Date: 19980408
Docket: B934045
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

CHRISTOPHER FENTON, an infant by his Guardian Ad Litem, SUZANN FENTON

PLAINTIFF

AND:

DANIEL ROBERT BALDO, ANDRE FRANCOIS BALDO and the DISTRICT OF KITIMAT

DEFENDANTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MADAM JUSTICE LOO

Counsel for the Plaintiff: Christopher R. Bacon and Todd A. McKendrick

Counsel for the Defendants Daniel Robert Baldo and Andre Francois Baldo: Scott B. Stewart and Sandra Katalinic

Counsel for the Defendant District of Kitimat: Ian J. Stirling

Place and Date(s) of Hearing: Vancouver, B.C. March 30, 31, April 1, 2, and 3, 1998

[1] At the close of the plaintiff's case, the defendants Daniel Baldo and Andre Baldo, and the defendant District of Kitimat applied for a dismissal of the plaintiff's case pursuant to Rule 40(8). The rule permits a defendant to move for a non-suit on the basis of no evidence at the close of the plaintiff's case, without being put to an election as to whether or not to call evidence.

[2] The application of the District of Kitimat was successful and the action against it was dismissed with costs. However, the application of the defendants Daniel Baldo and Andre Baldo was dismissed.

[3] With the consent of the defendants, the plaintiff reopened his case, and called further evidence, following which the defendants made a further application for a non-suit.

[4] I will set out the facts which were established by the evidence when the first non-suit application was made, and the facts which have since been established after the plaintiff reopened his case.

[5] The plaintiff was struck by a van driven by the defendant Andre Baldo near the crosswalk on Nalabila Boulevard and Duncan Street in Kitimat on April 29, 1993. The plaintiff who was then 12 years old had been sent to the convenience

store. He lived in a townhouse complex with his father and brother. The townhouse complex is on the north side of Nalabila Boulevard. To reach the store, the plaintiff would have to exit from his townhouse unit, and walk a couple of units east to reach the driveway which sloped down to Nalabila. He would have to go down the driveway and then cross the crosswalk to the sidewalk on the south side of Nalabila and then proceed east about a block to the store. The marked crosswalk across Nalabila was located about two metres to the west of the driveway to the townhouse complex.

[6] The action against all of the defendants is in negligence.

[7] As against the defendant Andre Baldo, it is alleged that he failed to keep any, or in the alternative, an adequate lookout; failed to take reasonable or proper or any precautions to avoid the accident; and drove without due care and attention and without reasonable consideration for other persons using the highway, contrary to s. 149 of the ***Motor Vehicle Act***.

[8] As against the defendant District of Kitimat, the allegations which are germane to the application are that it failed to take proper measures to illuminate the cross walk; and it failed to illuminate the northern approaches to the crosswalk.

[9] The question is whether the plaintiff has established any facts from which liability may be inferred.

[10] I set out the facts which I determined had been proved when the first non-suit application was made.

1. The plaintiff at approximately 9:30 p.m. on April 29, 1993 was headed from his townhouse complex to go to the Pine Plaza convenience store;

2. The defendant had to go down the driveway and then cross from the north side to the south side of Nalabila which is a two lane roadway proceeding both east and west.

3. It was overcast, but neither light nor dark. It was that time of day, according to the investigating officer Constable Rapacz that one did not need the light given off by the street lights in order to see. According to Constable Rapacz it was the “in between time”, dark enough that you could turn on your car headlights, but they would not give you any benefit. Mr. Fenton, the plaintiff’s father, remembers looking outside and seeing the flashing lights of the emergency vehicles. He went outside. It did not seem completely dark to him. It did not take time for his eyes to adjust.

4. The road surface was dry.

> 5. Andre Baldo was driving at approximately 50 kmh. He was familiar with the area he was driving, knew there were approximately nine crosswalks on Nalabila Boulevard, including the one at Duncan. He was watching the road and could see a couple of blocks ahead in the road.
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> 6. The collision occurred after the plaintiff had crossed the westbound lane of traffic. He had passed the centre lane when Mr. Baldo saw him. By then it was too late. The plaintiff first registered in Mr. Baldo's brain, to use his phrase, when he was in line with his left headlight, five or ten feet in front of his vehicle.

[11] In order to succeed against the District of Kitimat, the plaintiff must establish on a balance of probabilities that the accident could have been avoided, had it provided better, or more illumination.

[12] The evidence established that there was sufficient light and that any additional light would not have provided any added benefit. Mr. Baldo admittedly could see two blocks away. The evidence of the plaintiff's father, and Constable Rapacz was that while it may have been an "in between time", visibility caused by insufficient street lighting was not a problem.

[13] I found that the plaintiff had failed to prove that the failure to provide illumination, caused or contributed to the accident, or that there was a causal connection between the lighting and the accident. The non-suit application on behalf of the District of Kitimat was successful and the plaintiff's case against it is dismissed with costs.

[14] However, I dismissed the non-suit application by the defendants Daniel Baldo and Andre Baldo on the basis that the plaintiff had established a *prima facie* case: there was nothing obstructing the defendant Andre Baldo's view of the plaintiff, and it was not dark at the time of the accident.

[15] On reopening his case, the plaintiff called Constable MacIssac, the only eye witness to the accident. His evidence established that the plaintiff without looking, ran down the driveway onto Nalabila, east of the crosswalk, and into the path of the defendant's car. The collision was unavoidable.

[16] At the time of the accident, Constable MacIssac was off duty. He and his wife were traveling east bound on Nalabila at 45 to 50 kmh. He was being followed by the Baldo van approximately 40 feet behind "give or take 10". Mr. Baldo was traveling at about the same speed. There was no other traffic on the road. The sky was dark. The street lights were on. Constable MacIssac had his vehicle headlights on.

[17] To put Constable MacIssac's evidence in perspective, it is necessary to review some of the measurements. The distance from the top of the driveway starting from the north edge of the grassy area to the north edge of Nalabila Boulevard is 14 metres. The crosswalk to cross Nalabila is just to the west of the six metre wide driveway. The west bound lane of Nalabila is 3.9 metres. The east bound land is 3.6 metres. Duncan Street intersects with the south side of Nalabila in a T intersection some eleven metres east of the driveway.

[18] As Constable MacIssac's car was crossing the crosswalk his eye was caught by the motion of the plaintiff running down the driveway. He turned his head left out of his side window to see the plaintiff's arms flailing, and his legs running so fast that it looked as if his legs could not keep up with the upper part of his body. He appeared out of control, and at the point of falling. He was running in a south east direction. When Constable MacIssac first saw the plaintiff he was about in line with the north edge of the grassy area, a distance of about 14 metres to Nalabila, or 17.9 metres to the east bound lane of Nalabila.

[19] Constable MacIssac instantly feared the plaintiff was going to get hit because of the way he was running, and the fact that the defendant's car was following right behind him.

[20] When he could no longer see the plaintiff out of his side window, Constable MacIssac turned his head to see the plaintiff in his front mounted rear view mirror. By then the plaintiff had reached the center line of Nalabila some eight metres east of the crosswalk. He saw the plaintiff run across the centre lane, and at that moment, the Baldo van veer towards the centre lane. It was too late. The Baldo van struck the plaintiff. Constable MacIssac's dashboard clock read 9:53 p.m.

[21] Mr. Duane MacInnes, an expert in accident reconstruction, was of the opinion that if the defendant had been able to see the plaintiff at the same time as Constable MacIssac, and was no less that 19 metres behind, then he may have been able to steer left and avoid the collision.

[22] However, the defendant's car was less than 15 metres behind Constable MacIssac. At 30 feet or 50 feet, the Baldo van was between 9.23 to 15.38 metres behind Constable MacIssac's vehicle. Therefore, according to the plaintiff's own expert, the accident could not have been avoided.

[23] As a general rule, a litigant who presents contradictory evidence which absolves the defendant from all blame, has failed to prove his case, on a balance of probabilities: ***Tsatsos v. Johnson*** (1970), 74 W.W.R. 315 (B.C.S.C.)., affirmed on appeal, C.A.499/70.

[24] The plaintiff has failed to establish any evidence that the defendant Andre Baldo was in any way negligent. The defendants are therefore entitled to succeed on their application for a non-suit. The plaintiff's action is dismissed with costs.

"LOO, J."

Loo, J.

Vancouver, B.C.
April 8, 1998