In the Court of Appeal of Alberta

Citation: Bradford v Snyder, 2016 ABCA 94

Date: 20160408
Docket: 1501-0189-AC
Registry: Calgary

Between:

Casey L. Bradford

Respondent
(Plaintiff)

- and -

Siobhan M. Snyder and Eitne P. Snyder

Appellants
(Defendants)

The Court:

The Honourable Mr. Justice Peter Martin
The Honourable Madam Justice Barbara Lea Veldhuis
The Honourable Madam Justice Frederica Schutz

Memorandum of Judgment

Appeal from the Judgment by
The Honourable Mr. Justice A.D. Macleod
Dated the 24th day of June, 2015
Filed on the 8th day of September, 2015
(2015 ABQB 406, Docket: 1201 09761)

Memorandum of Judgment

The Court:

INTRODUCTION

[1] This case involves a collision between a motor vehicle and a cyclist.

[2] For the reasons that follow, the appeal is dismissed.

FACTS

[3] On June 18, 2011, at approximately 5:00 p.m., a cyclist and a Volkswagen van collided at the intersection of 24th Avenue NW and 5th Street NW in Calgary, Alberta.

[4] It was a grey and rainy afternoon. The lighting conditions were dim and the road was wet.

[5] The cyclist was travelling northbound on 5th Street. She was facing a stop sign at the intersection.

[6] The driver of the van was travelling westbound on 24th Avenue through a playground zone. The van belonged to her mother, who is also an appellant in this action. There was no stop sign or any other traffic control device facing the driver at the intersection. She was travelling at approximately 30 to 35 km/hr.

[7] The cyclist testified that she came to a "rolling stop" at the stop sign before proceeding through the intersection. She concedes that, had she properly stopped, the accident could have been avoided. She did not see the van before the collision.

[8] The driver testified that she had looked down at her speedometer once or twice to check her speed while in the playground zone. At pre-trial questioning, the driver estimated that she might have looked down at the speedometer for as long as four seconds before the accident. However, at trial, she testified that this estimate was in error and that it was actually closer to two seconds. The driver also did not see the cyclist before the collision.

[9] At trial, both of the accident reconstruction experts, Dr. Good and Mr. MacInnis, gave evidence that the sightlines in the intersection were clear. The cyclist and driver should have been visible to one another. The accident was avoidable.

[10] As a result of the collision, the cyclist was seriously injured. Prior to a two-day trial held on May 28 to 29, 2015, the parties agreed upon damages in the amount of $187,500.00 plus costs. The only issue at trial was the extent, if any, of the driver's liability.

DECISION OF THE TRIAL JUDGE: 2015 ABQB 406

[11] In civil proceedings, the burden is usually on the plaintiff to prove that the defendant was negligent. However, in accidents involving a motorist and a non-motorist, s 186 of the *Traffic Safety Act*, RSA 2000, c T-6 (the "*TSA*") requires the motorist to prove that the accident did not arise because of negligent operation of a motor vehicle. Citing *Meyer v Neuman*, 2004 ABQB 232 and *Elliott v Edmonton (City)* [1993], 135 AR 316 (CA), the trial judge held that s 186 clearly applied in this case and that it imposed a "reverse onus" on the defendant driver to prove that she was not negligent (para 7).

[12] The court ultimately found that the defendant driver had not discharged the onus imposed by s 186. It reasoned that "[b]y taking her eyes off the road even for two seconds before entering an intersection in a playground zone, the appellant was not taking reasonable care to avoid a collision" (para 15).

[13] However, the court also found contributory negligence on the part of the cyclist, determining that she bore greater responsibility for the accident because she failed to properly stop at the stop sign (para 17).

[14] The trial judge apportioned fault pursuant to the *Contributory Negligence Act*, RSA 2000, c C-27: one-third to the driver and two-thirds to the cyclist.

STANDARD OF REVIEW

[15] Apportionment is a question of mixed fact and law. It is reviewed on a standard of reasonableness. An appellate court will only intervene if the trial judge has made a palpable and overriding error: *Heller v Martens*, 2002 ABCA 122 at paras 48-49; *Crackel v Miller*, 2004 ABCA 374 at para 5; *Mahe v Boulianne*, 2010 ABCA 32 at para 7; and *Prosser v 20 Vic Management Inc*, 2010 ABCA 57 at para 10.

[16] Questions of law are reviewed on a standard of correctness. This includes issues of statutory interpretation: *Housen v Nikolaisen*, 2002 SCC 33 at para 8; *Pauli v Ace Ina Insurance Co*, 2004 ABCA 84 at para 5.

ANALYSIS

1. The Onus of Proof under the *Traffic Safety Act*

[17] Section 186 of the *TSA* imposes a statutory burden of proof on the operator of the motor vehicle to demonstrate that the subsequent loss or damage "did not entirely or solely arise" through his negligence. In other words, the provision creates a "reverse onus" or a rebuttable presumption that the loss or damage from the accident arose from the driver's negligence.

Onus on owner or driver

186 (1) If a person sustains loss or damage by reason of a motor vehicle being in motion, the onus of proof in any civil proceeding that the loss or damage did not entirely or solely arise through the negligence or improper conduct of the owner or driver of the motor vehicle is on that owner or driver.

(2) This section does not apply in the case of an accident between motor vehicles on a highway.

(3) In this section, "motor vehicle" includes a self-propelled implement of husbandry.

[18] Under section 1(x) of the *TSA*, "motor vehicle" is defined as:

(i) a vehicle propelled by any power other than muscular power, or

(ii) a moped,

but does not include a bicycle, a power bicycle, an aircraft, an implement of husbandry or a motor vehicle that runs only on rails.

[19] The rebuttable presumption created by s 186 of the *TSA* remains until the end of the case and does not shift back to the plaintiff: *HC (Dependent Adult) v Loo*, 2006 ABCA 99; *Gotlib v Calgary (City)*, 2009 ABQB 174; *Rances v Scaplen*, 2008 ABQB 708; *Mose v Moeck*, 2005 ABQB 485.

[20] If the driver is able to prove that the accident occurred through no fault of his own, then the presumption will be rebutted and the motorist will be found not liable. For example, in *Winnipeg Electric Company v Geel*, [1932] 4 DLR 51 (PC), the driver adduced proof that neither party was to blame because neither party could avoid the other.

[21] If, at the end of the case, either: (a) the evidence shows that the driver was at fault; or (b) the evidence was too meagre or too evenly balanced for a court to determine the issue of the driver's negligence, then the presumption will not be rebutted. The non-motorist's claim will therefore succeed.

[22] It is important to highlight that evidence of contributory negligence on the part of the plaintiff is not, in itself, sufficient for the driver to discharge the onus: see *Goldberg and Goldberg v McInnis, Capital Cab Co Ltd and Nordli*, (1959) 19 DLR (2d) 306 (Sask QB) at 18. Without more, such evidence goes only to rebutting the presumption *in part* such that an apportionment of fault under the *Contributory Negligence Act* is necessary. This point was clarified by the Supreme Court of Canada

in *Feener (Next friend of) v McKenzie*, [1972] SCR 525, which dealt with a similar provision under Nova Scotia's *Motor Vehicle Act*, RSNS 1967, c 191. At pp 537 to 538:

> This presumption against the operator remains until the very end of the case, but it is a presumption which can be rebutted either in whole or in part, and if after all the evidence has been heard the jury is satisfied that the operator was only partly to blame, then the fault is to be divided in accordance with the provisions of the *Contributory Negligence Act*. If, on the other hand, the jury is satisfied on the whole of the evidence that there was no fault on the part of the operator which caused the accident, the plaintiff's action must be dismissed. The question of whether, and to what extent, the presumption has been rebutted is one which can only be determined at the conclusion of the case. [Emphasis added.]

(a) The appellants' section 185 argument

[23] The appellants acknowledge that s 186 of the *TSA* imposes the onus on an operator of a motor vehicle to prove that an accident did not occur because of her negligent operation of the motor vehicle. However, on the facts of this case, they argue that s 185 of the *TSA* and the common law displace this onus.

[24] Section 185 is another statutory onus provision that places an onus of proof on a party who contravenes the *TSA*, and sustains loss or damage, to prove that the loss or damage did not arise because of this contravention.

> **Onus where Act contravened**
>
> 185 If
>
> (a) a person sustains loss or damage arising out of the operation of a motor vehicle on a highway, and
>
> (b) that motor vehicle is operated by a person who is in contravention of or fails to comply with this Act,
>
> the onus of proof in any civil proceeding that the loss or damage did not arise by reason of that contravention or failure to comply is on the owner or driver of the motor vehicle.

[25] The appellants submit that a cyclist should be considered the same as a motorist when there has been a breach of the *TSA* or the *Use of Highway and Rules of the Road Regulation*, Alta Reg 304/2002 ("*Road Regulation*") because both instruments impose the same duties on cyclists and motorists.

[26] In this case, the appellants claim that the driver had the statutory right of way and that there was no evidence that she had breached the *TSA* or the *Road Regulation*. They also argue that the trial judge never made a finding as to whether s 185 applied, or whether it took precedence over s 186. Instead, he simply applied the onus created by s 186 without addressing the impact of s 185.

[27] The appellants claim that *Elliott v Edmonton (City)*, [1993] AJ No 117 (ABCA), a case about a cyclist attempting to pass a parked car in a curb lane and colliding with a passing bus, supports the application of s 185 of the *TSA*. At paras 2-3:

> Breach of the *Highway Traffic Act* is by its own terms negligence unless same be disproved. And of course it very clearly sets a standard of care which was not met here.
>
> Therefore, what the appellant cyclist did was very illegal, very negligent, and not reasonably foreseeable.

[28] The appellants submit that *Elliott* stands for the proposition that (1) breach of the *TSA* is *de facto* negligence; and that (2) the onus to disprove that negligence rests with the individual who breached the *TSA*.

[29] However, a close reading of *Elliott* reveals that it does not stand for these propositions. The Court in *Elliott* found that a cyclist had breached the *Highway Traffic Act*, which (by its own terms) is negligent conduct unless the same is disproved. That **is not** a determination about whether the owner or driver of a motor vehicle in motion had met the onus of proving that the loss or damage resulting from the vehicle's operation did not entirely or solely arise through his own negligence or improper conduct. Those are two different inquiries.

[30] Furthermore, s 185 (what was then s 179 of the *Highway Traffic Act*, RSA 2000, c H-8) was never applied in *Elliott* at either the trial or appellate level. The trial judge in that case explicitly held that the onus of proof still fell on the operator of the motor vehicle to demonstrate that the injury or loss did not arise entirely or solely from his negligence. This holding was not disturbed on appeal.

[31] Ultimately, the appellants' section 185 arguments fail to recognize that the onus of proof in this case is not based on the alleged blameworthiness of the parties, but rather on a statutory framework. Imposing an onus of proof on the operator of the motor vehicle is not the same as a finding of negligence on the part of the operator of the motor vehicle.

[32] If the motorist had acted lawfully and without negligence, as the appellants suggest, the appellants would have fully discharged the reverse onus imposed by s 186. The trial judge's fact findings are to the contrary. The trial judge found that the driver's conduct fell below the standard of care of a reasonable motorist in the circumstances.

[33] Further, ss 185 and 186 deal with two completely separate situations – the former dealing with collisions between motor vehicles, the latter dealing with collisions only involving one motor vehicle

in motion. Contrary to the appellants' arguments, if a cyclist with obligations under the *TSA* contravenes a provision, that contravention does not void the operation of s 186.

[34] Pedestrians, too, have obligations under the *TSA* (see Part 3 of the *Road Regulation*, for example) and there have been many cases where a pedestrian's contravention of the Act has led to an accident. However, this has not prevented courts from applying the reverse onus under s 186 in the pedestrian's favor: *Knibb (Guardian of) v Foran*, 2014 ABCA 303 (appeal was on a limitations period issue); *Murhula v Yetman*, 2010 ABQB 655; *Mose v Moeck*, 2005 ABQB 485; *Bouchard Estate v Chalifoux*, 2004 ABQB 877; *HC v Loo*, 2003 ABQB 52; *Barnes v Smith*, 2002 ABQB 105; *Grela v Sydor*, 2001 ABQB 980; *Little Plume v Weir***,** 1998 ABQB 523; and *Ropchan v Duncan*, [1992] AJ No 1227.

(b) The appellants' servient driver/dominant driver argument

[35] The appellants attempt to draw an analogy between this case and situations where an accident occurs because the servient driver fails to yield the statutory right of way. In such cases, the common law places an onus on the servient driver to demonstrate that the dominant driver was (or reasonably should have been) aware of the impending accident and could have taken evasive action.

[36] The appellants cite *Walker v Brownlee and Harmon*, [1952] 2 DLR 450 (SCC) at para 50. Based on *Walker*, they submit that the cyclist was the "servient driver" and that the appellant driver was the "dominant driver" in this collision. They reason that the cyclist had the common law burden of proof to show that the appellant driver could, and should, have avoided the accident. However, as the trial judge mentioned in his reasons for judgment, *Walker* is an Ontario case that applies to collisions between two motor vehicles (*Walker*, para 9). A bicycle is not a motor vehicle and has been expressly excluded from the definition of "motor vehicle" under s 1(x) of the *TSA*.

[37] In summary, we find that the trial judge did not err in holding that s 186 of the *TSA* applies in this case to impose an onus on the driver to prove that the accident was not caused entirely or solely by her negligence. His finding is supported by the legislative scheme of the Act and the case law. This ground of appeal is dismissed.

2. The Apportionment of Fault

[38] In order to establish contributory negligence, a court must find that the cause of the loss or damage to the plaintiff was the concurrent fault of both the plaintiff and defendant. Once proven, the *Contributory Negligence Act*, s 1(1) applies such that "... the liability to make good the damage or loss [caused by this accident] is in proportion to the degree in which each person was at fault...".

[39] This Court held in *Heller v Martens*, 2002 ABCA 122 that the degree to which each person is at fault is determined using the "comparative blameworthiness" approach, which requires that a court examine "all the circumstances of the parties' misconduct to determine their relative negligence": *Heller* at para 30. In other words, apportionment is based on the degree to which each party departed

from the standard of care. It is *not* based on the extent to which each party's conduct *caused* the damage.

[40] In assessing comparative blameworthiness, *Heller* sets out a non-exhaustive list of factors that a court can consider at para 34:

1. The nature of the duty owed by the tortfeasor to the injured person;

2. The number of acts of fault or negligence committed by a person at fault;

3. The timing of the various negligent acts;

4. The nature of the conduct held to amount to fault. For example, a deliberate departure from safety rules may be more blameworthy than an imperfect reaction to a crisis; and

5. The extent to which the conduct breaches statutory requirements.

[41] In light of these factors, fault can therefore vary from extremely careless conduct (a reckless indifference or disregard for the safety of persons or property) to a momentary or minor lapse of care in conduct: *Heller* at para 35. Liability is apportioned according to the parties' degrees of fault.

[42] Apportionment is not a mathematical exercise. There is no prescribed formula or ratio for tallying and then mapping the parties' acts of fault to their respective liabilities. In other words, the law does not require that the Court apportion liability amongst the parties in proportion to their discrete acts of fault. For example, if a plaintiff allegedly committed five discrete acts of negligence, and the defendant allegedly committed ten acts, the trial judge does not then automatically impose one-third liability on the plaintiff and two-thirds liability on the defendant.

[43] The appellants submit that the trial judge failed to consider relevant evidence in his apportionment of liability. They suggest that, when the totality of the evidence relating to the cyclist's acts of fault is contrasted with the driver's "brief but inopportune speedometer glance," it is not possible to apportion liability in the manner done by the trial judge.

[44] The appellants cite three categories of evidence that were allegedly not considered by the trial judge.

(a) The testimony of Dr. Good and Mr. MacInnis

[45] Both of the accident reconstruction experts testified at trial that the collision could have been completely avoided if the cyclist had stopped at the stop sign and properly looked both ways. The appellants submit that this factor was not properly considered by the trial judge in his apportionment.

[46] At trial, the respondent conceded that the cyclist failed to stop at the stop sign, and that this was a cause of the accident. The trial judge acknowledged these concessions: paras 3, 17.

[47] The apportionment assessment is not based on the extent to which each party's conduct *caused* the damage. If the driver fails to rebut the onus of negligence under s 186 of the *TSA*, she was a contributory cause of the accident. The evidence of Dr. Good and Mr. MacInnis that the cyclist's actions were the cause of the accident does not add or detract from the required assessment of the appellant driver's departure from the standard of care. There is no evidence that the trial judge failed to consider, or improperly considered, the cyclist's stop sign contravention.

(b) The testimony of Mr. Barton

[48] At trial, the cyclist testified that she came to a rolling stop at the stop sign. The expert witnesses, particularly Dr. Good, accounted for this alleged "rolling stop" in their calculations. On this basis, the trial judge found that the appellant driver could have seen the cyclist before she proceeded into the intersection.

[49] However, the appellants submit that the testimony of the independent eyewitness, Mr. Barton, should be preferred. Mr. Barton gave evidence that the cyclist had come off the sidewalk as she entered the intersection, and that she did so extremely quickly. His evidence as to the cyclist's speed was not contradicted at trial. The appellants claim the trial judge erred in failing to consider Mr. Barton's evidence.

[50] We find that the trial judge did not err in assigning little weight or relevance to Mr. Barton's evidence. Mr. Barton only saw the cyclist very briefly and he was not paying full attention because he was looking for houses in the area. His statement to the police after the collision did not refer to the cyclist's speed or location. Mr. Barton's observations as to the cyclist's speed and location were made at trial, approximately four years after the event.

(c) The cyclist's acts of fault

[51] Finally, the appellants submit that the evidence at trial clearly established that the cyclist was wearing a hood over her head, and may have also been wearing earbuds in her ears. They claim that the trial judge, in determining contributory negligence, failed to consider how the cyclist's attire could have obstructed her vision or impaired her hearing. The appellants cite the case of *Heller* at para 34 for the importance of examining all the circumstances of the parties' misconduct to determine their relative negligence.

[52] All these categories of evidence cited by the appellants, including this final category, revolve around the assumption that the trial judge did not properly weigh and consider all the circumstances. We disagree.

[53] With respect to the law, the trial judge was correct in finding that the *Contributory Negligence Act* and the "comparative blameworthiness" approach applied to the issue of apportionment in this case. While he did not directly cite *Heller*, his articulation of the "comparative blameworthiness" approach was taken from that leading authority and was correct. As the trial judge stated at para 17 of his decision, apportionment requires "an assessment of relative misconduct from the perspective of departures from standards of reasonable care".

[54] In his reasons, the trial judge emphasized that the cyclist failed to stop at the stop sign, and therefore she must bear the greater responsibility. He then went on to hold that, based on all the evidence before him (para 18), he would apportion fault between the parties at one-third to the driver and two-thirds to the cyclist.

[55] There was no suggestion that the cyclist's failure to stop was the only factor that the trial judge considered in his assessment. It is presumed that he appreciated the issues and relevant evidence, and then applied the proper legal tests and principles. We are satisfied that the trial judge's reasons for judgment meet the requirements of *R v Sheppard* [2002] 1 SCR 869, 2002 SCC 26. Any omissions the trial judge might have made in his reasons – absent proof that he had actually forgotten, ignored or misconceived the evidence at trial – does not constitute palpable and overriding error.

[56] For these reasons, we also dismiss this ground of appeal.

CONCLUSION

[57] The appeal is dismissed.

Appeal heard on March 10, 2016

Memorandum filed at Calgary, Alberta
this 8th day of April, 2016

Authorized to sign for: Martin J.A.

Veldhuis J.A.

Schutz J.A.

Appearances:

C.G. Gillespie/P. Wallebeck
for the Respondent

D.M. Pick
for the Appellants