

CANADA / JUDGMENT

Russell v. Parks

2014 BCCA 104

COURT

British Columbia Court of Appeal

DECIDED

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2014 BCCA 104 Russell v. Parks COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Russell v. Parks, 2014 BCCA 104 Date: 20140319 Docket: CA040177 Between: Lenord Russell Appellant (Plaintiff) And Kenneth Manson Parks Respondent (Respondent) Before: The Honourable Madam Justice Newbury The Honourable Mr. Justice Frankel The Honourable Madam Justice Bennett On appeal from: Order of the Supreme Court of British Columbia, dated July 27, 2012 (Russell v. Parks, 2012 BCSC 1128, Cranbrook Docket 19093.) Counsel for the Appellant: M.G. Temple Counsel for the Respondent: R.A. Cundari, Q.C. C. Cavanagh Place and Date of Hearing: Vancouver, British Columbia October 16, 2013 Place and Date of Judgment: Vancouver, British Columbia March 19, 2014 Written Reasons by: The Honourable Madam Justice Bennett Concurred in by: The Honourable Madam Justice Newbury The Honourable Mr. Justice Frankel Summary: The appellant was a pedestrian in a motor vehicle accident. At trial the defendant driver was held liable but the appellant was found contributorily negligent and his damages were reduced by two-thirds. He appealed the apportionment of liability and the failure to award him damages for cost of future care. Held: Appeal allowed; the trial judge erred in assessing the appellant's statutory obligations under the Motor Vehicle Act leading to a grossly disproportionate distribution of liability. As there was ample medical evidence to support some of the appellant's claims for future care, these were allowed in part. Reasons for Judgment of the Honourable Madam Justice Bennett: I. BACKGROUND

- [1] On August 21, 2008, Mr. Russell was walking through the parking lot of a strip mall in Cranbrook, B.C. when he was struck by a vehicle driven by Mr. Parks.
- [2] Mr. Russell had just left a bakery located in the strip mall. He proceeded along a walkway adjacent to the strip mall and then stepped over a low concrete barrier that separated the stores and walkway from a strip of angled parking stalls. Unlike many strip malls, there is no clear sidewalk in front of the stores. There is a walkway, but if someone opens a door from one of the stores, it takes up most of the space. When a vehicle pulls into a parking stall nothing physically, including the concrete barrier, prevents it from encroaching on that walkway. Mr. Russell was about six feet into a marked parking stall when Mr. Parks' vehicle struck him. As Mr. Parks pulled into the stall to park his vehicle he was looking backwards, performing a shoulder check, because he had come into the lot against the direction of the angled parking stalls and was manoeuvring his vehicle in a wide turn to pull into the space.

Mr. Russell was looking down when he was struck. He injured his right knee, left ankle (which exacerbated pre-existing left knee and ankle injuries) and fractured a bone in his left foot. He spent several months in a wheelchair after the accident.

- [3] The trial judge concluded that Mr. Parks was 33 1/3% liable and that Mr. Russell was 66 2/3% liable for the accident. Mr. Russell appeals this apportionment of liability.
- [4] The trial judge ordered damages in favour of Mr. Russell for non-pecuniary losses, and past and future loss of earning capacity in the total amount of \$85,000 (which was subsequently reduced by two-thirds to account for his contributory negligence). The trial judge did not award anything for cost of future care. Mr. Russell also appeals that finding.
- [5] The trial judge relied on ss. 179-181 of the Motor Vehicle Act, R.S.B.C. 1996, c. 318: Rights of way between vehicle and pedestrian 179 (1) Subject to section 180, the driver of a vehicle must yield the right of way to a pedestrian where traffic control signals are not in place or not in operation when the pedestrian is crossing the highway in a crosswalk and the pedestrian is on the half of the highway on which the vehicle is travelling, or is approaching so closely from the other half of the highway that he or she is in danger.
 - (2) A pedestrian must not leave a curb or other place of safety and walk or run into the path of a vehicle that is so close it is impracticable for the driver to yield the right of way.
 - (3) If a vehicle is slowing down or stopped at a crosswalk or at an intersection to permit a pedestrian to cross the highway, the driver of a vehicle approaching from the rear must not overtake and pass the vehicle that is slowing down or stopped. Crossing at other than crosswalk 180 When a pedestrian is crossing a highway at a point not in a crosswalk, the pedestrian must yield the right of way to a vehicle. Duty of driver 181 Despite sections 178, 179 and 180, a driver of a vehicle must
 - (a) exercise due care to avoid colliding with a pedestrian who is on the highway ...
- [6] The trial judge made the following findings of fact with respect to Mr. Park's conduct:
 - [32] In my view, the defendant was in breach of both his statutory and common law duties which he owed the plaintiff. His breach of his statutory duties is evidence from which I can conclude in consideration of all the evidence that he was negligent. In particular, although Mr. Parks did have the right of way, he failed to keep a proper lookout for persons, such as the plaintiff, who he either saw or, acting reasonably, ought to have seen prior to the Accident occurring.
- [33] I find that Mr. Parks was proceeding slowly immediately prior to the Accident. He was likely going somewhat faster than his estimate of one to two miles per hour but still at a safe and slow speed considering the fact he was bringing his vehicle to a stop while in the process of parking.

- [34] I accept he made three separate checks over his right shoulder, the first as he made his wide turn to get around the vehicle which was parked, the others after he saw the individual in front of the Windsor Plywood store. But I also find it was likely the last two checks took place just before and as the defendant entered the parking space which diverted his attention from the fact the plaintiff had crossed over the concrete barrier and had placed himself directly in front of his van. Had the defendant been keeping a proper lookout he would have seen the plaintiff who was clearly there to be seen.
- [35] In so far as causation is concerned, I find that the defendant, at the speed he was travelling, could have brought his vehicle to a stop without coming into contact with the plaintiff had he been keeping a proper lookout as to what was taking place in front of him.
- [7] The trial judge also found Mr. Russell contributorily negligent. He made the following findings of fact regarding his actions:
- [36] I also conclude the plaintiff was contributorily negligent. I find he left a place of safety, being the walkway, and stepped over the concrete barrier. By doing so, he immediately placed himself right in front of the defendant's vehicle which was in the process of being parked. Mr. Russell was unable to provide any explanation for his actions. His counsel suggested there may have been an open door to one of the businesses which impeded the plaintiff's passage or a concern that at the end of the walkway near Windsor Plywood there was a "blind corner" as a reason for the plaintiff's actions. He then indicated it would be sheer speculation to conclude this was the reason for the plaintiff acting as he did. I agree.
- [37] Based on the plaintiff's evidence on examination for discovery referred to above, I conclude he was looking downwards as he stepped over the concrete barrier and, when he looked up, realized the defendant's vehicle was right in front of him. He was not, in my view, paying attention when he did so and, accordingly, failed to take reasonable care for his own safety.
- [8] The trial judge concluded that Mr. Russell had left a place of safety and immediately placed himself in front of Mr. Park's car. He appears to have found liability, in part at least, on Mr. Russell's violation of s. 179(2) of the Motor Vehicle Act.
- [9] In terms of future care costs, the trial judge said there was no "medical justification for his claim for future care costs causally related to the Accident" (para. 101). He denied Mr. Russell's claims for weight loss therapy, physiotherapy, kinesiology, a recumbent bicycle, leg braces, as well as annual costs for weight reduction maintenance, physiotherapy, kinesiology, yard maintenance and snow removal.
- II. POSITIONS OF THE PARTIES
- [10] Mr. Russell argues that the trial judge erred in finding that the walkway in front of the stores in the strip mall was a "place of safety". He further submits that there should be no finding of contributory negligence against him. Alternatively, he submits that if there was a basis for finding contributory negligence, the conclusion of the judge is significantly outside the range of liability found in similar cases.

- [11] Mr. Russell submits that the trial judge erred in not awarding anything for the cost of future care. He submits that the trial judge applied the wrong test when assessing whether there was any medical evidence to support an award under this head of damages.
- [12] Mr. Parks disputes all of these assertions. III. DISCUSSION A. Contributory Negligence and Apportionment of Liability
- [13] This court will not interfere with a trial judge's apportionment of liability unless it is grossly disproportionate to what the appeal court would have made if it had been trying the case: see *Moses v. Kim*, 2009 BCCA 82 at para. 33.
- [14] Much argument was made of whether Mr. Russell had left a "place of safety" within the meaning of s. 179(2) of the Motor Vehicle Act.
- [15] In my view, s. 179(2) does not apply to this case. In *Loewen v. Bernardi* (1994), 93 B.C.L.R. (2d) 242 (C.A.), Rowles J.A., speaking for herself and Prowse J.A., reviewed several cases that have considered s. 179 (what was then s. 181) and interpreted the provision as follows:
- [47] The provisions of s. 181 of the Act have recently been considered by this Court in *Cook v. Teh* (1990), 45 B.C.L.R. (2d) 194, and in *Pirang v. Kooy* (1993), 76 B.C.L.R. (2d) 396. In *Cook v. Teh*, Anderson J.A. at p. 203 set out the interpretation of subss. (1) and (2) of s. 181 [now s. 179(1) and (2)] which had been relied upon by the defendant (appellant): The focus of these subsections is on the positive act of "crossing in a cross-walk" and upon the leaving of a "curb or other place of safety". It is submitted that the proper interpretation of the subsections is as follows:
- (1) A pedestrian who desires to cross a highway in a cross-walk must not leave a curb or other place of safety and walk or run into the path of a vehicle that is so close that it is impracticable, i.e. when there is no "time" ("time" being the product of "speed" X "distance") for a driver to yield the right of way and
 - (2) Having discharged such obligation both to himself and to the drivers of such vehicles, the pedestrian may then commence his act of "crossing" and the drivers of approaching vehicles (none of whom fall into the category of being "so close") must then yield the right of way to the "crossing" pedestrian. The result is a rational, reasonable and predictable code of conduct for motorists and pedestrians alike.
- [48] Mr. Justice Anderson rejected (at pp. 203-204) the defendant's interpretation of s. 181(1) and (2), but that interpretation was accepted by both Wallace J.A. in his dissenting reasons at pp. 210-211 and with Wood J.A. in his concurring reasons at p. 220.
- [49] In *Pirang v. Kooy*, supra, the plaintiff appealed the dismissal of her action while conceding her own negligence. Mr. Justice Hutcheon, at p. 398, (Wood and Gibbs J.J.A. agreeing), approved the trial judge's interpretation of s. 181(1) and (2) of the Act. The trial judge had said: These subsections place an obligation on a motorist in Mr. Kooy's position to maintain an ability to yield the right of way to a pedestrian in Ms. Pirang's position as he approaches

the crosswalk. In order to do this he must remain ready and able to bring his vehicle to a stop if the pedestrian elects to exercise her right of way. When the vehicle is so close to the crosswalk that it is impracticable for its driver to yield the right of way to the pedestrian the obligation shifts to the pedestrian to yield the right of way to the vehicle. The statute places an obligation on both parties to keep the other under observation.

- [50] In respect to the defendant's obligation in approaching the crosswalk, Hutcheon J.A. said at p. 399: Even though the trial judge, in my opinion, interpreted s. 181 correctly, that does not end the obligation of the driver approaching the crosswalk. Mr. Brun submits that Kooy breached his common law duty to avoid a collision and ought to be found to have contributed to the accident . . . In *British Columbia Electric Railway v. Farrer*, [1955] S.C.R. 757, Mr. Justice Estey at p. 763 said: Legislative bodies have, for many years, been enacting provisions intended to facilitate and make safer the movement of pedestrians and vehicular traffic on the highways and public streets. The general rule is that these provisions and regulations are supplementary, or in addition, to the common law duty that rests upon all persons using the highways to exercise due care. *Swartz Bros. Ltd. v. Wills; Royal Trust Co. v. Toronto Transportation Commssn.* (my emphasis) [Underlining added, italics in original.]
- [16] In my respectful opinion, the trial judge erred in law by applying s. 179(2), rather than ss. 180 and 181, to the circumstances of this case. Madam Justice Rowles' analysis in *Loewen v. Bernardi*, and the wording of s. 179, when viewed as a whole, describe a code of conduct for vehicles and pedestrians who are approaching or entering a crosswalk. Where, as in this case, there are no crosswalks, ss. 180 and 181 are more appropriate. Section 180 imposes a duty on the pedestrian to yield the right of way to a vehicle when crossing a highway at a point not in a crosswalk. Under the Motor Vehicle Act, a parking lot falls within the definition of "highway". Mr. Russell was crossing through a parking lot and it is clear that he was not using a crosswalk, therefore s. 180 applies. Section 181 imposes a corresponding duty on a driver "to exercise due care to avoid colliding with a pedestrian on a highway." The standard of "due care" will obviously be higher in a parking lot than, for example, on a freeway, because one can expect pedestrians to be using that space. This approach is consistent with *Bohati v. Jewell* (1996) 84 B.C.A.C. 161, another "parking lot" case, where this court relied on what are now ss. 180 and 181 to apportion liability. Sections 180 and 181, rather than s. 179(2), have also been relied upon in lower court decisions involving parking lots: see *Gray v. Ellis*, 2006 BCSC 1808, and *Davidson v. Donnelly*, [1996] B.C.J. No. 800 (S.C.).
- [17] Even if Mr. Russell did leave a place of safety, the trial judge erred in his interpretation of s. 179(2) by considering only part of it. This provision has two components: a pedestrian must leave a place of safety and this must be done so suddenly that it is "impracticable for the driver to yield the right of way." The trial judge's findings clearly indicate it was not impracticable for Mr. Parks to yield the right of way. He found that Mr. Parks could have stopped and avoided the accident had he been keeping a proper lookout (para. 34). In my view, s. 179(2) contemplates a situation where the pedestrian steps onto a path designated for pedestrians (such as a crosswalk) but in doing so steps immediately into the path of a

moving vehicle that could not practicably yield the right of way in time. According to the trial judge's findings, this does not describe the situation in which Mr. Russell and Mr. Parks found themselves.

- [18] Mr. Russell argues that if he was not in violation of the statutory obligation pursuant to s. 179(2), he is not contributorily liable. I would not disturb the trial judge's finding that he breached his common law (and statutory) duty to exercise due care and that this contributed to his injuries. The trial judge found that Mr. Russell was looking down as he walked into the parking stall, and as a result, failed to take reasonable care for his own safety. There is no basis on which to interfere with this conclusion.
- [19] The next question is whether the apportionment of liability was grossly disproportionate to what this court would have ordered (see *Moses*, supra, para. 33). Each assessment will turn on the facts of the case. In this instance, Mr. Russell was looking down as he stepped over the barrier, and continued to look down as he took a few steps into the parking stall. Mr. Parks was aware that there were pedestrians in the area, entered the lot from a direction that required him to swing wide to enter a parking stall, changed his mind at the last minute in terms of which stall he would take, shoulder checked numerous times, and ended up driving forward when he was looking backward, striking Mr. Russell. Clearly both were at fault. However, finding that Mr. Russell was two-thirds responsible for the accident, in my respectful view, is grossly disproportionate to his fault. The trial judge was clearly influenced by the finding that Mr. Russell had breached his statutory duty under s. 179(2) of the Motor Vehicle Act by leaving a "place of safety". As I have explained above, this finding was in error. Although Mr. Russell was looking down as he walked, he did not step off a curb or shoulder into moving traffic (which is what s. 179(2) is designed to prevent) and his fault should not be assessed as if he did.
- [20] In *Loewen v. Bernardi*, this court reduced a finding of liability against the pedestrian plaintiff from 25% to 10% on the basis that the plaintiff's contribution was minor. In that case, the plaintiff was half-way through a marked crosswalk when he was struck by a vehicle. I would not characterize Mr. Russell's degree of fault as "minor". On the other hand, it was not the main cause of the accident. The main cause was the fact that Mr. Parks drove forward while he was looking backward. I would allow the appeal on this ground and apportion liability on the basis of 75% against Mr. Parks and 25% against Mr. Russell. B. Cost of Future Care
- [21] This court has recently addressed the question of the proper test to be applied to this head of damage, as well as what evidentiary foundation is required to establish the award. In *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144, Garson J.A. said:
- [38] Courts do accept testimony from a variety of health care professionals as to necessary and reasonable costs of future care: *Jacobson v. Nike Canada Ltd.* (1996), 19 B.C.L.R. (3d) 63, 133 D.L.R. (4th) 377 (S.C.) at para. 182; in which Levine J. (as she then was) said:

- [182] The test she enunciated does not, in my view, require that the evidence of the specific care that is required by the plaintiff be provided by a medical doctor. In *Milina v. Bartsch*, McLachlin J. accepted the evidence of a rehabilitation expert as to the type of care that should be provided. See also: *Aberdeen v. Zanatta*, 2008 BCCA 420 at paras. 43-53, 63; *Rizzolo v. Brett*, 2010 BCCA 398 at paras. 72-83.
- [39] I do not consider it necessary, in order for a plaintiff to successfully advance a future cost of care claim, that a physician testify to the medical necessity of each and every item of care that is claimed. But there must be some evidentiary link drawn between the physician's assessment of pain, disability, and recommended treatment and the care recommended by a qualified health care professional: *Aberdeen* at paras. 43, 63.
- [22] An occupational therapist was qualified to give expert opinion evidence in the area of work capacity and cost of care. She summarized the following costs of future care for Mr. Russell:
- ONE-TIME ONLY COSTS
Nutritional counseling 1,360.00
Registration for weight reduction maintenance program 44.00
Physiotherapy 1,440.00
Kinesiology 1,600.00
Recumbent bicycle 950.00
Custom right knee off-loading brace 1,225.00
Custom left ankle off loading brace 210.00
TOTAL

\$6,829.00 ESTIMATED YEARLY COST OF CARE NEEDS STARTING IN 2012
Weight reduction maintenance 660.00
Physiotherapy 540.00
Kinesiology 600.00
Yard maintenance 400.00
Snow removal 200.00

\$2,400.00

- [23] The medical evidence indicated that almost every physician recommended weight loss, and two indicated that Mr. Russell's deconditioning was, at least in part, due to the accident. There was evidence that Mr. Russell had gained weight post-accident. The trial judge accepted that the injuries he sustained as a result of the accident had exacerbated his pre-existing weight and conditioning problems (para. 63). Mr. Russell has considerable difficulty doing any kind of exercise because of the injury to his knee. According to the medical experts, if he lost weight, he would suffer less pain. Since he is now deprived of the ability to exercise as he used to (he played hockey prior to the accident and has been unable to play since), nutritional counselling and weight loss are the only avenues left to drop some of his excessive weight. In my respectful view, there was ample medical evidence linking at least part of his need for weight reduction to the injuries he suffered as a result of the accident.
- [24] Before the accident, Mr. Russell did heavy yard work and shovelled snow to earn his living. The trial judge found the following with respect to his ability to earn a living in the future:

- [88] In my view the plaintiff has proven a real and substantial possibility of a future event leading to a financial loss which is causally related to the injuries sustained in the Accident. His inability to earn an income in the future and to which the Accident's injuries have contributed is not mere speculation. Although others may have recuperated from a soft-tissue injury to the right knee in the timeframe identified by Dr. Leith, that is not the appropriate barometer. I have found that of the multifactoral causes of the plaintiff's ongoing condition and disability, these include the injury to the right knee. This conclusion is supported by the opinions of Dr. Richardson, Dr. Craig and Ms. Petrov. Although the plaintiff's weight did apparently return to its pre-Accident level a few months after the Accident, it then increased significantly. More recently it has been reduced. This is consistent with the plaintiff being inactive, then attempting to exert himself more as he perceived his knee condition to be improving.
- [25] The trial judge awarded Mr. Russell \$30,000 for loss of future earning capacity.
- [26] In my view, this finding is inconsistent with the refusal to award damages for assistance for his own yard work and snow removal. Dr. Craig opined that Mr. Russell would need assistance with heavy yard work. In my view, there is ample medical evidence linking this cost to the accident. I would allow the award for yard maintenance and snow removal.
- [27] Mr. Russell was of the view that physiotherapy was no longer helping him, and stopped attending. There is no medical evidence specifically suggesting that physiotherapy will help him at this point. I would not allow this cost.
- [28] Similarly, a search of the transcripts and reports do not support an off-loading knee or ankle brace for Mr. Russell. I would not award this cost.
- [29] In summary, I would award the one-time costs of nutrition counselling, registration for a weight reduction maintenance program, kinesiology (to implement the weight loss program) and the recumbent bicycle; and the on-going costs of weight reduction maintenance, kinesiology, yard maintenance and snow removal. IV. CONCLUSION
- [30] I would allow the appeal. I would reapportion liability at 25% against Mr. Russell and 75% against Mr. Parks. I would allow some of the costs of future care as detailed above. Counsel may calculate the precise figure for the order. I would grant Mr. Russell his costs of the appeal.
- [31] As there were pre-trial settlement offers, the issue of costs ordered at trial may need to be revisited in light of this ruling, and I would refer the matter to the trial court to resolve that issue, if necessary. "The Honourable Madam Justice Bennett" I agree: "The Honourable Madam Justice Newbury" I agree: "The Honourable Mr. Justice Frankel"

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