

CANADA / JUDGMENT

Pereira v. Jory

2020 BCCA 318

COURT

British Columbia Court of Appeal

DECIDED

20 November 2020

BEFORE

The Honourable Mr. Justice Goepel

The Honourable Mr. Justice Hunter

The Honourable Mr. Justice Voith

On appeal from: An order of the Supreme Court of British Columbia, dated August 29, 2019 (Pereira v. Jory, 2019 BCSC 1465, Nanaimo Docket M76943).

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2020 BCCA 318 Pereira v. Jory

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Pereira v. Jory,
2020 BCCA 318
Date: 20201120
Docket: CA46402

Between:

Gordon Pereira
Appellant
(Plaintiff)
And
William Jory
Respondent
(Defendant)

Before:

The Honourable Mr. Justice Goepel
The Honourable Mr. Justice Hunter
The Honourable Mr. Justice Voith
On appeal from: An order of the Supreme Court of British Columbia, dated August 29, 2019 (Pereira v. Jory, 2019 BCSC 1465, Nanaimo Docket M76943).

Counsel for the Appellant:

P.K. McMurchy

**Counsel for the
Respondent:**

P.J. Giroday

**Place and Date of
Hearing:**

Vancouver, British Columbia
September 28, 2020

Place and Date of Judgment:	Vancouver, British Columbia November 20, 2020
Written Reasons by:	The Honourable Mr. Justice Goepel
Concurred in by:	The Honourable Mr. Justice Hunter The Honourable Mr. Justice Voith
Summary:	The parties were involved in a motor vehicle accident. The respondent was turning left at an intersection when struck by the appellant driving straight through. The appellant was travelling at least 40 km/h over the speed limit. The trial judge apportioned liability 60% to the appellant and 40% to the respondent. The appellant challenges the apportionment of liability on the basis that the trial judge erred in finding that the respondent had stopped at the stop sign despite uncontested expert evidence that showed the respondent's vehicle had never come to a complete stop. Held: Appeal dismissed. The trial judge made an error in finding that the respondent had stopped at the stop sign. Regardless, the trial judge's apportionment of liability is entitled to deference and is not grossly disproportionate to the apportionment the Court of Appeal would have made. Reasons for Judgment of the Honourable Mr. Justice Goepel: INTRODUCTION [1] This appeal concerns the apportionment of fault for a motor vehicle accident that occurred at an intersection in Nanaimo, British Columbia. Mr. Pereira's vehicle, which was proceeding on the through street, struck Mr. Jory's vehicle, whose entry into the intersection was controlled by a stop sign. The trial judge apportioned fault 60 percent to Mr. Pereira and 40 percent to Mr. Jory. Mr. Pereira now appeals the apportionment. He submits that Mr. Jory should be found at least 75 percent at fault. BACKGROUND [2] Following the accident, Mr. Pereira and Mr. Jory each commenced legal proceedings against the other for damages. The parties agreed to sever liability and damages and proceeded to trial in the two actions on liability alone. Because each driver was insured, they had different counsel in the individual actions. Their insurers provided defence counsel, while the parties had their personal counsel acting for them as plaintiffs. [3] The collision occurred on Sunday, May 17, 2015, at approximately 10 a.m. at the intersection of Rutherford Road and Cedar Ridge Place. The weather and road conditions were clear and dry. [4] Rutherford Road runs roughly east/west. It has two lanes in each direction, which are divided by a concrete median and some vegetation. I will refer to the two eastbound lanes of Rutherford Road as the median lane and the curb lane. The speed limit on Rutherford Road is 50 kilometres per hour. [5] Cedar Ridge Place runs roughly north/south and approaches Rutherford Road from the south to form a "T" intersection. A stop sign on Cedar Ridge Place controls entry onto Rutherford Road. At the location of the stop sign, there is a white line across the road, described in the evidence as a stop bar. [6] Mr. Pereira was driving a 2006 Chevrolet Cobalt east on Rutherford Road. Mr. Jory was driving a 2011 Dodge Caravan north on Cedar Ridge Place. He planned to turn left onto Rutherford Road. [7] Mr. Jory testified that he came to a complete stop at the stop sign on Cedar Ridge Place, looked left, right, then left again before proceeding into the intersection to make his turn. He said when he first looked left, he observed a vehicle in the curb

lane and Mr. Pereira's vehicle in the median lane of Rutherford Road. Mr. Jory testified he had no concern about making the left-hand turn, as he believed the vehicles were sufficiently far away that he could proceed safely across the eastbound lanes of Rutherford Road and then make his left turn. He agreed in cross-examination that he might not have been of the same opinion if he had understood that Mr. Pereira's vehicle was travelling well in excess of the 50 km/h speed limit. He testified the collision occurred in the median lane.

[8] Troy Monsell witnessed the accident. He was driving west on Rutherford Road. He testified that he had a clear view of the collision. He said he saw Mr. Jory's vehicle stopped at the Cedar Ridge Place stop sign and then observed the vehicle proceed slowly and cautiously forward. He said he then saw Mr. Pereira's vehicle heading east in the median lane at a speed he estimated at well over 80 km/h. He testified Mr. Pereira's vehicle jerked to the left at the last minute, which lessened the impact of the collision. He said the accident took place in the median lane.

[9] Mr. Pereira testified that he had turned off the Island Highway, which he believed was an 80 km/h speed zone, onto Rutherford Road, which he knew to be a 50 km/h speed zone. He testified that he was travelling in the curb lane "with the speed of traffic." He testified that he saw Mr. Jory's vehicle coming down Cedar Ridge Place before the stop sign and had a clear view of Mr. Jory's vehicle from the time he first noticed it until the collision. He said Mr. Jory's vehicle slowed down as it approached the stop sign. He says Mr. Jory's vehicle did not come to a complete stop at the stop sign but continued slowly past the stop sign and into the eastbound curb lane. Mr. Pereira testified that he did not slow down or apply his brakes as he assumed Mr. Jory's vehicle would stop. Mr. Pereira's recollection was Mr. Jory's vehicle came to a stop right in front of him, and he had no opportunity to avoid the accident. Mr. Pereira testified that the accident took place in the curb lane.

[10] Mr. Jory led evidence from Mr. Dinn, a professional engineer who was qualified as an expert in accident reconstruction. He opined that at the time of impact, Mr. Pereira's vehicle was travelling 90 km/h. He noted that if Mr. Pereira had braked prior to the accident, his speed before applying the brakes would have been approximately 115 km/h or more. Mr. Dinn stated that photographic evidence suggested the accident occurred in the median lane.

[11] Mr. Dinn was able to access the Event Data Recorder ("EDR") from Mr. Jory's vehicle, which provided five seconds of pre-crash data. The EDR data indicated that the Dodge was travelling at 18 km/h about 5 seconds prior to the crash when it was about 5 metres from the stop sign. It slowed to about 14 km/h when it was 3.8 seconds from impact and with its front bumper at the stop bar. At 3 seconds prior to impact, it was travelling at 8 km/h and was straddling the stop bar. At 2.4 seconds prior to impact, it was travelling at 8 km/h, and its front bumper was 3.6 metres ahead of the stop bar and 2.1 metres from Rutherford Road's roadway edge. At about 2 seconds prior to impact, its speed began to increase to about 10 km/h. The last speed captured, just prior to impact, was 22.5 km/h.

[12] The EDR data indicated that Mr. Jory applied the brakes from about 5 seconds to about 2.8 seconds prior to impact. The accelerator pedal had zero input until about 2.6 seconds prior to impact. The accelerator pedal was applied through to impact with a surge in the pedal application about 0.3 seconds prior to impact. In his testimony, Mr. Dinn agreed that the EDR data indicated that the Dodge did not stop at the stop bar or at any other point prior to entering the intersection.

[13] In his report, Mr. Dinn provided scenarios in which the accident might have been avoided. In that regard, he noted that if the Dodge had been able to travel an additional vehicle length, which would have taken about 0.8 seconds, no accident

would have occurred. He further opined that if the Chevrolet's speed were lower or the Chevrolet had decelerated such that it arrived 0.8 seconds later, the collision would have been avoided.

[14] Mr. Pereira filed an expert report from Mr. Gough in response to Mr. Dinn's report. Mr. Gough agreed that the accident likely happened in the median lane. He agreed with Mr. Dinn's interpretation of the EDR data and noted that the EDR data revealed that Mr. Jory's vehicle did not stop prior to entering the intersection. While Mr. Gough agreed it was possible to estimate the speed of Mr. Pereira's vehicle, he noted that such calculations are inherently uncertain. He did not provide an estimate of the speed of Mr. Pereira's vehicle. Mr. Gough did not testify.

REASONS FOR JUDGMENT

- [15] Regarding credibility, the trial judge preferred the evidence of Mr. Jory and Mr. Monsell over the evidence of Mr. Pereira. She found the evidence of Mr. Jory and Mr. Monsell consistent with each other's and with the expert evidence.
- [16] Notwithstanding that the expert evidence taken from the EDR data showed that Mr. Jory did not stop at the stop line, the trial judge found that Mr. Jory stopped at the stop line before proceeding into the intersection slowly and cautiously. She accepted Mr. Dinn's evidence that Mr. Pereira was speeding at the time of collision and was travelling between 80 and 115 km/h at the time of impact. She further found that Mr. Jory could have safely made the turn if Mr. Pereira had not been speeding. She found that Mr. Jory did not accurately assess the hazard presented by Mr. Pereira's vehicle since he assumed Mr. Pereira's vehicle was travelling in and around the speed limit.
- [17] The trial judge then considered the legal framework. She noted the drivers owe a common law duty to take reasonable care for the safety of themselves and others when using a roadway and that this duty was supplemented by the statutory duties found in the Motor Vehicle Act, R.S.B.C. 1996, c. 318 [MVA]. She noted the following provisions of the MVA as relevant:

Careless driving prohibited

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, or
- (c) at a speed that is excessive relative to the road, traffic, visibility or weather conditions.

...

Speed limits

146 (1) Subject to this section, a person must not drive or operate a motor vehicle on a highway in a municipality or treaty lands at a greater rate of speed than 50 km/h, and a person must not drive or operate a motor vehicle on a highway outside a municipality at a greater rate of speed than 80 km/h.

Yielding right of way on left turn

174 When a vehicle is in an intersection and its driver intends to turn left, the driver must yield the right of way to traffic approaching from the opposite direction that is in the intersection or so close as to constitute an immediate hazard, but having yielded and given a signal as required by sections 171 and 172, the driver may turn the vehicle to the left, and traffic approaching the intersection from the opposite direction must yield the right of way to the vehicle making the left turn.

Entering through highway

175 (1) If a vehicle that is about to enter a through highway has stopped in compliance with section 186,

- (a) the driver of the vehicle must yield the right of way to traffic that has entered the intersection on the through highway or is approaching so closely on it that it constitutes an immediate hazard, and
 - (b) having yielded, the driver may proceed with caution.
- (2) If a vehicle is entering a through highway in compliance with subsection (1), traffic approaching the intersection on the highway must yield the right of way to the entering vehicle while it is proceeding into or across the highway.

Stopping at intersections

186 Except when a peace officer directs otherwise, if there is a stop sign at an intersection, a driver of a vehicle must stop

- (a) at the marked stop line, if any,
- (b) before entering the marked crosswalk on the near side of the intersection, or
- (c) when there is neither a marked crosswalk nor a stop line, before entering the intersection, at the point nearest the intersecting highway from which the driver has a view of approaching traffic on the intersecting highway.

[18] In her analysis, the trial judge found that Mr. Jory stopped at the stop line in compliance with s. 186 of the MVA. She found that Mr. Jory should have realized that Mr. Pereira was an immediate hazard and therefore was the dominant driver with the right of way. She held that it should have been apparent to Mr. Jory that Mr. Pereira was travelling at an unsafe speed.

- [19] In regard to Mr. Pereira, the trial judge found, notwithstanding that he was the dominant driver, that he was travelling far in excess of the speed limit at the time of the collision. She found that his excessive speed was in contravention of his duties under the common law and s. 146 of the MVA. She found that had Mr. Pereira not been speeding, he would have been able to avoid the collision. She found Mr. Pereira negligent for not taking evasive action sooner.
- [20] In regard to the apportionment of liability, the trial judge stated that Mr. Pereira's dangerous and excessive speed in a residential area was a substantial cause of the accident. She found that Mr. Pereira's conduct was more blameworthy than Mr. Jory's. She found Mr. Jory 40 percent liable for the accident and Mr. Pereira 60 percent.

ON APPEAL

- [21] Mr. Pereira, in the action in which he is plaintiff, appeals the apportionment of liability. Mr. Pereira's insurer did not appeal in the action in which Mr. Jory is plaintiff. Accordingly, if the apportionment of liability is adjusted, the adjustment will only apply in the proceeding in which Mr. Pereira is plaintiff. This will result in inconsistent verdicts in the two actions. While inconsistent verdicts are to be avoided when possible, in certain circumstances they cannot be avoided. In this case, an inconsistent verdict might arise because of Mr. Pereira's insurer's decision not to appeal the verdict in the Jory action. Mr. Pereira, as plaintiff, has the right to appeal the apportionment, and his right to appeal cannot be frustrated because it might lead to an inconsistent result.
- [22] The foundation of Mr. Pereira's appeal is that the trial judge made a palpable and overriding error in finding that Mr. Jory stopped at the stop sign before proceeding onto Rutherford Road. He submits that this finding is clearly contradicted by the EDR data and cannot stand. He further submits that this finding, in turn, led to an incorrect apportionment of fault for the accident.
- [23] Mr. Jory submits that there is evidence to support the trial judge's finding of fact that Mr. Jory came to a complete stop at the stop sign and that this Court should defer to the trial judge's conclusion. He further submits that even if the trial judge made the alleged error, given the circumstances of the accident, her apportionment of liability should not be disturbed.

DISCUSSION

- [24] It is common ground that appellate courts are not to reverse findings of fact unless they can establish that the trial judge made a palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 10. An appellate court is not entitled to interfere because it takes a different view of the evidence.

- [25] That said, findings of fact are not immune from review. An appellate court can intervene if the judge has made a manifest error, has ignored conclusive or relevant evidence, has misunderstood the evidence or has drawn erroneous conclusions from it: *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 S.C.R. 114 at 121.
- [26] In this case, Mr. Jory and Mr. Monsell both testified that Mr. Jory's vehicle came to a complete stop at the Cedar Ridge Place stop sign. The trial judge stated that she believed the evidence of Mr. Jory and Mr. Monsell over the evidence of Mr. Pereira. She further found that their evidence was consistent with each other's and with the expert evidence.
- [27] In finding that the evidence of Mr. Jory and Mr. Monsell was consistent with the expert evidence, the trial judge clearly erred. The expert evidence contradicted their evidence that Mr. Jory came to a complete stop. The EDR data showed that Mr. Jory's vehicle slowed down but did not stop at the stop sign. In the five seconds prior to the accident Mr. Jory's vehicle was in constant motion. In closing submissions, all counsel agreed by way of admission that the EDR evidence was accurate.
- [28] In making her finding that Mr. Jory stopped at the stop sign, the trial judge did not make any reference to the EDR evidence despite it featuring prominently in the parties' closing submissions. She either misunderstood the EDR evidence or ignored conclusive or relevant evidence. The EDR evidence conclusively establishes that Mr. Jory's vehicle did not come to a complete stop at the stop sign. The trial judge's finding to the contrary cannot be upheld.
- [29] That error, however, does not in itself lead to the conclusion that the trial judge's apportionment of liability must be adjusted. In that regard, it must be remembered that the trial judge, notwithstanding her finding that Mr. Jory stopped at the stop sign as required by s. 186 of the MVA, held that Mr. Jory breached s. 175 of the MVA by entering the highway at a time when Mr. Pereira was an immediate hazard. Based on that finding, she found that Mr. Pereira was the dominant driver and had the right of way.
- [30] A judge's apportionment of liability is entitled to deference. *Moses v. Kim*, 2009 BCCA 82, sets out the standard of review of a trial judge's apportionment of fault under the Negligence Act, R.S.B.C. 1996, c. 333 [NA]:
- [33] The standard of review of a trial judge's apportionment of fault pursuant to the Negligence Act, R.S.B.C. 1996, c. 333 is also subject to a stringent standard. Appellate courts may not interfere with a trial judge's apportionment of liability unless there is a "gross disproportion" between the apportionment of fault as determined by the trial judge and the apportionment the appeal court would have made: *Crown West Steel Fabricators v. Capri Insurance Services Ltd.*, 2002 BCCA 417, 214 D.L.R. (4th) 577 at para. 27; *Rimmer (Guardian ad litem of) v. Langley (Township)*, 2007 BCCA 350, 48 M.V.R. (5th) 1 at para. 64. In earlier authority, this threshold was described as requiring "very strong and cogent reasons" to disturb the apportionment of liability as determined by a trial judge: *Stermer v. Lawson* (1979), 17 B.C.L.R. 181; *Swyrd v. Tulloch*, [1954] S.C.R. 199.

[31] Section 1 of the NA reads as follows:

- (1) If by the fault of 2 or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree to which each person was at fault.
- (2) Despite subsection (1), if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability must be apportioned equally.

[32] In *Cempel v. Harrison Hot Springs Hotel Ltd.* (1997), 43 B.C.L.R. (3d) 219 (C.A.), this Court emphasized that the inquiry under s. 1 is focused exclusively on the degree to which each party's conduct represented a departure from the expected standard of care. It is not an inquiry into other considerations that might connect the actions of one party more closely than the other with the damage that occurred. Mr. Justice Lambert, for the majority, said:

[19] The Negligence Act requires that the apportionment must be made on the basis of "the degree to which each person was at fault". In this context, "fault" means blameworthiness. So it is a gauge of the amount by which each proximate and effective causative agent fell short of the standard of care that was required of that person in all the circumstances.

...

[24] In the apportionment of fault there must be an assessment of the degree of the risk created by each of the parties, including a consideration of the effect and potential effect of occurrences within the risk, and including any increment in the risk brought about by their conduct after the initial risk was created. The fault should then be apportioned on the basis of the nature and extent of the departure from the respective standards of care of each of the parties.

[33] In *Alberta Wheat Pool v. Northwest Pile*, 2000 BCCA 505, Finch J.A. (as then he was) explained that fault or blameworthiness covers a continuum of conduct:

[46] Fault or blameworthiness evaluates the parties' conduct in the circumstances, and the extent or degree to which it may be said to depart from the standard of reasonable care. Fault may vary from extremely careless conduct, by which the party shows a reckless indifference or disregard for the safety of person or property, whether his own or others, down to a momentary or minor lapse of care in conduct which, nevertheless, carries with it the risk of foreseeable harm.

[34] In *Salaam v. Abramovic*, 2010 BCCA 212, Justice Groberman set out the Court's task in apportioning liability in a motor vehicle case:

[21] In the end, a court must determine whether, and to what extent, each of the players in an accident met their common law duties of care to other users of the road. In making that determination, a court will be informed by the rules of the road, but those rules do not eliminate the need to consider the reasonableness of the actions of the parties. This is both because the rules of the road cannot comprehensively cover all possible scenarios, and

because users of the road are expected to exercise reasonable care, even when others have failed to respect their right of way. While s. 175 of the Motor Vehicle Act and other rules of the road are important in determining whether the standard of care was met, they are not the exclusive measures of that standard.

- [35] In this case, Mr. Jory breached ss. 175 and 186 of the MVA. He failed to come to a complete stop at the stop sign, and he failed to yield the right of way to Mr. Pereira. While the EDR data show that he did not come to a complete stop, it also indicates that he did proceed with some caution. He slowed his vehicle to 8 km/h. He saw Mr. Pereira's vehicle but misjudged its speed.
- [36] Mr. Jory's failure to yield the right of way is not determinative in considering the respective degrees of fault. The dominant driver can be found to be negligent to a greater degree of fault than the servient driver: *Nerval v. Khehra*, 2012 BCCA 436 at para. 38.
- [37] Mr. Pereira was in breach of s. 146 of the MVA by driving at least 40 km/h over the 50 km/h speed limit. Arguably, he may also have been in breach of s. 144 of the MVA by driving at a speed that was excessive relative to road and traffic conditions. Although he observed Mr. Jory's vehicle proceeding through the stop sign, he did not slow his vehicle. If he had done so, the accident could have been avoided.
- [38] This Court should not interfere with the trial judge's apportionment of fault unless there is a "gross disproportion" between the apportionment of fault as determined by the trial judge and the apportionment the appeal court would have made. The trial judge held that Mr. Pereira's conduct was more blameworthy than Mr. Jory's. In the circumstances of this case, I cannot find that the trial judge's apportionment of fault is grossly disproportionate to the apportionment that this Court would have made.
- [39] I would indeed go further and add that notwithstanding the trial judge's error in regard to whether Mr. Jory stopped at the stop sign, in the circumstances of this case an assessment of the degree of the risk created by each of the parties, including a consideration of the effect and potential effect of occurrences within the risk, and including any increment in the risk brought about by their conduct after the initial risk was created, leads me to conclude and agree with the trial judge that as between Mr. Pereira and Mr. Jory the conduct of Mr. Pereira was more blameworthy.

[40] I would dismiss the appeal.

"The Honourable Mr. Justice Goepel"

I AGREE:

"The Honourable Mr. Justice Hunter"

I AGREE:

"The Honourable Mr. Justice Voith"

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