
CANADA / JUDGMENT

Sarkari v. Carew

2018 BCSC 2129

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Supreme Court of British Columbia

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2018 BCSC 2129 Sarkari v. Carew

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sarkari v. Carew,

2018 BCSC 2129

Date: 20181203

Docket: M111772

Registry: Kelowna

Between:

Fred Sarkari

Plaintiff

And

Christopher Carew

Defendant

And

Insurance Corporation of British Columbia

Third Party

Before: The Honourable Mr. Justice Riley

Reasons for Judgment

Counsel for the Plaintiff:

J.A. Hemmerling and

M. Prah

Defendant:

No Appearance

Counsel for the Third Party:

G. Ginter

Place and Date of Trial/Hearing:

Kelowna, B.C.

November 21, 22, 2018

Place and Date of Ruling given to Parties with Reasons to follow:

Kelowna, B.C.

November 23, 2018

Place and Date of Reasons:

Kelowna, B.C.

December 3, 2018

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Introduction

- [1] These are reasons for judgment on the issue of liability in respect of a motor vehicle collision. The collision occurred on 7 May 2015, in Kelowna. The plaintiff Mr. Sarkari was driving a 2008 Mercedes Sedan and the defendant Mr. Carew was driving a 2007 BMW motorcycle. The vehicles collided at the intersection of Park Avenue and Knox Crescent. The plaintiff Mr. Sarkari filed a Notice of Civil Claim, seeking damages from Mr. Carew in connection with the collision; Mr. Sarkari says Mr. Carew bears full responsibility for the collision and should be found liable. Mr. Carew did not file an appearance in this matter. The third party ICBC filed a Third Party Notice and a Response to the Notice of Civil Claim, denying liability for the collision on behalf of Mr. Carew.
- [2] The trial in this matter began on 21 November 2018 and lasted for two days. On 23 November 2018, I gave judgment, holding that this was a case requiring apportionment of liability, and that the defendant bore 80% responsibility and the plaintiff bore 20% responsibility, with written reasons to follow. These are the reasons.

The Facts

- [3] There were two witnesses called by the plaintiff. The first was Mr. Sarkari himself. The second was Mr. Hughes, a pedestrian who was on the sidewalk when the collision took place more or less right in front of him. The third party called one witness, Mr. Carew.

Basic Facts of the Collision

- [4] Based on all of the evidence, there appears to be no real dispute about the basic facts of the collision, which occurred shortly after 4:00 p.m. on 7 May 2015. It was a sunny day and the roads were dry. The area where the collision occurred is a residential area near the waterfront in Kelowna. Mr. Sarkari, the sole occupant of his Mercedes sedan, was driving northbound on Long Street. He turned right, heading eastbound on Park Avenue. He then drove about two or three car lengths, before starting a left turn intending to go northbound on Knox Crescent. Meanwhile, Mr. Carew was driving his BMW motorcycle eastbound on Park Avenue, behind Mr. Sarkari's sedan. As the sedan started its left turn onto Knox Crescent, the motorcycle ran into the rear driver's side of the BMW.

- [5] The motorcycle was moving at such a speed that it flipped over the sedan and landed on the road on the opposite side. Mr. Carew was thrown from the motorcycle, landing on the pavement some 10 to 15 feet east of the point where the collision occurred.
- [6] The collision caused a large dent on the driver side rear quarter panel of Mr. Sarkari's sedan; there was also damage to the rear window and the roof of the car as Mr. Carew and his motorcycle rolled over it. Mr. Carew's motorcycle was totalled. The front forks were bent, and the gas tank appears to have been crushed or sheered off.
- [7] Although the basic facts of the collision are beyond dispute, the cause is not. At this point, it is necessary to separately review the events from the perspective of Mr. Sarkari, Mr. Hughes, and Mr. Carew.

Testimony of Mr. Sarkari

- [8] Mr. Sarkari testified that he was on Long Street, intending to turn right onto Park Avenue. He stopped at the stop sign on Long Street and looked up and down Parke Avenue before proceeding. He did not see any cars coming westbound. He did notice the motorcycle coming eastbound on Park Avenue from Abbott Street, but it was more than one block away from his position. Seeing that the intersection was clear, Mr. Sarkari turned right onto Park Avenue. He was driving slowly, intending to take an immediate left on Knox Crescent, a mere two or three car lengths further down Park Avenue. He was traveling at 10 to 20 kilometers per hour, and it took him about two to three seconds to turn right onto Park Avenue and before turning left onto Knox Crescent. Before he completed the turn, he felt his car stop. He believed something hit his car but he did not see what it was. He immediately put his car in park and got out, at which point he saw damage to the rear driver's side of his car, but still did not know what had hit him. He went around to the other side of his car, where he saw a motorcycle on the ground. Mr. Sarkari then saw the motorcycle driver, later determined to be Mr. Carew, lying on the ground about 10 to 15 feet away from the point where the collision occurred.
- [9] Mr. Sarkari testified that he believed it was safe to turn onto Park Avenue because there were no vehicles coming westbound, and the only vehicle coming eastbound was the motorcycle, more than one block away. Mr. Sarkari had no independent recollection of whether he used his turn signal as he turned right onto Park Avenue, and then left onto Knox Crescent, but he testified that it was his practice to signal when turning and he believes he did so on this occasion. Mr. Sarkari further testified that he could not independently recall whether he looked in his rear view mirror or side mirror before starting the left turn onto Knox Crescent, but it was his practice to do so.
- [10] In cross-examination, Mr. Sarkari said he could not recall or could not say for sure that he looked in his rear view mirror or side mirror, although he maintained that it was his practice. He did not do a shoulder check. Later in his cross-examination, Mr. Sarkari said he did not need to look in the mirror because he knew when he turned onto Park Avenue that

there were no vehicles approaching him; the only vehicle he saw on Park Avenue was the motorcycle, which was more than one block away. He agreed with the suggestion that he assumed the motorcycle was a safe distance behind him when he started his left turn onto Knox Crescent, adding that he would have had to check his mirrors because it was not necessary to do so. Mr. Sarkari did not see the motorcycle as he began the turn, and did not realize it hit him until he got out of his vehicle and saw the motorcycle on the opposite side of his car.

- [11] I found Mr. Sarkari to be a credible and reliable witness. His testimony was straightforward and largely consistent throughout. He was not combative or argumentative on cross-examination. He readily acknowledged having no independent recollection of actually checking his mirrors or using his turn signals, although he believed that he did so because it was his common practice. However, as noted, he later testified that it was not necessary for him to check, because the motorcycle was at least one block away from him when he drove onto Park Avenue. Although I do not consider this to be an inconsistency in his testimony, I take it to be an acknowledgment or concession that he may not have checked in his mirror before starting the left hand turn, knowing that a mere two to three seconds earlier there were no vehicles within a block of his position. Thus, he assumed that the motorcycle was still a safe distance behind him when he began the left hand turn onto Knox Crescent.

Testimony of Mr. Hughes

- [12] I turn now to the evidence of Mr. Hughes. There are two components to his evidence.
- [13] The first component of Mr. Hughes' testimony is less germane than the second, but I will recount it as it still has at least some relevance. Mr. Hughes testified that in the late afternoon hours of 7 May 2015, he was jogging northbound on Abbott Street when he heard a motorcycle coming up from behind him. The engine was unusually loud, giving him the impression that the motorcycle was going fast. It drove past him and continued northbound. Mr. Hughes estimates that the motorcycle was travelling 70 kilometers per hour. Mr. Hughes went on to testify about the collision, as described below, which took place a short time later, a few blocks away from where he saw the apparently speeding motorcycle. Mr. Hughes testified that the motorcycle he saw go by him at a high rate of speed on Abbott Street was the same motorcycle he later saw in the collision at the intersection of Park Avenue and Knox Crescent. Mr. Hughes believed it was the same motorcycle because it sounded the same, it was the same style of motorcycle, and the driver appeared to be wearing the same clothing.
- [14] The second component of Mr. Hughes' testimony is more significant because it relates directly to the collision. In particular, at some time just past 4:00 pm, as Mr. Hughes continued on his regular running route, he was going eastbound on Park Avenue, on the sidewalk on the north side of the street when he witnessed the collision. He was about 30 feet from the intersection of Park Avenue and Knox Crescent when it occurred.

- [15] Just before the collision, Mr. Hughes also saw Mr. Sarkari's sedan just in front of him. It turned right onto Park Avenue, and travelled north on Park Avenue for about two or three seconds, travelling at about 10 kilometers per hour.
- [16] At more or less the same time, Mr. Hughes heard a motorcycle coming up behind him. Mr. Hughes thought it was moving fast because the engine was loud. Mr. Hughes saw the motorcycle drive past him, eastbound on Park Avenue, just as the sedan started to make a left turn onto Knox Crescent. Mr. Hughes estimated that the motorcycle was travelling at about 60 kilometers per hour as it passed him. In cross-examination, Mr. Hughes agreed that it is difficult to estimate the speed of a vehicle based on visual observation. Mr. Hughes thought there might be an accident, because the motorcycle was travelling fast, and it was not clear what the motorcyclist could do to avoid hitting the turning sedan.
- [17] Mr. Hughes saw the motorcycle slow down and swerve to the left in an apparent effort to avoid the sedan. He estimates that the motorcycle was past the centre of the road, near the north edge of Park Avenue when it hit the rear driver side of the sedan. The motorcycle driver flipped over the sedan, and landed on the road about 10 to 15 feet away, just in front of the sidewalk on the north east corner of the intersection of Park Avenue and Knox Crescent.

Testimony of Mr. Carew

- [18] I turn now to the testimony of Mr. Carew. Before addressing his evidence concerning the collision, I will first summarize two other aspects of his evidence, namely his driving qualifications and training, and his activities before the collision on 7 May 2015.
- [19] With regard to his driver qualifications and training, Mr. Carew testified in chief that he had a class 5 license, and a 6L license. A class 5 license is a basic license for driving a car. A class 6L license is a learner's license for driving a motorcycle, the terms of which require that Mr. Carew can only drive a motorcycle in the company of another person, over the age of 25, with a valid license to drive a motorcycle. Mr. Carew admitted that on the date of the collision on 7 May 2015, he was driving a motorcycle without being in the company of another licensed motorcycle operator, contrary to the terms of his license. It was admitted that as a result of the incident on 7 May 2015, Mr. Carew received a ticket for driving a motorcycle without a proper license; the ticket was not disputed and he was thus found guilty of an offence under s. 24 of the Motor Vehicle Act.
- [20] In cross-examination, Mr. Carew was equivocal about whether he had any form of motorcycle license at all on 7 May 2015. He testified that he failed the written portion of the test several times, but he could not recall whether that was before or after 7 May 2015. When discovery transcript was put to him, in which he admitted that he did not take the tests until after the 7 May 2015 incident, Mr. Carew appeared to concede that he had no license at all at the time of the accident. He also conceded that at the time of the collision on 7 May 2015 he had no motorcycle training, had not taken any courses, and that he was basically "a new guy on a motorcycle".

- [21] With regard to his activities in the time frame leading up to the collision on 7 May 2015, Mr. Carew testified in chief that he had gone out for a motorcycle ride some time in the late morning or early afternoon. He drove his motorcycle from his home, to a beach on Lake Avenue. After visiting with a friend for 10 to 15 minutes, he got back on his motorcycle, driving south on Abbott Street and then turning onto Park Avenue, intending to head out of town via Pandosy Street. Mr. Carew denied that he was the motorcyclist Mr. Hughes had seen driving northbound on Abbott at a high rate of speed. Mr. Carew said he never drove northbound on Abbott that day.
- [22] In cross-examination, Mr. Carew gave vague and inconsistent evidence about the time of day when the accident occurred. At first he testified in cross-examination that he started his motorcycle ride in the early afternoon but he could not remember the exact time. He agreed that in his written statement given four days after the event, he said he left his house for a motorcycle ride at 3:00 pm, meaning the collision must have occurred at some point after that. Mr. Carew's explanation for the timing discrepancy was that he could not now recall exactly what time of day the accident took place; all he could say was that it was a sunny day. When it was suggested that the accident actually took place some time after 4:00 p.m., Mr. Carew said that timeline did not make sense to him, because he did not think he had been riding his motorcycle for that long before the accident occurred.
- [23] In addition to my general concerns regarding Mr. Carew's overall credibility as discussed below, I find Mr. Carew's evidence regarding his activities before the collision to be internally inconsistent, and inconsistent with the other evidence including the testimony of both Mr. Sarkari and Mr. Hughes. I cannot accept Mr. Carew's evidence on these points. I am satisfied that it was in fact Mr. Carew who Mr. Hughes had seen driving a motorcycle southbound on Abbott Street, at a high rate of speed, a short time before the collision with Mr. Sarkari.
- [24] I turn next to Mr. Carew's evidence about the collision itself. He testified in chief that he drove his motorcycle southbound on Abbott, and then turned left onto Park Avenue. He saw a car - clearly, Mr. Sarkari's sedan - in front of him. He was unclear when precisely he first caught sight of it. The sedan was travelling slowly; it had Alberta plates and Mr. Carew thought the driver might be trying to figure out where he was going. Mr. Carew said he "feels like maybe" the car still had its right turn signal on from turning right onto Park Avenue. Mr. Carew then "accelerated to go by him"; at this point he was in second gear, travelling 50 to 60 kilometers per hour. He explained that this was an estimate as he was not looking at his speedometer. He then realized that the sedan was starting a left turn directly in front of him. He believes his motorcycle was in the "outside of the lane", basically in centre of the road at that point. He made an attempt to avoid the sedan by veering further to the left, but it was too late. Mr. Carew testified that the last thing he remembers is trying to slow down before the collision. He applied his brakes and braced for impact. He cannot remember the collision itself. The next thing he remembers is coming to, lying on the ground, with a person telling him he had been in a serious accident.

- [25] In cross-examination, it was suggested that when Mr. Carew said he "tried to slow down", this implied he was going too fast. Mr. Carew disagreed, explaining that he tried to slow down because he knew he was going to hit the sedan and it was better to do so at 10 or 20 kilometers per hour than at 30 or 40 kilometers per hour. Mr. Carew expressed the belief that Mr. Sarkari's sedan was actually going too slow. He agreed that he accelerated to 50 to 60 kilometers per hour to pass the sedan. When asked later in the cross-examination why he did not just slow down, Mr. Carew responded that he tried to slow down as best he could, but you cannot stop on a dime when driving a motorcycle.
- [26] Also in cross-examination, Mr. Carew was unable to say how long he was following behind the sedan when he first saw it. He agreed that in his examination for discovery - which took place about 14 months before the trial - he stated that he had been following behind the sedan for 30 to 40 seconds. He agreed that he gave those answers at the discovery, but could not say if they were correct, because he did not have a full recollection of the event. He explained that he suffered a concussion as a result of the accident and his memory was poor. He could not say, at the time of his trial testimony, how long he was driving behind the sedan before the collision occurred.
- [27] Mr. Carew was also cross-examined on a written statement he made on 11 May 2015, four days after the event. He agreed that generally his memory of the incident would have been better at that time than at the time of his trial testimony. Mr. Carew agreed that in the statement, he said he was travelling maybe 50 to 55 kilometers per hour "intending to pull by him" when he (meaning Mr. Sarkari, driving the sedan) "crowded me left and started a left turn".
- [28] At the conclusion of the first day of trial, Mr. Carew was still under cross-examination. I directed him to return to court the following morning to continue his testimony. When court convened the following day Mr. Carew was not present.
- [29] I will go back a step to explain that at the end of the proceedings on the first day of trial, Mr. Carew said it was going to be inconvenient for him to return to court because his employer - in Abbotsford - was expecting him to be back at work. I told Mr. Carew that he could convey to his employer that he has been ordered by a Judge of the Supreme Court to return to court to finish his testimony. Mr. Carew acknowledged that. He gave no other reason why he would be unable to attend court for the continuation of his evidence.
- [30] On the second day of trial, the case was called at 10:20 a.m. and Mr. Carew was not present. The case was stood down and efforts were made to contact him. The case was recalled at 11:00 a.m. and Mr. Carew was still not in attendance. Counsel for ICBC informed the Court that she had left messages for Mr. Carew on his cell phone; counsel explained that previously Mr. Carew had answered his cell phone or returned her calls promptly, and she had no explanation for why he was no longer doing so. Counsel for ICBC made efforts to reach Mr. Carew through his former legal counsel, with no success. Counsel for ICBC also sent an email to Mr. Carew at an email address provided by his former counsel, with no

response.

- [31] I then heard submissions from the parties with regard to how the case should proceed in the wake of Mr. Carew's failure attend for the completion of cross-examination. Counsel for the plaintiff initially argued that Mr. Carew's failure to attend engaged Rule 12-5(76) as applied in cases such as *Bithell v. Surrey Memorial Hospital*, 2008 BCSC 684 and *Laponder v. Birckich*, 2017 BCSC 1888. However, those cases are distinguishable because although Mr. Carew is a party who failed to attend for the conclusion of his evidence, in this case there is another party, ICBC, who is legally in a position to argue against Mr. Carew's liability. ICBC should not be deprived of its ability to argue against liability on the basis of the failure of a separate party, Mr. Carew, to attend for the continuation of his evidence.
- [32] After further discussion with counsel, there appeared to be two options as to how to proceed in the wake of Mr. Carew's non-attendance.
- [33] The first option would have been to adjourn the trial so that steps could be taken to compel Mr. Carew's attendance to complete his cross-examination. This would involve either a warrant for Mr. Carew's arrest, or a subpoena compelling his attendance. As far as this option is concerned, there is a complicating factor in that Mr. Carew was not formally under subpoena; he attended court voluntarily through arrangements between himself, his counsel, and counsel for ICBC. While I clearly ordered Mr. Carew to return to court to complete his cross-examination, strictly speaking an arrest warrant under Rule 12-5(38) could not be issued because two of the prerequisites were not met, those being the requirement for service of a subpoena and the provision of witness fees. Of course, the Court would still have the inherent jurisdiction to issue a warrant based on Mr. Carew's apparent choice not to attend Court in the face of my clear direction to do so, as a form of contempt of court. However, that course was procedurally more complicated and not fully explored by the parties. Yet another manner of course of action would have been to adjourn the trial so that counsel for ICBC could serve Mr. Carew with a subpoena and witness fees; then if Mr. Carew failed to attend at the continuation, a warrant could be issued for his arrest under Rule 12-5(38). In the end, counsel for the plaintiff urged the Court not to adjourn the trial because of the resulting prejudice to his client in terms of both added cost and delay.
- [34] The second option would be to proceed with the trial without hearing the balance of Mr. Carew's cross-examination. This, of course, would involve some prejudice to the plaintiff's case, in that plaintiff's counsel would be deprived of the opportunity to complete his cross-examination of Mr. Carew, a participant in and key witness to the collision. Further cross-examination of Mr. Carew may well have elicited additional evidence bearing on his credibility. It might also have elicited additional testimony about the particulars of the collision, helpful to the plaintiff's case. In the end, plaintiff's counsel and counsel for ICBC agreed that the prejudice to the plaintiff's case could be addressed by way of an adverse inference, as discussed in the somewhat comparable case of *Lau v. Insurance Corporation of British Columbia*, 2012 BCSC 1226, at paras. 22 and 55-57.

- [35] Having heard all the evidence, I find that there are serious problems with both the credibility and reliability of Mr. Carew's testimony. With regard to reliability, Mr. Carew asserted that he had poor memory of the events due to a concussion arising from the collision. In terms of credibility, there were a number of key points in respect of which Mr. Carew's answers in direct examination differed markedly from his answers on cross-examination. Key aspects of his evidence were also contradicted by his answers given in discovery, and by assertions made in his written statement. As the cross-examination proceeded, Mr. Carew became more and more combative and less responsive. He also placed increasing reliance on alleged lapses in memory due to a concussion suffered in the collision, in response to questions about specific details of the collision. This is significant because in chief Mr. Carew testified that he could not remember anything after the point at which he tried to brace for impact. By contrast, near the end of his cross-examination he claimed that because of the concussion he was unable to remember many of the details preceding the collision, including what time of day it was when the collision occurred, how long he had been following behind Mr. Sarkari's car, where he was when he first caught sight of Mr. Sarkari's car, and whether he could or could not see other cars on the road.
- [36] Added to all this, there is the adverse inference arising from Mr. Carew's failure to return to court for the completion of his cross-examination. Mr. Carew failed to return to court in response to a specific direction to do so, and there is no evidence of an effort to report to the court or even respond to enquiries from counsel following his non-attendance. In the result, the plaintiff was deprived of the opportunity to further probe both the credibility and the substance of Mr. Carew's testimony.

Factual Conclusions

- [37] In written submissions, counsel for ICBC usefully set out a number of factual issues which must be resolved in order to properly analyze this case. My findings on these factual issues are addressed below under sub-headings (a) through (g).
- (a) Route by Which Plaintiff's Sedan Drove onto Park Avenue
- [38] Both Mr. Sarkari and Mr. Hughes gave clear evidence that Mr. Sarkari drove onto Park Avenue from Long Street, turning right. I have no hesitation in accepting their evidence on this point.
- (b) Position of Defendant's Motorcycle when Plaintiff's Sedan Drove onto Park Avenue
- [39] Mr. Sarkari testified that when he stopped at the stop sign on Long Street, he looked down the road and saw the motorcycle as it came off Abbott Street and onto Park Avenue. Mr. Sarkari further testified that when he turned onto Park Avenue, the motorcycle was more than a full city block away, travelling eastbound on Park Avenue. I accept Mr. Sarkari's evidence on both of these points. His credibility was never seriously challenged, and I find his evidence to be reliable. He had a very clear recollection of the events. His evidence on this point reflected a fair degree of confidence in his position, and his subsequent actions

were entirely consistent with that perspective.

(c) Plaintiff's Speed and Manner of Driving on Park Avenue

[40] Mr. Sarkari testified that he was on Park Avenue for two to three seconds, travelling a distance of two to three car lengths at a speed of 10 to 20 kilometers per hour before starting his turn onto Knox Crescent. The evidence of Mr. Hughes was basically to the same effect. From the perspective of Mr. Hughes, there was nothing unusual or particularly notable about Mr. Sarkari's manner of driving, and Mr. Hughes recalls that he was going slowly. And to the extent that I place any reliance at all on Mr. Carew's evidence, nothing he said in his testimony contradicts Mr. Sarkari on this point. In fact, Mr. Carew confirmed that Mr. Sarkari's sedan appeared to be travelling slowly. I accept Mr. Sarkari's evidence on this point.

(d) Defendant's Speed and Manner of Driving on Park Avenue

[41] Mr. Carew testified that he was initially traveling at 50 to 60 kilometers per hour as he drove east on Park Avenue. He acknowledged that he was not checking his speedometer, but this was his best estimate. Mr. Hughes testified that when Mr. Carew's motorcycle was parallel with his position, he looked right and saw the motorcycle go by him. He estimated the motorcycle's speed at 60 kilometers per hour, although he acknowledged that it was difficult to determine speed of a vehicle in this context. I find that Mr. Carew was travelling 50 to 60 miles per hour.

[42] Mr. Carew testified that when he saw Mr. Sarkari's sedan in front of him, he swerved left, intending to pass it. When he realized Mr. Sarkari's sedan was in fact turning left, it was too late for him to change course and he did not see anywhere to go, so he slowed down and braced for impact. The testimony of Mr. Hughes is more or less to the same effect; he testified that the motorcycle swerved slightly to the left and started to slow down before hitting the sedan. Mr. Hughes also testified that when the motorcycle hit the sedan, the motorcycle was on Park Avenue, in the westbound lane, near the edge of the road, but not on the gravel. This matches up with the place where Mr. Carew landed after flipping over Mr. Sarkari's car, as pointed out by Mr. Hughes in the scene photographs.

[43] Finally, I note that after impacting Mr. Sarkari's sedan, Mr. Carew's 500 to 700 pound motorcycle flipped over the sedan and landed on the opposite side of the car. Although I did not have the benefit of any expert or forensic evidence in this case, common sense suggests that even after slowing down somewhat as Mr. Carew braced for impact, the motorcycle must have been travelling quite quickly to have ended up where it did. I accept all of the above as an accurate account of Mr. Carew's manner of driving on Park Avenue.

(e) Whether Plaintiff Signalled an Intention to turn Left

- [44] Mr. Sarkari testified that it is his normal practice to use his indicator signals when turning, and he believes he signalled on this occasion, although he has no independent recollection of doing so. Mr. Hughes did not appear to notice whether or not Mr. Sarkari signalled before commencing his left turn onto Knox Crescent.
- [45] For his part, Mr. Carew testified in chief that he "feels like" Mr. Sarkari still had his right hand signal light on, after the right hand turn from Long Street onto Park Avenue, and that this caused Mr. Carew to believe he had an opportunity to pass. It is significant to me that Mr. Carew did not say he saw the right hand signal light, nor did he say he thought he saw it, nor did he say that he thought he had a memory of seeing it. Instead, he testified that he "feels like" the right hand signal light was on, without giving any basis for that "feeling". Taking into account all of the issues with respect to Mr. Carew's credibility as discussed above, I place no weight on Mr. Carew's assertion that he "feels like" Mr. Sarkari's right hand signal light was still on at or shortly before the time that Mr. Sarkari commenced his left turn onto Knox Crescent.
- [46] Counsel for ICBC suggests that the Court should view Mr. Sarkari's testimony about his "normal practice" with skepticism, because Mr. Sarkari had a very clear and specific recollection of many of the details leading up to the collision, but professed to have no specific recollection of whether he used his turn signals. I do not accept counsel's submission on this point. I find it entirely plausible that a person can have an independent recollection of travelling a certain route, the speed at which one was travelling, and the manner of driving, without having an independent recollection of whether or not one used a turn signal, which can be an almost automatic action for an experienced driver with good driving habits.
- [47] Nevertheless, on all the evidence, I conclude that Mr. Sarkari did not signal his left hand turn onto Knox Crescent. Mr. Hughes did not see a turn signal, which may not be all that surprising in that he simply may not have noticed it. Mr. Sarkari has no independent recollection of signalling, which again is not surprising, for the reasons explained above. However, what is most telling is Mr. Sarkari's testimony about whether he checked his mirrors before turning. One of the points Mr. Sarkari accepted in cross-examination is that since the motorcycle was more than one block away when he drove onto Park Avenue, he assumed the motorcycle would still be a safe distance behind him when he began his turn onto Knox Crescent. My conclusion is that Mr. Sarkari effectively conceded in cross-examination that he did not check his mirrors for this reason. The same reasoning applies with more or less the same force to the question of whether Mr. Sarkari used his signal light before initiating the left turn. There is no direct evidence that he actually did so, and his testimony as a whole suggests that at the time he did not consider it necessary, on the assumption that there were no vehicles in his immediate vicinity when he initiated the left turn.

(f) Whether Plaintiff Checked his Mirrors Before Turning Left

- [48] Mr. Sarkari testified that it is his normal practice to check his mirrors before making a left hand turn, and he believes he did so on this occasion, while frankly admitting that he had no independent recollection of doing so. In the end, even though I accept Mr. Sarkari's testimony that it is his normal practice to check behind him using his mirror or mirrors, I find that he did not do so on this occasion, for two reasons.
- [49] First, if Mr. Sarkari had in fact checked his mirrors, it is very likely that he would have seen the motorcycle. Mr. Carew's motorcycle was in relative close proximity to Mr. Sarkari's sedan when Mr. Sarkari began his left turn onto Knox Crescent. According to Mr. Hughes, the motorcycle was parallel to his position, about 30 feet away from the intersection of Park Avenue and Knox Crescent when Mr. Sarkari initiated his left turn. Mr. Sarkari was only travelling 10 to 20 kilometers per hour. At that distance and at that speed, there is every reason to believe that if Mr. Sarkari checked his mirrors, he would have seen the motorcycle. Since he admittedly did not see the motorcycle coming, I conclude that it is because he did not check his mirrors.
- [50] The second point was already alluded to above, namely Mr. Sarkari's testimony that since the motorcycle was more than one block away when he drove onto Park Avenue, he assumed it would still be a safe distance behind him when he began his turn onto Knox Crescent. As noted above, my assessment is that Mr. Sarkari effectively conceded in cross-examination that he did not check his mirrors for this reason.
- (g) Location of Plaintiff's Sedan when Defendant's Motorcycle Hit It
- [51] Mr. Sarkari testified that his sedan stopped immediately upon impact, and that he immediately put the car in park. If this account was accurate, it would mean that at the point of impact, the sedan was well onto Knox Crescent, as indicated in the scene photographs. However, I have no difficulty concluding, on the basis of the testimony of Mr. Hughes combined with the photographic evidence, that the rear portion of Mr. Sarkari's sedan was in fact in the westbound lane of Park Avenue when the motorcycle hit it. Mr. Hughes testified to this effect. I also note that after flipping over Mr. Sarkari's sedan, Mr. Carew landed on the northeast corner of the intersection of Park Avenue and Knox Crescent, just in front of the sidewalk. Assuming his flight over Mr. Sarkari's car was linear, this would mean the sedan was in the westbound lane of Park Avenue when it was hit by Mr. Carew's motorcycle.

Legal Principles

- [52] Various provisions of the Motor Vehicle Act, R.S.B.C. 1996, c. 318 [MVA], are relevant to this case. I will review each of them briefly.
- [53] Section 24 prohibits operating a vehicle without a license. I will not quote the text of the provision.
- [54] Section 144 deals with driving without due care and attention. It reads as follows:

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.
- (2) A person who contravenes subsection (1) (a) or (b) is liable on conviction to a fine of not less than \$100 and, subject to this minimum fine, section 4 of the Offence Act applies.

[55] Section 146(1) addresses speed limits, and reads as follows:

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.

[56] Section 157 sets out a driver's duty when overtaking another vehicle. It reads as follows:

Duty when overtaking

157 (1) Except as provided in section 158, the driver of a vehicle overtaking another vehicle

- (a) must cause the vehicle to pass to the left of the other vehicle at a safe distance, and
 - (b) must not cause or permit the vehicle to return to the right side of the highway until safely clear of the overtaken vehicle.
- (2) Except when overtaking and passing on the right is permitted, a driver of an overtaken vehicle,
- (a) on hearing an audible signal given by the driver of the overtaking vehicle, must cause the vehicle to give way to the right in favour of the overtaking vehicle, and
 - (b) must not increase the speed of the vehicle until completely passed by the overtaking vehicle.

[57] Section 159, which governs passing a vehicle on the left, states that:

Passing on left

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

[58] Section 160 addresses the requirement for a driver not to enter the left side of the road, unless the driver has a clear view. It states that:

Clear view on passing

160 A driver of a vehicle must not drive to or on the left side of the roadway, other than on a one way highway, unless the driver has a clear view of the roadway for a safe distance, having regard for all the circumstances.

[59] Section 165 sets out the requirements for a driver intending to make a left turn at the intersection of two roads. It reads as follows:

Turning at intersections

165 (1) If the driver of a vehicle intends to turn it to the right at an intersection, the driver must cause it to approach the intersection and then make the turn as close as practicable to the right hand curb or edge of the roadway.

- (2) When the driver of a vehicle intends to turn it to the left at an intersection where traffic is permitted to move in both directions on each highway entering the intersection, the driver must
 - (a) cause the vehicle to approach the intersection in the portion of the right side of the roadway that is nearest the marked centre line, or if there is no marked centre line, then as far as practicable in the portion of the right half of the roadway that is nearest the centre line,
 - (b) keep the vehicle to the right of the marked centre line or centre line of the roadway, as the case may be, at the place the highway enters the intersection,
 - (c) after entering the intersection, turn the vehicle to the left so that it leaves the intersection to the right of the marked centre line of the roadway being entered, or if there is no marked centre line then to the right of the centre line of the roadway being entered, and,
 - (d) when practicable, turn the vehicle in the portion of the intersection to the left of the centre of the intersection.
- (3) When the driver of a vehicle intends to turn the vehicle left at an intersection where traffic is restricted to one direction on one or more of the highways, the driver must cause the vehicle to approach the intersection in the extreme left hand lane available to traffic moving in the direction of travel of the vehicle, and after entering the intersection turn the vehicle to the left so as to leave the intersection as nearly as practicable in the left hand lane available to traffic moving in the direction of travel of the vehicle on the highway being entered.
- (4) If at an intersection there is a traffic control device indicating the course to be travelled by vehicles turning at the intersection, a driver must turn a vehicle at the intersection in the manner directed by the traffic control device.
- (5) A person must not turn a vehicle at an intersection unless it is in the position on the highway required by this section.

[60] Section 170 of the MVA sets out the requirement to signal when turning in circumstances where the turn will "affect traffic". It provides that:

Signals on turning

170(1) If traffic may be affected by turning a vehicle, a person must not turn it without giving the appropriate signal under sections 171 and 172.

- (2) If a signal of intention to turn right or left is required, a driver must give it continuously for sufficient distance before making the turn to warn traffic.
- (3) If there is an opportunity to signal, a driver must not stop or suddenly decrease the speed of a vehicle without first giving the appropriate signal under section 171 and 172.

[61] As explained in *Tabori v. Renaud*, 2016 BCSC 1242 [Tabori] at para. 41, these statutory provisions "provide guidance for assessing fault in motor vehicle accident cases", but they "do not, alone, provide a complete legal framework". The broader legal framework is governed by the law of negligence as set out in common law, and in the applicable provisions of the Negligence Act, R.S.B.C. 1996 c. 33.

[62] With respect to the law of contributory negligence, I find the following passage from *Ratelle v. Barton*, 2017 BCSC 1262 [Ratelle] at para. 114-116 to be helpful:

[114] Pursuant to s. 4 of the Negligence Act, R.S.B.C. 1996, c. 333, if the plaintiff contributes negligently to his injury, the court must determine relative degrees of fault. The question is whether the plaintiff failed to take reasonable care for his safety and whether that failure was one of the causes of the accident: see *Bradley v. Bath*, 2010 BCCA 10 at para. 27:

In my respectful view, the trial judge did not ask the correct question. The proper question was not whether a jogger, rollerblader or pedestrian could have been hit by the defendant's vehicle. The correct inquiry was to determine whether the plaintiff failed to take reasonable care for his own safety and whether his failure to do so was one of the causes of the accident. While the judge acknowledged that the plaintiff was under a heightened duty of care because he was in breach of the law by riding his bicycle on the sidewalk, she failed to give effect to the heightened duty because she did not consider what care had been taken by the plaintiff when he saw the defendant's vehicle moving towards the exit from the gas station.

[115] The task for the court is to assess the respective blameworthiness of the parties. Fault or blameworthiness evaluates the party's conduct in the circumstances and the extent or degree to which it departs from the standard of reasonable care: see *Alberta Wheat Pool v. Northwest Pile Driving Ltd.*, 2000 BCCA 505 at paras. 45-46:

[45] In my view, the test to be applied here is that expressed by Lambert, J.A. in *Cempel [v. Harrison Hot Springs Hotel Ltd.]* (1997), 43 B.C.L.R. (3d) 219 (C.A.), and the court's task is to assess the respective blameworthiness of the parties, rather than the extent to which the loss may be said to have been caused by the conduct of each.

[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.

[116] In *Bradley* at para. 24, the court held:

At common law, contributory negligence on the part of a plaintiff was a complete defence to his or her claim. This was considered to be unjust, and legislatures in many common law jurisdictions passed contributory negligence statutes (also referred to as apportionment legislation). The statute in this province is currently called the Negligence Act, R.S.B.C. 1996, c. 333, s. 1(1) of which reads as follows:

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.

If damage or loss has been caused by the fault of two or more persons, s. 4 of the Act requires the court to determine the degree to which each person was at fault. While the prerequisite to apportionment is that the damage or loss has been caused by the fault of two or more persons, the apportionment must be done on the basis of the degree to which each person was at fault, not on the basis to which each person's fault caused the damage: *Cempel v. Harrison Hot Springs Hotel Ltd.*, [1998] 6 W.W.R. 233, 43 B.C.L.R. (3d) 219 (C.A.).

[63] The parties cited a number of decided cases involving collisions between overtaking vehicles and left-turning vehicles. In particular, the plaintiff cited *Tabori; Ali v. Fineblit*, 2015 BCSC 1494; and *Willett v. Rose*, 2017 BCSC 627. The third party cited *Ratelle; Crevier v. Thompson*, 2015 BCSC 1552, and *Pipe v. Dusome*, 2007 BCSC 1066.

[64] These cases are comparable to the case at bar in that this case also involved an overtaking vehicle (Mr. Carew's motorcycle) colliding with a left-turning vehicle (Mr. Sarkari's sedan). However, the result in each case is very much fact-dependent, and in this regard the decided cases are really only of assistance insofar as they discuss and apply the applicable legal principles. The decided cases provide helpful examples in which the relevant rules of the road are applied to particular fact patterns.

Analysis

[65] Applying the statutory provisions, and common law principles as discussed above to the facts of the case at bar, my conclusion is that the driving of both parties fell below the standard of care that can be expected of a reasonably prudent motorist, and that the conduct of both parties contributed to the collision. Thus, apportionment of liability is required, and each party must bear at least some degree of responsibility for the collision.

- [66] With regard to Mr. Carew, I find that he was negligent in the operation of his motorcycle in that his manner of driving departed from the standard of reasonable care that can be expected of a person operating a motorcycle in the particular circumstances in which he found himself.
- [67] To begin with, Mr. Carew was not properly licensed. He received a violation ticket which resulted in a fine for an offence under s. 24 of the MVA. This is not proof of negligence but I consider it highly relevant, particularly in light of Mr. Carew's limited experience and complete absence of training in the operation of motorcycles. This lack of training was apparent in his manner of driving, and in his failure to appreciate the circumstances in which he found himself when he decided to pass Mr. Sarkari's sedan as I will discuss in greater detail in a moment.
- [68] I also find that Mr. Carew was driving too fast for the circumstances. He was travelling at least 50 kilometers per hour when he accelerated to pass Mr. Sarkari. In the absence of any evidence to the contrary, I must proceed on the basis that the speed limit in this particular area within the city of Kelowna was 50 kilometers per hour. That is the maximum permissible speed; this does not mean it is always safe to drive at 50 kilometers per hour in all circumstances in an area with a 50 kilometer per hour speed limit. Mr. Carew testified that he was familiar with the area where the collision occurred. It is a residential area. It is also an area where the layout of the streets is somewhat irregular. By this I mean that a vehicle travelling north or south cannot drive directly across the Park Avenue from Long Street to Knox Crescent or vice versa. Rather, in either direction, the driver must turn right onto Park Avenue, drive down Park for about 20 feet or so, and then make a left hand turn off of Park. Mr. Carew knew that there was a vehicle ahead of him, travelling slowly. A reasonably prudent driver in those circumstances would not choose to accelerate to a speed of 50 to 60 kilometers per hour. This is a point in respect of which Mr. Carew's lack of training and experience is particularly relevant. At one point, Mr. Carew testified that you cannot stop a motorcycle on a dime. If Mr. Carew truly appreciated the consequences of that proposition, he would not have been driving 50 to 60 kilometers per hour in the circumstances in which he found himself.
- [69] Intimately connected with Mr. Carew's speed is his imprudent decision to pass Mr. Sarkari's sedan. I note that Mr. Carew was ticketed for driving without due care and attention to other motorists, and that the ticket resulted in a finding that Mr. Carew breached s. 144(b) of the MVA. The evidence in this trial is consistent with that disposition. Mr. Carew basically felt that Mr. Sarkari was driving "too slow", and he was intent on passing, in circumstances where it was imprudent to do so.
- [70] Mr. Carew testified that he sped up or accelerated to pass Mr. Sarkari's sedan on the left. Mr. Carew testified that he "felt like maybe" Mr. Sarkari had his right turn signal on and that he might be pulling over. As explained above, I have given no weight to that assertion. I find, rather, that when Mr. Carew initially turned onto Park Avenue, he was more than one block behind Mr. Sarkari's sedan. Mr. Carew quickly closed the distance and, believing that Mr.

Sarkari was going "too slow", was intent on passing. He accelerated to 50 to 60 kilometers per hour and, by the time he realized Mr. Sarkari was actually turning left it was too late; realizing he had nowhere to go, at that point he could nothing more than try to slow down and brace for impact. Once again, Mr. Carew's lack of training and experience are relevant. A prudent driver, quickly closing distance on a slower moving vehicle, in a residential area with cross-streets at irregular junctions, would not have chosen to accelerate and pass in these circumstances, particularly if the pass involved accelerating to 50 to 60 kilometers per hour.

- [71] Turning to Mr. Sarkari, I find that his conduct departed from what could be expected of a reasonably prudent driver in two respects.
- [72] First, Mr. Sarkari failed to check his mirrors before initiating the left turn. Without doing so, he could not assess whether his turn would affect the drivers around him. Counsel for Mr. Sarkari makes the point that he is entitled to assume that other drivers will obey the rules of the road, and that since the motorcycle was more than a block away when Mr. Sarkari turned onto Park Avenue, it was not wrong for him to "assume" the vehicle was a safe distance behind him when he initiated his turn. But the fact is, Mr. Sarkari had turned onto a road with a 50 kilometer per hour speed limit, and then driven for two to three seconds at a speed of 10 to 20 kilometers per hour. In those circumstances, he could not be assured that it was safe to make another turn before checking to see if the turn would affect the traffic around him. Having said that, I accept Mr. Sarkari's evidence that he genuinely believed that there were no vehicles within a block of his position, he assumed it was safe. And he was driving a mere 10 to 20 kilometers per hour in a residential area without a lot of traffic. So, in terms of the degree of departure from the standard of care expected of a prudent driver, I would describe this as a minor and momentary lapse of judgment.
- [73] Second, I have found that Mr. Sarkari did not signal his left turn. I note here that s. 170 requires a driver to signal a turn "if traffic may be affected by a turning vehicle". Mr. Sarkari did not know that "traffic would be affected", since he believed the motorcycle was far enough behind him that it would not be affected by his turn. But since Mr. Sarkari did not check his mirrors before turning, he did not properly assess whether "traffic would be affected" by his turn. Once again, my finding is that Mr. Sarkari did this because he had checked the traffic coming east on Park Avenue a mere two to three seconds before initiating his turn, and he believed the coast was clear. And, once again, I note the relatively low speed at which he was travelling, and the nature of the area being a residential area. Although Mr. Sarkari departed from the standard of care that is required of a driver making a left hand turn, it was a momentary and minor lapse in judgment.
- [74] This brings me then to apportionment of liability as between the plaintiff Mr. Sarkari and the defendant Mr. Carew. My conclusion is that Mr. Carew must bear the lion's share of responsibility. I would apportion 80% of the liability for the collision to Mr. Carew and 20% liability to Mr. Sarkari. There are several reasons for this.

- [75] First, Mr. Carew's manner of driving involved a significant departure from the standard of care that is expected of a prudent driver. By contrast, Mr. Sarkari's departure from the standard of care was minimal. He did not check his mirrors or signal his turn, but he had checked the traffic coming from behind him a mere two to three seconds earlier and believed that the motorcycle was a safe distance behind him. Moreover, he was travelling at a reasonable and prudent speed, considering that he was in a residential area with a number of irregular cross-streets.
- [76] Second, this is a situation in which, as between the overtaking driver and the left turning driver, Mr. Carew was clearly in "the better physical position to foresee a possible collision". The leading case of *Samograd v. Collison* (1995), 17 B.C.L.R. (3d) 51 (C.A.) recognizes that as a matter of law there is no special onus or "higher duty" on an overtaking motorist to guard against collision, but that there may be circumstances in which, practically speaking, the overtaking driver is in a better physical position to properly assess the situation than the driver who is being overtaken. I find that to be the situation here. When Mr. Carew turned onto Park Avenue, he was more than a block behind Mr. Sarkari. He had ample time to appreciate that Mr. Sarkari's vehicle was moving slowly (and not unreasonably so), in a residential area where there are irregular junctions in the road. Mr. Carew was in the best position to assess whether it was possible for him to overtake Mr. Sarkari in a manner that was safe.
- [77] I have considered the case law in which drivers have been found to be wholly or more substantially liable for failing to check traffic or use a turn signal when turning left. I agree with counsel for Mr. Sarkari that those cases are factually quite different from the case at bar. This was not a case involving a motorist who swung wide right and then made a left turn off a highway with a speed limit of 80 to 100 kilometers per hour. Nor is it a case where a motorist swung wide right and attempted a U-turn without signalling. Rather, it was a case where a motorist (Mr. Sarkari) actually checked the traffic coming behind him a mere two to three seconds earlier, and failed to check again before initiating a low-speed turn in a residential area. That motorist (Mr. Sarkari) was hit by an unlicensed, untrained motorcyclist (Mr. Carew) who was intent on passing, and chose to do so at an inappropriate juncture, at a rate of speed that was excessive in the circumstances. Thus, while both drivers bear some responsibility for the collision, Mr. Carew bears much greater responsibility than Mr. Sarkari, and liability must be apportioned accordingly.

Costs

- [78] If the parties are unable to agree on costs, they can file written submissions. Counsel for the plaintiff may file written submissions of four pages or less (plus an affidavit containing any supporting materials) within two weeks of the release of these reasons. Counsel for the third may file written submissions of four pages or less (plus an affidavit containing any supporting materials) within two weeks of receiving the plaintiff's written submissions. Counsel for the plaintiff may file a reply of two pages or less (plus any reply affidavit

material) within one week of receiving the third party's written submissions. If either party takes the view that submissions on costs cannot effectively be dealt with in writing, that party may, within the time limits set out above, submit a request to schedule a further appearance for oral submissions on costs.

"Riley J."

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