CANADA

PROVINCE OF BRITISH COLUMBIA

SUPREME COURT OF BRITISH COLUMBIA

CITY OF VANCOUVER

IN THE SUPREME COURT OF BRITISH COLUMBIA
(Before the Honourable Mr. Justice Thackray)

No. B906123
Vancouver Registry

September 4, 1992
Vancouver, B.C.

BETWEEN:)
MALCOLM BOLTON SCURRAH)
AND:)
THE TOWN OF GIBSONS)

ORAL REASONS FOR JUDGMENT
OF
THE HONOURABLE MR. JUSTICE THACKRAY

APPEARANCES:

M. WELSH, Esq. for the Plaintiff

H. WILLIAMSON, Esq. for the Defendant

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THE COURT: The case before me is by way of an 18(a) hearing. It has been agreed by both counsel that it can be handled in this manner. I entirely agree after having heard the case that this is subject to a judgment by way of an 18(a) summary hearing.

This accident happened when the plaintiff drove his truck into a concrete barrier. The concrete barrier had been placed by or on instructions of the defendant and it came at the intersection wherein the highway made a 90 degree turn to the right for the

direction of travel of the plaintiff. The plaintiff was not very familiar with the area.

He has agreed that he saw certain warning signs. He saw a "slow" sign which was on the right-hand side of the highway, and as far as I can see from the photographs it would be a short block and a half from the intersection in question.

Then at a point about half a block or so from the intersection in question he saw a sign which said 20 kilometers per hour. This sign was affixed to the post and immediately above that sign on the same post was an arrow showing a 90 degree turn to the right. Ahead of him at the intersection was a do not enter sign, what has been called a Chevron sign indicating a right turn, a partially constructed concrete barrier with boards on it, a flashing yellow light attached to the barrier and three red cones immediately in front of the barrier. He also had a centre line on the road which for some distance before the turn was a double painted yellow centre line.

Mr. Scurrah said that he was "travelling at about 20 kilometers per hour". He said as he was proceeding towards this intersection there was a vehicle coming towards him. Both it and Mr. Scurrah had their lights on. It would appear that there was lighting in and about this area.

Mr. Scurrah had worked until about 4:30 p.m. He

had dinner, he went to a gymnasium and he went to a friend's home until 11:45 p.m. He and his friend apparently then decided to go to a cabaret and they were there from until about 1:30 or 1:45 a.m. He said he consumed two drinks of rum and Coke. He then left the cabaret. It was overcast and raining and he drove until the accident occurred.

At no time before the accident, with respect to relevant times, did the plaintiff apply his brakes. He was driving a 1988 Ford Ranger truck with about 15,000 kilometers on it. He was wearing a seat-belt. The vehicle was a total write-off as a result of the accident.

The first question is as to whether or not there was contributory negligence on the part of the defendant with respect to this accident. It is conceded by the plaintiff that he was negligent. He was found guilty of driving without due care and attention.

I am of the opinion that the plaintiff is totally responsible for the accident. The question of whether or not it was a wooden barrier or a paper barrier or a concrete barrier has no bearing on that finding. Whatever the barrier was made of the fault for hitting it was entirely with Mr. Scurrah.

It is a fact that he had put in a long day. He put in a long evening. He had consumed alcohol and he

was driving. It is a fact that he saw a sign saying to go slowly. It is a fact that he saw a sign to drive at 20 kilometers an hour. It is a fact that he saw a sign telling him that he would be making a 90 degree turn to the right. He had to assume that the turn to the right would come very soon.

I am aware of the fact that there was an oncoming vehicle but that does not excuse him from not being prepared to make the right turn. The lines in the centre the road were full warning of that. The turn sign was full warning of that. He failed to make the turn. I see in the evidence no excuse, whatsoever, for that fact. He failed, apparently, to see the flashing amber light.

It is not possible in this sort of a hearing to ascertain exactly what affect the alcohol had upon him, nor the late hour, nor the length of the day. I think it would be fictional, though, not to acknowledge that those factors in all probability had an effect on his failure to see or react as he should have.

Mr. Scurrah said that he was travelling at about 20 kilometers an hour. I did not have evidence in front of me as to how he ascertained that. He does not say that he saw this on his speedometer nor that he consciously slowed down to that speed and checked it on the speedometer. It is a retrospective opinion

on his part.

His vehicle, which was in good condition and was a sound and strong vehicle, was rendered a write-off. Once again, in practical terms, it is very difficult to accept that at a speed of 20 kilometers an hour or about 13 miles an hour that a vehicle could be rendered a write-off.

My opinion on that is substantiated by the opinion of Constable Bourrie. He stated that in his opinion he did not "believe that the damage which occurred to the plaintiff's vehicle could have occurred if he was travelling 20 kilometers per hour."

The next question is whether or not this ends the case, that is, if the plaintiff is totally responsible for the accident can damages still flow on the basis that his injuries were aggravated because the barrier was cement rather than of some other substance. Various cases have been put in front of me by the plaintiff to establish that such a finding can be made.

In submissions, Mr. Welsh said that the concrete increased the amount of injury. He said that the case does not end if the plaintiff is liable for the accident. He said that as in Stuart, damages can still be awarded.

As to the amount, he argued that this has to be a common sense approach, that is, the court must take

a common sense approach as to how much increased injury there was because it was concrete rather than some other material. I do not believe the cases support Mr. Welsh's submission.

I will refer to Stuart vs The Queen and the Right of Canada, 1988. It looks like 45 CCLT 290. This is a decision of the Federal Court of Canada. On the last page, being 323, the court said, "It is my conclusion that the claimant fell in large part because she did not pay sufficient attention to where she was walking". That is a finding of a division of liability for the accident. That is not, in my opinion, a finding that because of an exacerbated injury damages are to be awarded.

I am of the opinion that the plaintiff must fail on the basis that the accident was caused solely by his negligence. However, if I am wrong in that then the question becomes one of assessing the increased amount of the injury because the barrier was concrete. It has been suggested, and it seems to make common sense, that there will be greater damage if somebody hits concrete rather than a light wooden fence.

The argument is based on certain standards that have been put before me in an engineering report. These standards make suggestions that with respect to highway barriers different products are used in different situations for different reasons. One of

the reasons for using a lighter product is to try to minimize injuries.

Even if I assume that the barrier should have been a wooden barrier I must then try and grapple with the increased amount of the damage or injury, if any, because the barrier was concrete.

Unfortunately, there is no evidence in front of me upon which I can make such a finding. I'm asked to use common sense but I find it impossible to simply pick a figure out of the air and say that the injuries would have been a certain percentage less if the barrier had been some form of wood or light metal. The evidence fails the court in this regard.

I have allowed into evidence the expert report of Terra Engineering Ltd. I have taken it into account.

Mr. Stuart said that as vehicles approached the barrier the severity of accidents will inevitably be substantially increased by the use of a concrete barrier. He has suggested that a wooden post and rail-type barrier would substantially reduce the amount of the damage. It may well be and as I've said it seems to make common sense that injuries might well be less.

But while that may be a general rule, I have no evidence in front of me that Mr. Scurrah's injuries would have been less if the barrier had been made of some other substance. Therefore, even if I am

incorrect on my earlier point, that the case ends when the court found that Mr. Scurrah was totally at fault for this accident, he would nevertheless be unsuccessful in this case and is unsuccessful because the court does not have evidence that his injuries were increased because of the fact it was a concrete barrier. The case is therefore dismissed.

THE COURT: Is there anything else?

MR. WELSH: No costs I assume would follow the event, My Lord.

THE COURT: I might have a hard time denying them, Mr. Welsh, unless you have some --

MR. WELSH: Well, the costs generally follow the event, My Lord. I really can't make any submissions. I mean, notwithstanding the report, Your Lordship -- I follow Your Lordship's comments so I can't really think of any reason --

THE COURT: I would say this on costs. I'm conscious of the fact that after this accident the concrete barrier was removed and a wooden barrier was put up. I believe the law is clear and both counsel agree that is not evidence of negligence but it is evidence of the state of mind which the defendants maybe should have had at an earlier time. Not necessarily, but maybe.

It may be that because of this accident they simply took further steps in the best interests of trying to minimize damages. Nevertheless, they did this and it may be that they could give some credit to

the plaintiff for bringing something to their attention, maybe that they could excuse costs. However, if costs are demanded the defendant is entitled to them. Thank you.