle was overtaking the defendant's vehicle on the left.

Analysis

- [46] I was not provided with any case law in which the facts mirror those in this case, which is not particularly surprising. However, I will refer to two cases in which there are some factual similarities, in that they involve similar pavement markings to those present in this case.
- [47] In *Uppal v. Judge*, 2016 BCSC 642 the plaintiff was emerging from a strip mall parking lot at 80 Ave. near 132 St. in Surrey. He was planning to turn left to head west on 80 Ave. Eastbound traffic on 80 Ave. was stopped for a red light but there was a gap in traffic, which permitted the plaintiff to cross the eastbound lanes in order to effect his turn. At that point, 80 Ave. has two eastbound lanes as well as a left turn lane for drivers intending to turn from 80 Ave. to head north on 132 Street.

- [48] As the plaintiff passed the stopped vehicles in the eastbound lanes, he was struck by the defendant who came up on the left of the stopped vehicles on 80 Ave. Madam Justice Loo found that the defendant had driven over a cross-hatched area on 80 Ave. in order to get into the left turn lane and catch the left turn signal. She found the defendant wholly at fault for the accident (at para. 54).
- [49] In *Hanson v. Yun*, 2013 BCSC 2313 the plaintiff proceeded across two lanes of stopped eastbound traffic on Highway 10 in Surrey intending to turn left from 174 St. onto the westbound merge lane of Highway 10. As he was about to enter the merge lane, he was struck by the defendant's vehicle coming from the east.
- [50] Mr. Justice G.P. Weatherill found that the defendant had stopped behind a bus in the eastbound fast lane. After waiting for about 15 seconds, the defendant pulled out into the cross-hatched meridian intending to access the left turn lane on Highway 10 in order to turn left at 176 Street. When he did so, he collided with the plaintiff.
- [51] Justice Weatherill found the defendant to be 100% liable, and said at paras. 151-156:
- [151] I find that defendant was in a hurry and not prepared to wait his turn behind the bus. He gambled that he could pass the bus on the left, drive over the meridian through the intersection and into the left turn lane on the far side.
- [152] This gamble did not pay off.
- [153] I find that that plaintiff was the dominant driver. As such, the defendant was required to yield to him.
- [154] The defendant's decision to pass the Handy DART bus on the left by driving over the meridian without ensuring the intersection was clear was a momentary lapse of care in conduct. It violated a number of provisions of the Act, including ss. 144(1)(a), 151(a)(d), s. 159 and 160. Paraphrasing from *McEachern C.J.B.C. in Ferguson*, this accident was caused solely by the defendant's failure to comply with the statutory requirements and with the common law that obligated him to not create a situation where an accident of this kind would be inevitable once he passed the bus by driving on the meridian without making sure he could do so safely.
- [155] Whether looked at in terms of who was the dominant driver and who was the servient driver, or in terms of blameworthiness for the accident, the conclusion is the same.
- [156] The defendant is 100% at fault.
- [52] In both of these cases, the Court found that the driver who had improperly driven over the cross-hatch meridian was 100% at fault.

- [53] What sets those cases apart from the case at bar is that in each instance, the plaintiff driver had no way of knowing or anticipating the defendant's presence. Both were crossing stopped lanes of traffic intending to make a somewhat blind left turn. Neither of the defendant drivers was "there to be seen" prior to impact.
- [54] In the present case, the defendant was not entering blindly into the left turn lane but rather had an unobstructed view into that lane as well as to the left and rear of her. She did not see the plaintiff because she did not check her mirrors or do a shoulder check.
- [55] The issue is whether she was negligent in failing to do so given that the area in which the plaintiff was travelling was an area in which the plaintiff was not lawfully permitted to be. Put another way, did the defendant's duty to drive with due care and attention require her to anticipate the illegal and/or negligent actions of the plaintiff?
- [56] Again, I was not provided with any case law directly analogous to the facts of this case. A useful summary of the relevant legal principles can however be found in *Ali v. Fineblit*, 2015 BCSC 1494.
- [57] In that case, the plaintiff was driving his motorcycle along West 7 Ave. in Vancouver intending to turn left onto Pine Street. He testified that he came to a stop at the intersection with his left turn signal on. He also checked his mirrors and determined that the car behind him had also stopped. He then commenced his turn and was struck by the car behind him that was attempting to pass him on the left.
- [58] Madam Justice Gerow summarized the applicable law as follows, at paras. 20-21:
- [20] Drivers are entitled to expect other drivers to obey the rules of the road. They are not required to anticipate another driver's negligent manoeuvre. As noted in *Carvalho v. Angotti*, 2007, BCSC 1760, at para. 23:
- [23] The principle in *Walker v. Harmon*, [1952] 2 D.L.R. 450 at 461 (S.C.C.), has been cited in countless cases, including *Keen v. Stene*, 44 D.L.R. (2d) 350 at 367 (B.C.C.A.):

If he seeks to case any portion of the blame upon B, the driver with the right of way, A must establish that after B became aware, or by the exercise of reasonable care should have become aware, of A's disregard of the law, B had in fact a sufficient opportunity to avoid the accident of which a reasonably careful and skillful driver would have availed himself; and I do not think that in such circumstances any doubts should be resolved in favour of A, whose unlawful conduct was fons it origo mali;

- [21] When a driver is going to pass another vehicle they must be reasonably certain it is safe to do so. If there is uncertainty, the obligation of the passing motorist is to wait to until it is reasonably safe to do so: *Eccleston v. Dresen*, 2009 BCSC 332, at para. 43.

- [59] Madam Justice Gerow found that the defendant driver was impatient about how slow the plaintiff was driving and passed the plaintiff on the left without ascertaining whether it was safe to do so. She found the defendant 100% liable for the accident (at para. 34).
- [60] In the case at bar, it is arguable that the defendant could or should have become aware of the plaintiff's illegal actions through a simple mirror or shoulder check. However, to find that she was required to take such actions would, in my view, impose an unreasonable and unfair burden on a driver who was driving in a proper fashion and in accordance with the rules of the road.
- [61] This case is different from, for example, a left turn situation where a driver turns across a through lane in which the other driver is lawfully travelling. There, the turning driver is obliged to check to ensure the manoeuvre can be safely made. Here, the defendant was not turning left but rather entering the turning lane at a point where she was entitled to do so and in circumstances in which there was no reason to expect or anticipate another driver would emerge through the cross-hatch median.
- [62] In contrast, the plaintiff was driving where she was not supposed to be and was overtaking the defendant on the left when it was unsafe to do so.
- [63] In the circumstances, I find that the plaintiff is 100% liable for the Accident.

Conclusion

- [64] The plaintiff's claim is dismissed with costs.

"Skolrood J."

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