

CANADA / JUDGMENT

Randhawa v. Evans

2020 BCCA 292

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 292 Randhawa v. Evans COURT OF APPEAL FOR BRITISH COLUMBIA Citation:

Randhawa v. Evans, 2020 BCCA 292 Date: 20201027 Dockets: CA46159; CA46166; CA46167 Docket: CA46167 Between: Sarbjit Randhawa Respondent (Plaintiff) And Linda Lee Evans, Ocean Park Ford Sales Ltd., SCK Motor Company Limited, Sukhvir Paul and Randeep Paul Respondents (Defendants) And Sukhvir Paul and Randeep Paul Appellants (Defendants)

- and - Docket: CA46159 Between: Sukhvir Kaur Paul Appellant (Plaintiff) And Ocean Park Sales Ltd., SCK Motor Company Limited, and Linda Lee Evans Respondents (Defendants)
- and - Docket: CA46166 Between: Linda Lee Evans Respondent (Plaintiff) And Sukhvir Paul and Randeep Paul Appellants (Defendants) Before: The Honourable Mr. Justice Groberman The Honourable Mr. Justice Goepel The Honourable Madam Justice Fisher On appeal from: An order of the Supreme Court of British Columbia, dated May 21, 2019 (Randhawa v. Evans, 2019 BCSC 787, Vancouver Registry Dockets M094370, M106016 and M194426). Counsel for Sarbjit Randhawa in CA46167: E.A. Poyner Counsel for the Sukhvir Kaur Paul and Randeep Paul in CA46166 and CA46167: C.C. Godwin M.D. Booth Counsel for Sukhvir Kaur Paul in CA46159: B.S. Sanghera Counsel for SCK Motor Company Limited and Linda Lee Evans: L.R. Taneda Place and Date of Hearing: Vancouver, British Columbia September 9, 2020 Place and Date of Judgment: Vancouver, British Columbia October 27, 2020 Written Reasons by: The Honourable Mr. Justice Goepel Concurred in by: The Honourable Mr. Justice Groberman The Honourable Madam Justice Fisher Summary: The parties were involved in a motor vehicle collision. Respondent was turning left at an uncontrolled intersection when struck by the appellant driving straight through. Respondent did not see the appellant's oncoming vehicle before commencing her turn; appellant did not observe that cars to her left had stopped to allow the respondent to turn. The trial judge apportioned liability 90% to the appellant and 10% to the respondent. The appellant appeals the apportionment of liability on the basis that the trial judge erred in not recognizing and applying the appropriate legal priority between a left-turning driver and a driver passing another vehicle on the right and that the allocation of fault was grossly disproportionate to an appropriate allocation. Held: Appeal allowed. Liability apportioned 60% to the respondent and 40% to the appellant. Trial judge's apportionment of fault was grossly disproportionate to an appropriate allocation. The respondent entered the intersection when unsafe to do so. She failed to yield the right of

way. Appellant was at fault for failing to recognize that other vehicles had stopped. Based on the nature and extent of the departure from their respective standards of care, the respondent's conduct was clearly more blameworthy. 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 in an intersection when a driver turning left was struck by a vehicle driving through the intersection. The trial judge apportioned 90% of the fault of the accident to the through-driver (Ms. Paul) and 10% of the fault to the left-turning driver (Ms. Evans). Ms. Paul now appeals the apportionment. She submits that the allocation of fault was grossly disproportionate.

BACKGROUND

- [2] The motor vehicle accident occurred between 3 and 4 p.m. on December 10, 2008, at the intersection of Oak Street and Wolfe Avenue in Vancouver. Oak Street has three northbound lanes and three southbound lanes. During the afternoon rush hour, starting at 3 p.m., no parking is permitted in the southbound curb lane. Wolfe Avenue intersects perpendicularly with the west side of Oak Street. Wolfe Avenue is a residential street. The intersection is uncontrolled.
- [3] Ms. Evans was driving northbound on Oak Street in a red Mercedes-Benz SL500 coupe. She intended to turn left onto Wolfe Avenue and stopped in the left lane of Oak Street to wait for a break in traffic. After a couple of minutes, the southbound traffic started to back up, and the lead vehicle in each of the centre and middle southbound lanes stopped as a courtesy to let her turn left. She observed that three or four vehicles behind them had also come to a stop.
- [4] When Ms. Evans commenced her turn, her view of the curb lane was obstructed because of the two rows of traffic in the left and middle southbound lanes. Ms. Evans testified that she turned her car into the gap, stopped at the eastern edge of the curb lane and again, two feet into it, to check that the curb lane was clear. She then continued her turn. Ms. Evans testified that she then had a perfect view of the curb lane and that it was clear of vehicles. She said, "[it] would be suicidal just to dart across three lanes of traffic into the third lane, not knowing [what was] coming." When asked why she did not see a vehicle coming towards her in the curb lane, she said, "Because there was none."

- [5] Ms. Paul was driving a blue Dodge minivan in the curb lane southbound on Oak Street at 40-45 km/hr. The speed limit was 50 km/hr. She testified she was focusing on her lane and did not observe the traffic slowing in the other two southbound lanes as she approached Wolfe Avenue. As Ms. Evans pulled into the curb lane, the front of Ms. Paul's Dodge hit the passenger side of Ms. Evans' Mercedes. Both drivers testified that they did not see the other before the collision.
- [6] As a result of the motor vehicle accident, three lawsuits were commenced. Ms. Evans sued Ms. Paul and her husband, Randeep Paul, who owned the Dodge. Ms. Paul sued Ms. Evans, SCK Motor Company Limited ("SCK"), which was the lessee of the Mercedes and Ocean Park Ford Sales Ltd. ("Ocean Park"), which was the lessor of the Mercedes. Sarbjit Randhawa, who was a passenger in Ms. Paul's car, sued Ms. Paul, Mr. Paul, Ms. Evans, SCK, and Ocean Park. Each driver claimed the other was 100% at fault. Ms. Randhawa claimed that both drivers were at fault.
- [7] The trial was limited to liability. SCK and Mr. Paul admitted vicarious liability. The trial judge found that Ocean Park, who did not participate in the hearing, was also vicariously liable. The issue at the trial and on appeal was the respective liabilities of Ms. Evans and Ms. Paul.
- [8] The trial judge commenced her liability analysis by noting that the legal obligations of drivers are found in the Motor Vehicle Act, R.S.B.C. 1996, c. 318 [MVA] and in the common law duties of care that are owed to other road users.
- [9] The trial judge then noted that the relevant sections of the MVA were s. 158, which concerns passing on the right, and s. 174, which deals with yielding the right of way when turning left. Those sections read as follows: Passing on right 158 (1) The driver of a vehicle must not cause or permit the vehicle to overtake and pass on the right of another vehicle, except
- (a) when the vehicle overtaken is making a left turn or its driver has signalled his or her intention to make a left turn,
 - (b) when on a laned roadway there is one or more than one unobstructed lane on the side of the roadway on which the driver is permitted to drive, or
 - (c) on a one way street or a highway on which traffic is restricted to one direction of movement, where the roadway is free from obstructions and is of sufficient width for 2 or more lanes of moving vehicles.
- (2) Despite subsection (1), a driver of a vehicle must not cause the vehicle to overtake and pass another vehicle on the right
- (a) when the movement cannot be made safely, or
 - (b) by driving the vehicle off the roadway. 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.

- [10] She next cited the decision in *Nerval v. Khehra*, 2012 BCCA 436, where this Court considered the relationship between the obligations posed by these provisions of the MVA and established a framework for assessing liability under them.
- [11] The trial judge then turned to consider whether Ms. Paul was an immediate hazard when Ms. Evans commenced her left turn. She implicitly rejected Ms. Evans' evidence that there was no vehicle in the curb lane. She found that the Dodge was there to be seen, and Ms. Evans was negligent in not seeing it. Ms. Evans' counsel concedes on the appeal that, based upon this finding of fact, the Dodge was an immediate hazard when Ms. Evans commenced her turn and that Ms. Paul had the right of way.
- [12] The trial judge then went on to consider whether Ms. Paul was negligent. She held that Ms. Paul breached s. 158 of the MVA and her common law duty of care by not paying attention to the traffic in the middle and southbound lanes and not seeing that the traffic in those lanes was slowing and/or stopping as she approached the Wolfe Avenue intersection. The trial judge found Ms. Paul had a positive obligation to be aware of all her surroundings and that she did not see Ms. Evans' vehicle because she was not paying attention to what was happening on her left. She found a reasonable driver would have been aware that they were passing on the right and of the slowing or stopped traffic at Wolfe Avenue and should have approached the intersection with caution at a reduced speed. She found that if Ms. Paul had done this, the collision could have been avoided.
- [13] The trial judge apportioned liability 90% to Ms. Paul and 10% to Ms. Evans. In doing so, she said:
- [29] In apportioning liability in this case, I am guided by what Justice Groberman wrote in [*Salaam v. Abramovic*, 2010 BCCA 212]:
- [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.

- [30] In this case, Ms. Paul bears the lion's share of responsibility for the collision because her breach of the standard of care was far more serious than Ms. Evans'. Ms. Paul was not attending to the traffic around her at all. By contrast, Ms. Evans approached the left turn with caution, but somehow failed to see the approaching Dodge. Considering all of the circumstances, I apportion liability 90% to Ms. Paul and 10% to Ms. Evans. ON APPEAL
- [14] Ms. Paul does not challenge the trial judge's finding that she was negligent. She submits, however, that the trial judge allocated fault in a manner that was grossly disproportionate to an appropriate allocation when Ms. Evans breached the higher legal standard of care, and neither party saw the other until the moment of collision. She submits the relationship and priority between the duties of drivers set out in ss. 174 and 158 of the MVA were considered and definitively determined in *Nerval*, where the Court held that the obligation created by s. 174 has priority over the obligation created by s. 158: at para. 29. She submits that in determining the relevant apportionment of fault between Ms. Evans and Ms. Paul, the trial judge did not consider nor apply the priority of duties under s. 174 over those under s. 158 as mandated by the decision in *Nerval*. She submits that in failing to do so, the trial judge made an error of law that justifies this Court to intervene on a standard of correctness.
- [15] Ms. Paul further submits that the analysis of the trial judge as to the relative degrees of fault cannot be supported. She notes that neither driver saw the other until the moment of impact, nor can it be said that the negligence of the through-driver who did not see the left-turning vehicle was greater than the negligence of the left-turning driver who did not see the through vehicle. She notes the judge found that the Dodge was an immediate hazard when Ms. Evans commenced her left turn, and Ms. Evans had a positive obligation not to commence her turn in the face of that immediate hazard.
- [16] Ms. Paul submits that the appropriate allocation of fault in this case would be 90% against Ms. Evans and 10% against Ms. Paul. Alternatively, she submits that there can be no realistic justification for any allocation less than that set out in *Nerval* in which the servient left-turner was held 60% at fault and the dominant driver, who in that case was speeding, was held but 40% at fault.
- [17] Ms. Evans submits that the trial judge's analysis contains no palpable and overriding errors, and her apportionment of fault should not be disturbed.
- [18] Ms. Randhawa took a limited role in the appeal. While generally supportive of the trial judge's decision, she argued that if this Court finds the trial judge erred, this Court should allocate fault without ordering a new trial, and if fault is re-allocated, Ms. Paul should be found at least 10% at fault for the collision. DISCUSSION
- [19] *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.
- [20] On the appeal, Ms. Paul submitted that the trial judge had erred in law by not recognizing and applying the appropriate legal priority between the duties of a left-turning driver and the duties of a driver passing another vehicle on the right. While this Court in *Nerval* found that the duties under s. 174 of the MVA on a left-turning driver take priority over the obligation under s. 158 of the driver passing another vehicle on the right, such a finding is not determinative in considering their respective degrees of fault. Indeed, in *Nerval* itself, the Court acknowledged that a through-driver may indeed be negligent, even to a greater degree of fault than the servient driver: at para. 38.
- [21] 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.
- [22] 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 focussed 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.
- [23] In *Alberta Wheat Pool v. Northwest Pile*, 2000 BCCA 505, Finch J.A. (as he then 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.
- [24] Ms. Evans departed from safety rules when she entered the intersection when it was unsafe to do so. She did not keep a proper lookout. She failed to yield the right of way. Ms. Paul was not speeding, but she was at fault for not recognizing that the vehicles to her left had stopped and failing to slow down. I note that the traffic to her left had only come to a stop in the moments before Ms. Evans commenced her turn. Once Ms. Evans pulled into the curb lane, Ms. Paul had no opportunity to avoid the collision. In considering the nature and extent of the departure from the respective standards of care of each of the parties, I am of the view that the conduct of Ms. Evans was clearly more blameworthy. With respect, I find that the trial judge's apportionment of fault was grossly disproportionate to the apportionment the appeal court would have made. I would apportion liability 60% to Ms. Evans and 40% to Ms. Paul. COSTS
- [25] Ms. Paul is entitled to the costs of the appeal against Ms. Evans. Given Ms. Randhawa's limited role in the appeal, I would make no award for costs for or against her. "The Honourable Mr. Justice Goepel" I AGREE: "The Honourable Mr. Justice Groberman" I AGREE: "The Honourable Madam Justice Fisher"

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