

CANADA / JUDGMENT

Penner International Inc. v. Basaraba Estate

2015 BCSC 1136

COURT

Supreme Court of British Columbia

DECIDED

2 July 2015

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2015 BCSC 1136 Penner International Inc. v. Basaraba Estate IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Penner International Inc. v. Basaraba Estate, 2015 BCSC 1136 Date: 20150702 Docket: M143726 Registry: New Westminster Between: Penner International Inc. Plaintiff And Lillian Vera Basaraba as Executrix of the Estate of Larry Basaraba, Deceased, and Superior General Partner Inc. doing business as Superior Propane Defendants Before: The Honourable Mr. Justice A. Saunders Reasons for Judgment Counsel for the Plaintiff: J.A. Thomson Counsel for the Defendants: L.G. Harris, Q.C. Place and Date of Trial: New Westminster, B.C. January 27, 2015 Place and Date of Judgment: New Westminster, B.C. July 2, 2015 I. Introduction

- [1] This is an assessment of damages for property damage resulting from two separate collisions that occurred on January 14, 2011. In the first collision, a tractor-trailer rig owned by the plaintiff, Penner International Inc., and being driven by Mr. Frank Reimer, collided with an oncoming propane tanker owned by the defendant Superior Propane and being driven by the late Mr. Larry Basaraba, who was killed in the collision. The Reimer vehicle was then, within seconds, impacted by a second tractor-trailer - also, coincidentally, owned by the plaintiff - being driven by Mr. Ray Gustavson. The plaintiff seeks damages for physical damage to its two tractor-trailers, and associated damage and loss.
- [2] Liability was admitted in respect of the first collision. Liability in respect of the damages arising out of the second collision has already been determined through trial before Mr. Justice Jenkins in British Columbia Supreme Court. In Reasons for Judgment indexed at 2013 BCSC 2356, Jenkins J. described the involvement of the plaintiff's two vehicles in the collisions in the following terms:
- [10] In these conditions Mr. Basaraba, while travelling westbound, drifted into the eastbound lane of Highway 16. Mr. Reimer suddenly saw the headlights of the Superior Propane truck driven by Mr. Basaraba directly in front of him. Mr. Reimer immediately swerved to the left in an attempt to avoid the Superior truck but the front passenger side of his tractor-trailer struck the front passenger side of the Superior truck. Mr. Reimer's vehicle deflected to his left, or towards the north side of the highway, into the westbound lane and jackknifed. The

trailer of Mr. Reimer's rig was sitting at an angle to the highway so that the rear of the trailer was partially in the eastbound lane.

- [12] Meanwhile, Mr. Gustavson had been continuing eastbound a matter of seconds behind the Reimer vehicle, driving, according to him, at between 30 and 40 km/h in the snow storm. He suddenly saw the back of Mr. Reimer's trailer, which was partially in the eastbound lane, and also the wreckage of the Superior Propane truck, which was on the south or right side of Mr. Gustavson and was partially in the eastbound lane. Not having time to stop, Mr. Gustavson attempted to drive between the Superior Propane truck and the trailer on Mr. Reimer's rig. However, there was not enough room and he impacted with the back right portion of Mr. Reimer's trailer, pushing it further towards the north side of the highway, dangerously close to going over a steep hillside. Mr. Gustavson's rig ended up eastbound on the south side of the highway, but off the highway. There is no evidence before me as to the width of the shoulder on the south side of the highway at the area of the accidents.
- [13] There was extensive damage to the tractor, trailer and contents of Mr. Gustavson's rig. The trailer of Mr. Reimer's rig also sustained considerable damage.
- [3] Liability for the second collision was apportioned 50/50 between the defendants and the plaintiff, on the grounds of the plaintiff being vicariously liable for negligence on the part of its driver, Mr. Gustavson.
- [4] The parties have reached agreement as to quantification of a number of damages issues. They remain apart with respect to several others, including the application of the liability findings to the individual loss items, principally the Reimer trailer, the actual cash value ("ACV") of the Gustavson tractor, salvage and towing charges, and quantification of the cargo loss. II. Damage to Reimer Tractor-Trailer A. Reimer Tractor Unit Tractor Unit Value
- [5] The parties are in agreement with the tractor - which was a total loss - being valued on the basis of its ACV, which is agreed at \$27,450. Tractor Salvage/Disposal
- [6] Following the collisions, the damage to the units was assessed by Mr. Sean Heitman, an appraiser, at the request of the adjuster appointed by the plaintiff's insurer, Manitoba Public Insurance ("MPIC"). Mr. Heitman testified at trial; he was the only witness called by either party.
- [7] On cross-examination, Mr. Heitman conceded that photographs of the Reimer tractor showed that there was a satellite dish unit on the tractor roof. This was missed during his assessment of the vehicle damages.

- [8] There is no evidence as to whether the satellite dish unit - probably a unit used for GPS navigation and tracking - was damaged, or whether any of its components were salvageable. There is evidence that the purchase price of such units when new is approximately \$2,800. The plaintiff submits that in the absence of evidence that this unit was particularly worn, damages may be awarded in that amount. The defendants counter that there is no evidence the unit was damaged and could not have been sold as salvage.
- [9] As to the tractor unit itself, the company that towed the tractors and trailers away from the accident scene, Thunder Valley Towing, offered to dismantle and deal with both the wrecked tractors without charge, in return for what they could recoup from the salvage. Mr. Heitman testified that the wheels and tires may have been reusable, however, given the remote location, even if finding a buyer for any salvaged components on an "as is, where is" basis were possible, the cost of locating a buyer and completing a sale would have been prohibitive, and the cost of disposal would therefore not likely have yielded any return to the plaintiff.
- [10] I find that Thunder Valley Towing's offer to dispose of the wreckage for its salvage value - which would have included the satellite dish unit - was practical. There is no evidence that this method resulted in Thunder Valley Towing making an inordinate profit. Allowing Thunder Valley to proceed with the dismantling and disposal on this basis saved the plaintiff - and, by extension, the defendants - further cost. I award no amount to the plaintiff, and give no credit to the defendants, in respect of the salvage. Tractor Towing Charges
- [11] The tractor towing charges are agreed at \$10,750.81. B. Reimer Trailer Unit Trailer Unit Value
- [12] Mr. Heitman testified that his initial impression was that the Reimer trailer was a total loss (i.e. the repair costs would exceed the unit's ACV). He then conducted a "walk around", noting the individual components of the trailer that had been damaged, and estimating the parts and labour costs for their repair or replacement. His approach to the "walk around" was that he simply needed to identify enough physical damage to the components to justify his initial impression. Because the damage was so severe, he did not look as carefully as he might have otherwise, and he did not determine the likelihood of there being any hidden damage. (For example, his damages appraisal made provision for 1.0 hrs to check the king pin and plate; these components may very well have sustained damage, given the force of the collisions, but he did not do a visual check for damage.)
- [13] Mr. Heitman found extensive damage to both the front and rear of the trailer. He identified probable repair and replacement costs amounting to \$18,558.90. He did so using industry standard rate sheets. As this figure exceeded his estimate of the trailer's ACV (\$12,278, being the average of three comparable internet sales and a dealer's opinion), he therefore recommended the trailer be treated as a total loss.

- [14] MPIC settled the losses with the plaintiff. For reasons not disclosed in the evidence, the amount of the ACV of the Reimer trailer was settled at \$11,450. The present action is acknowledged by counsel to be a subrogated proceeding. That, of course, does not limit a tortfeasor's liability for the full amount of a loss; nevertheless the plaintiff is restricting its claim for the Reimer trailer in the present action to that subrogated claim amount.
- [15] Mr. Heitman testified that a total of seven individual components of the trailer identified by him as requiring repair or replacement were located at the front end of the trailer. His estimate of the vehicle damage costs, using standard industry estimating tools, was that 52.4 hours of labour would be required (including the aforementioned 1.0 hours for checking the king pin) with respect to those items. At a rate of \$120.00 per hour, and an additional \$9.00 per hour provision for shop supplies, labour charges for this "front end" damage would amount to \$6,759.60. Parts costs were estimated at \$1,515.90. The total "front end" damage was therefore estimated at \$8,275.50. Mr. Heitman testified that given the possibility of additional hidden damage, the total "front end" damage alone may have been close to the trailer's ACV, and for that reason, had he been dealing with the front-end damage only he probably would not have recommended repair, and would have recommended an ACV settlement.
- [16] The plaintiff submits that given the possibility of additional damage having been sustained in the first collision, the whole of the ACV loss should be attributed to the first collision, and the defendants held 100% liable for \$11,450.
- [17] The defendants say that the physical damage sustained in the two collisions is indivisible, and applying the Negligence Act, R.S.B.C. 1996, c. 333 as interpreted in *Bradley v. Groves*, 2010 BCCA 361 - or, alternatively, the rule in *Cook v. Lewis*, [1951] S.C.R. 830 - liability ought to be apportioned 50/50.
- [18] In *Bradley*, a personal injury case, the court concluded that once a trial judge determines as a fact that an injury is indivisible, the tortfeasors are jointly and severally liable to the plaintiff. The court distinguished between divisible and indivisible injuries as follows:
- [20] Divisible injuries are those capable of being separated out and having their damages assessed independently. Indivisible injuries are those that cannot be separated or have liability attributed to the constituent causes.
- [19] I do not accept the defendant's position that this is a case of indivisible damage. There were two discrete collisions. No expert evidence was tendered attributing distinct items of damage to one collision or the other, but that does not mean that such could not have been undertaken. There are post-accident photographs of the damaged vehicles in evidence; they show considerable deformation of the rear doors of the Reimer trailer. It appears to me from Jenkins J.'s description of the collisions that this rear damage must have been caused by the second collision. A common sense view of the photographs leads naturally to the inference that the front damage was caused by the first accident, the rear damage by the second. There is no evidence to the contrary.

- [20] On the other hand, however, I cannot accept the plaintiff's position that physical damage at least equal to the trailer's ACV can be inferred. Mr. Heitman only testified to there being front end damage of \$8,275.50, approximately \$3,375 less than the ACV. Mr. Heitman was not qualified as an expert in collision damage or accident reconstruction, and I cannot accept as proven fact his assumption that there may have been more physical damage than he identified. I do not say this as a criticism of Mr. Heitman. His procedure in assessing the damage appears to have been entirely appropriate to his role as a loss adjuster. But the standard of proof an insurer may require to settle a claim, and in particular to establish ACV as an appropriate basis of settlement, is not necessarily the standard of proof required to prove damages in a civil action.
- [21] In the present case, the physical damage proven to have been caused by each collision was less than the trailer's ACV, but added together exceeded the ACV. Had the total physical damage been below the ACV, it would have been economical to repair the vehicle, and each party would have been liable for their share of the damage caused by the collisions for which they were responsible. It is appropriate in these circumstances to attribute to each collision a share of the ACV roughly proportional to the damage identified. (I say "roughly" given that Mr. Heitman was not qualified as an expert and did not purport to give expert opinion evidence.)
- [22] The Reimer trailer front end repair costs identified by Mr. Heitman amounted to approximately 45% of the total trailer repair costs. Liability for the 55% portion of the rear end repair costs is divided 50/50. This means that the defendants bear responsibility for approximately 73% of the physical damage. Their proportionate liability for the Reimer trailer ACV is therefore 73% of \$11,450, or \$8,358.50. Trailer Salvage/Disposal
- [23] The two trailers were towed and disposed of by Thunder Valley Towing. The disposal charge was \$2,000 per trailer. There was no explicit agreement made as to salvage.
- [24] (The schedule of damages submitted by the defendants during the trial treated the disposal charges as a component of the towing, as they appear on the towing invoices. However, they are conceptually more properly dealt with under the heading of salvage, and I deal with them accordingly.)
- [25] The plaintiff suggests no credit be given for any notional salvage of the trailer tires and wheels. The defendant submits that a notional \$1,500 credit is appropriate, but submits that the salvage credit and disposal costs are subject to apportionment as indivisible damage.
- [26] It appears that whatever salvage value the trailers may have had was simply abandoned to Thunder Valley Towing. Given the modest potential value of any salvage, and the costs inherent in attempting to locate a buyer, I cannot conclude that any credit for salvage is appropriate. The plaintiff is entitled to claim \$2,000 for the cost of disposal.

- [27] As regards the disposal charge, I find that simply apportioning this \$2,000 on a 50/50 basis as contended for by the defendants is not appropriate. Such a result would ignore two facts: that the plaintiff's liability arises only vicariously, through the contributory negligence of its driver Mr. Gustavson; and that a substantial portion of the indivisible damage arose out of the first collision, in which the defendants were wholly at fault and the plaintiff's driver, Mr. Reimer, was without fault.
- [28] While liability for loss and damage is apportioned under the Negligence Act in accordance with relative degrees of fault, not relative degrees of contribution, it is in my view unjust to apportion liability for indivisible damage in this case without recognizing that the plaintiff's contributory fault, as a contributing factor in the second collision, played a discrete, though indivisible, role in creating a need for the trailer to be disposed of, and that there was no liability on the part of the plaintiff in respect of the first accident. Bradley stands, among other things, for the proposition that liability for indivisible injury is not to be apportioned on the basis of causation. It is still, however, appropriate to assess the relative degrees of fault of the parties in respect of each tort or accident that indivisibly contributed to the loss: see *Bilanik v. Ferman*, 2014 BCSC 732 at paras. 174-178.
- [29] Recognizing that there were two discrete causes of the indivisible loss, and that the plaintiff bears no responsibility for one of those two causes, I apportion the liability in respect of the indivisible damage to the Reimer trailer caused by the two collisions 25/75 in the plaintiff's favour.
- [30] The defendants' liability in respect of the Reimer trailer disposal costs and salvage is therefore 75% of \$2,000, or the sum of \$1,500. Trailer Towing Charges
- [31] The Reimer trailer towing charges totalled \$3,176. The defendants agree with this amount, but say again that it is to be apportioned as an item of indivisible damage. I do not agree. I find it is probable that the trailer would have required towing as a result of the first collision. The subsequent, second collision caused further damage, but there is no evidence that it led to further towing costs being incurred. I award the plaintiff the full towing amount of \$3,176, as claimed. C. Reimer Cargo Cargo Value
- [32] The Reimer trailer was carrying a load of wood cabinets and accessory pieces. The value of the damage is agreed at \$42,950.39. It may have been the case that the damage was sustained wholly, or predominantly, as a result of the first collision, and on this basis the plaintiff seeks recovery for the full value. However, in the absence of evidence, not knowing how robust this cargo may have been, how or where it was packed and loaded, or the precise nature of the damage, I cannot make that assumption. I therefore treat this also as an indivisible loss, to be apportioned on a 25/75 basis as described above. The defendants are therefore liable for \$32,212.79. Cargo Towing Charges

- [33] The cargo towing charges amounted to \$961.36. Unlike the trailer towing charges, I cannot conclude, on the evidence, that the second collision made no material impact on the cost of towing the damaged cargo; if, as seems likely, some units were damaged in one collision, and not the other, the complexity of the towing operation would have increased. This is properly assessed as an item of indivisible damage. The defendants are liable for 75% of the claimed amount, or \$721.02. D. Reimer Downtime
- [34] The downtime claim is accepted at \$6,095.25. E. Reimer Environmental
- [35] The parties' insurers divided up responsibility for clean-up costs between themselves on a first-party basis (i.e. without accounting for any liability determination that might be made in respect of the second collision). The evidence does not disclose the basis for this apportionment. Clean-up costs in the sum of \$56,986.28 were attributed to the Reimer vehicles, and the defendants accept their liability in this amount. III. Damage to Gustavson Tractor-Trailer A. Gustavson Tractor Unit Tractor Unit Value
- [36] The Gustavson tractor was a total write-off.
- [37] Mr. Heitman obtained prices for comparable units from a dealer based in Prince George, B.C. and from three internet listings - two in Burnaby, B.C. and one in Calgary, Alberta. The dealer's price was \$45,000. The internet prices - which I presume to be private sale - were considerably lower. The average of these four values, adjusted for mileage differentials, was determined by Mr. Heitman to be \$40,174.25. The defendants accept valuation based on this average replacement cost.
- [38] The plaintiff also submits evidence of quotes given by two Manitoba dealers - the plaintiff being based in Steinbach, Manitoba - in answer to inquiries from the plaintiff's insurer, MPIC. One dealer put the value at "mid to high \$40,000s", the other at "\$42,500 to \$43,000".
- [39] In my view, it stands to reason that the dealer quotes may have been higher to allow for some profit. On the other hand, it also stands to reason that a commercial enterprise such as the plaintiff (as opposed to an independent owner/operator) might rightly prefer to deal with a reputable dealer, rather than buying on a private sale. I would also give more weight to the Manitoba quotes, given that the plaintiff is a Manitoba company.
- [40] When Mr. Heitman conducted his inquiries, he did not appreciate that the Gustavson tractor contained some after-market accessories. These were: a satellite unit, or a similar unit having been purchased by the plaintiff for \$2,800 in August, 2010; an auxiliary power unit ("APU"), installed on the tractor by the dealer at the time of purchase in 2007, at a cost of \$10,000; and an auto-greasing unit, installed at the time of purchase at a cost of \$3,000.
- [41] The defendant objects to these after-acquired items being included in the loss assessment, on the grounds that there is no evidence that their presence on the vehicle would have increased the unit's sales value. However, unless the defendant is able to show that the plaintiff would be able to obtain similar vehicles equipped with such accessories at no additional cost, some credit must be given for their loss. The plaintiff submits that an

electronic item such as the satellite unit would have undergone only modest wear and tear and ought to be valued at its original cost, although it concedes that the mechanical accessories may be appropriately valued through applying a depreciation factor of 40%. Although this is not in keeping with the tractor's mileage, I accept Mr. Heitman's evidence that the accessories would not be in continuous use, and could therefore have a lower depreciation rate applied than that applicable to the tractor itself.

- [42] I assess the loss of the tractor unit on the basis of a base value of \$43,000, plus \$2,500 for the satellite unit, \$6,000 for the APU, and \$1,800 for the greasing unit, for a total value of \$53,300. Based on the liability finding of Jenkins J., the defendant is liable for one-half this amount, being \$26,650. Tractor Salvage/Disposal
- [43] As with the Reimer tractor, I find the plaintiff's acceptance of Thunder Valley Towing's offer to deal with the wreckage in return for the salvage to have been a practical solution. There is no credit due for any salvage. Tractor Towing Charges
- [44] Towing charges were incurred in the agreed amount of \$5,775.22. The defendants are liable for one-half this sum, being \$2,887.61. B. Gustavson Trailer Unit Trailer Unit Value
- [45] The trailer value is agreed at \$15,000. The defendants are liable for one-half this sum, being \$7,500. Trailer Salvage/Disposal
- [46] As with the Reimer unit, I find the plaintiff is entitled to recover on the basis of the disposal costs, without deduction for salvage value. The defendants are liable for one-half the disposal costs, being \$1,000. Trailer Towing Charges
- [47] The trailer towing charges amounted to \$2,780.20. The defendants are liable for one-half this sum, being \$1,390.10. C. Gustavson Cargo Cargo Value
- [48] The Gustavson cargo was a shipment of wire that had to be re-galvanized and then re-shipped. The damages payable by the defendant are the costs, net of HST (which could be claimed as a flow-through credit). The loss amounted to \$14,634.31. The defendants are liable for one-half this sum, being \$7,317.16. Cargo Towing Charges
- [49] The defendants accept the tendered towing charges of \$7,123.12, and are liable for one-half this sum, being \$3,561.56. D. Gustavson Downtime
- [50] Downtime is agreed at \$5,200. The defendants are liable for one-half this sum, being \$2,600. E. Gustavson Environmental
- [51] The agreed environmental clean-up charges are \$46,317.67. The defendants are liable for one-half this sum, being \$23,158.84. IV. Summary
- [52] The plaintiff will have judgment against the defendants for the following amounts: Reimer Tractor Unit Value \$ 27,450.00 Reimer Tractor Towing Charges \$ 10,750.81 Reimer Trailer Unit Value \$ 8,358.50 Reimer Trailer Salvage/Disposal \$ 1,500.00 Reimer Trailer Towing Charges \$ 3,176.00 Reimer Cargo Value \$ 32,212.79 Reimer Cargo Towing Charges \$ 721.02

Reimer Downtime \$ 6,095.25 Reimer Environmental \$ 56,986.28 Gustavson Tractor Unit Value \$ 26,650.00 Gustavson Tractor Towing Charges \$ 2,887.61 Gustavson Trailer Unit Value \$ 7,500.00 Gustavson Trailer Salvage/Disposal \$ 1,000.00 Gustavson Trailer Towing Charges \$ 1,390.10 Gustavson Cargo Value \$ 7,317.16 Gustavson Cargo Towing Charges \$ 3,561.56 Gustavson Downtime \$ 2,600.00 Gustavson Environmental \$ 23,158.84 TOTAL: \$223,315.92 V. Costs

[53] Unless there are factors I am unaware of, the plaintiff will be entitled to its costs at Scale B.

[54] If the parties wish to make submissions as to costs, arrangements may be made for a hearing through Supreme Court Scheduling - New Westminster. "A. Saunders J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/SC/15/11/2015BCSC1136.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/penner-international-inc-v-basaraba-estate-2015>

Prepared on 29 October 2026 · Esheria