Date: 19971219
Docket: 11746
Registry: Nanaimo

IN THE SUPREME COURT OF BRITISH COLUMBIA

Oral Reasons for Judgment
Madam Justice Downs
December 19, 1997

BETWEEN:

KELIE FRANCES DOW

PLAINTIFF

AND:

LEE CHAVARIE and CITY OF NANAIMO

DEFENDANTS

Counsel for the Plaintiff: James A. Vanstone

Counsel for the Defendants: Leslie Slater

[1] THE COURT: The plaintiff's claim is for damages arising out of a motor vehicle accident which occurred on the 12th day of September 1995. Both quantum and liability are in issue.

[2] The accident occurred at about 17:15 a.m. on the day in question. Eight individuals testified, who were in the vicinity of the accident at the time it occurred. Five of them, all of whom were city workers, did not see the accident but had made certain observations immediately after hearing the

collision. Three individuals actually saw the collision; one of whom was the driver of the truck which struck the plaintiff's vehicle, the second was the plaintiff and the third was an independent witness to the events which occurred.

[3] On the morning in question the city crew was applying thermal plastic to areas of the intersection to mark lanes, crosswalks, stop bars and so forth. A portion of the work had been completed at the time the accident occurred.

[4] Mr. Lainchbury, the independent third party witness, was positioned within the intersection. This accident occurred at the intersection of Labieux and Bowen Roads in the City of Nanaimo. Mr. Lainchbury was positioned in the intersection on Bowen Road about to make a left turn onto Labieux Road. Mr. Lainchbury's vehicle was pointed in a southbound direction. The plaintiff's vehicle was heading northbound.

[5] Mr. Lainchbury pulled into the left-turn lane and came to a stop as the light controlling his direction of travel was changing from amber to red. Mr. Lainchbury testified as to persons seen in the vicinity of the intersection. He said there was a man with a sign walking from west to east. He testified that there were a number of persons in the vicinity with orange vests and white hats. Mr. Lainchbury described the man with the sign as being on the roadway, not in the crosswalk, and he described the man with the sign as being

kitty-corner to him, that is, in front of him and to his left. He described the man with the sign as not in the crosswalk but between the crosswalk and the stop line in the slow lane. Mr. Lainchbury described this man as basically facing away from Mr. Lainchbury. Mr. Lainchbury testified that from his position he saw the man holding the paddle-type sign which reads "Slow" on one side and "Stop" on the other side at head level with his right hand. Mr. Lainchbury testified that the "Stop" side of the paddle sign was pointing in his, that is Mr. Lainchbury's, direction, so he concluded that the "Slow" side of the sign was facing in the direction and would be visible to traffic moving northbound.

[6] Mr. Lainchbury gave some evidence as to the approach of the plaintiff's vehicle. It was travelling in the fast lane or the lane closest to the centre. He said that when that vehicle came into view, he estimated it was going at the speed limit, which in that vicinity was fifty kilometres per hour, and he said it continued going at that speed for a time. Mr. Lainchbury added at this portion of his testimony that he wasn't a good estimator of speed. When asked, he acknowledged that the plaintiff vehicle may have slowed. He said there was no "nose-dive", in other words, the front of the vehicle did not make a motion as a result of the application of brakes. Beyond that, Mr. Lainchbury's evidence simply was that the plaintiff did not come to an almost complete stop.

[7] Mr. Lainchbury testified when he saw the gentleman with the sign and the plaintiff's vehicle approaching he was aware of a vehicle on his left, and he said words to the effect that he knew what was going to happen. What did happen was that the plaintiff's vehicle entered the intersection and was struck on the passenger side by a five-ton cube van coming from Labieux Road intending to cross Bowen Road.

[8] There is no dispute whatsoever that the plaintiff entered the intersection when the light was red. Correspondingly, of course, there is no dispute that Mr. Doherty, the driver of the cube van, entered the intersection when the light for him was green.

[9] Mr. Lainchbury also testified as to what he did following the collision. Basically, he went to the plaintiff's vehicle.

[10] I should pause here to say that the collision itself must have been quite dramatic. There was a loud crash; there was a great deal of glass. The plaintiff's vehicle spun and bounced. It was a significant impact.

[11] Mr. Lainchbury went to the plaintiff's vehicle, inquired as to her wellbeing and he testified as to a certain conversation that took place. He said that he had spoken with the plaintiff and that she had not said anything about flagging to explain her entry into the intersection. He said there was

no discussion about the motor vehicle accident, nor did he tell anyone else at the scene about his observations of what had happened with respect to the man with the sign. Mr. Lainchbury also testified that he did not hear anyone talking about flagging at the scene of the accident.

[12] Ms. Parker, the plaintiff -- who commenced this action under the style of proceeding of Dow versus the City of Nanaimo, but has since married and elected to assume her new husband's name, so I will refer to her henceforward as Ms. Parker -- Ms. Parker testified that as she approached the area of the intersection, she crested the rise preceding it from the direction which she was going, at which time she could see the intersection. She testified as to seeing some men with vests, the same orange vests, in the area. She testified that she observed a man in an orange vest and a white hand with a "Slow" sign held up. She says she was travelling in the fast lane or the inside lane, and the light for her had changed from green to amber. She said the man with the sign was there holding the sign at head level with his elbow bent, with the "Slow" side facing her, and she said the man with the sign maintained eye contact with her. She described him as being between the centre lane and the curb lane, close to the white dotted line, very close to the broken line. She described him as having blond hair that stuck out under his hat.

[13] I should pause to add that Mr. Lainchbury also described the hair of the sign person as being blond and sticking out from under the white hat.

[14] Ms. Parker testified that although the light changed from amber to red, she understood the actions of the man with the sign, the eye contact and the fact that the "Slow" portion of the sign was facing her to mean that she should enter the intersection, in spite of the fact that the light was red, and she did so. She also testified that she did not recall if she looked right or left as she entered the intersection upon the assumed directions of the person with the flag, but expects that she had looked to her right and left and testified she did not remember seeing anything to the right.

[15] Certainly the plaintiff did testify that she had not seen the vehicle which struck her prior to the collision. The plaintiff also testified that she had slowed when she saw the light turning to amber and red, slowed significantly, and that she then sped up as she perceived the person with the flag wished her to enter the intersection.

[16] Ms. Parker also testified as to the man who had come over to her vehicle. She did not know him before the accident, nor has she seen him since. Mr. Lainchbury testified, by the way, as to his total lack of acquaintance with the plaintiff prior to the accident and since the accident.

[17] Ms. Parker testified that one of the construction crew, that is, one of the men with the orange vests, came over to the vehicle shortly after the collision and that crew member she did not know. In other words, she said, it was not the person holding the sign. That crew person, she testified, asked her how the events had taken place, and she indicated that she had been flagged through, so to speak, and the crew member asked her, "Was it me?" She then pointed to another individual who was within the intersection, she believes, sweeping up glass at the time.

[18] Ms. Parker added in cross-examination that she believes she was travelling in first gear at the time the impact occurred. She acknowledged that she was very shaken by the collision and that she was quite hysterical and also in pain immediately following the collision. She testified that the man, not the construction man, but the person I assume to be Mr. Lainchbury, of course, did not tell her she had been flagged through the intersection, and that she later became aware of the fact that he had seen the same events which she described, because he told her so.

[19] It goes without saying that all of the events happened very quickly, as was testified to by the plaintiff.

[20] I have already commented that none of the city work crew, all five of the persons present who testified, said he saw the collision in question. Translating that from the general to the specific, it goes without saying that this means none of the city people acknowledged holding a sign in the way described by the plaintiff and Mr. Lainchbury and, of course, it would go without saying that none of the city people testified as having eye contact with the plaintiff immediately preceding the collision.

[21] I will pause here to say that a great deal of testimony was led as to the various witnesses' recollection of the position of various individuals at or about the time of the collision. I will not review that evidence here.

[22] Mr. Doherty was the driver of the cube van, as I mentioned, which struck the plaintiff vehicle. He acknowledged, of course, that he entered the intersection on a green light and therefore the plaintiff must have entered on a red light. He said he saw her and he was unable to avoid the collision. He testified that another vehicle had preceded him through the intersection.

[23] He also testified as to his recollection of the position of various crew people in the area. Mr. Doherty also testified that he believed the plaintiff was travelling at about the speed limit, which is to say fifty kilometres per hour, at the

time of the collision, or prior to the collision, and he did not observe that she slowed down, as far as he could tell, before entering the intersection.

[24] Mr. Doherty testified that at the impact he didn't see where the workers were. He thought one man was on the sidewalk without any equipment and that another person was just past the lane the plaintiff's vehicle was coming by. He did not observe anyone flagging.

[25] Mr. Chavarie was the one person on the city crew that acknowledged that he was, at one point, carrying a Stop/Slow traffic control paddle. It was his evidence that he had crossed the street, was standing on the sidewalk looking away from the intersection altogether, and that prior to the collision he had set down on the applicator machine the Stop/Slow traffic control device. Mr. Chavarie, by the way, has short dark hair, and did at the time of the collision.

[26] That is a brief summary of the evidence with respect to the question of liability. Much has been omitted from that summary, but I believe I have related the most salient facts with respect to that issue. Certainly there is no doubt that the plaintiff entered the intersection when the light controlling her lane of traffic was red.

[27] Section 141 of the *Motor Vehicle Act* provides:

> If a flagger is controlling the movements of traffic around the section of highway being worked on, a person must not drive or operate a vehicle other than as directed by the flagger.

[28] I take this to mean, and counsel do not disagree, that a person controlling traffic with a traffic control device such as that described in this case, a flag so to speak, takes precedence over a traffic signal.

[29] I place a significant amount of reliance on the evidence of Mr. Lainchbury, whose evidence I find to have been straightforward, who had no vested interest in the outcome of these proceedings, and whose evidence dovetails substantially with the evidence of the plaintiff.

[30] I find on the whole of the evidence before me that the plaintiff entered the intersection on the reasonably-held belief that she was doing so at the direction of the flagperson against the red light.

[31] It is of significance to me that the safety procedure manual for the City of Nanaimo, one which governed the actions of the city crew on the day in question, makes certain provisions which are directly relevant to the issues before the court. The general requirement set out in the manual says:

> All control of public traffic will be carried out in accordance with this manual.

[32] Also within the general requirements is the statement:

> Every effort must be made to provide protection for the public and workers.

[33] Under the heading, "Use of traffic control devices," this is one of the mandatory procedures to be carried out. It states:

> Any traffic control device not required at any time during the work shall be removed from view.

[34] There is a further provision under the heading, "Use of traffic control devices," that reads:

> Misapplication and excessive use of traffic control devices shall be avoided. This may cause confusion and result in disrespect for the instruction.

[35] Now, I do not find that any crew member was intentionally flagging Ms. Parker through the intersection, but I do find a crew member held the traffic control device in the manner described by both Mr. Lainchbury and Ms. Parker, contrary to the provisions of the Safety Procedure Manual, and therefore negligently. It is confusion that was designed to be avoided, among other things, by requiring that the device be kept out of view when it was not being employed for the purpose of traffic control.

[36] I find that there was no reason for the plaintiff to have proceeded through the intersection against the red light other than her reasonably-held belief that she was being directed to do so. I find that she was not in any particular hurry, was not late for work, there was very little traffic, and I further find that her conduct following the collision was consistent with her version of the events, as was what she stated immediately following the collision when in an upset state which she described as hysterical. She did not advance any other reason or excuse for having entered the intersection.

[37] That is not wholly determinative, however, of the question of liability. The next question that arises is this. Did the plaintiff on entering the intersection have any independent duty of care, or was she entitled to rely exclusively on her reasonably-held belief that it was safe for her to enter the intersection because she reasonably believed she was directed to enter the intersection even though the light was red?

[38] Counsel have assured me, and I do not doubt, that they have diligently looked through the law reports to find a similar situation, and indeed were unable to find a case on point with respect to controlling intersections by flagpersons specifically.

[39] One case to which I was referred, ***Bachelor v. Brown***, a decision of the Supreme Court of Ontario, High Court of

Justice, February 21, 1980, was referred to by counsel for the defendant. It is of relatively little assistance to me because in the fact situation in that particular case the liability of all the involved parties, as I will call it, was not fully canvassed.

[40] Counsel for the plaintiff referred me to an authority, ***W. Brennan Hollidge v. C.R.L. Campbell Brothers Construction Ltd.*** [phonetic], (1980) O.J. 986, a decision of the Ontario District Court on June 14th, 1989. The learned judge in that situation dealt with an individual who was holding a sign very similar and probably identical to the sign in question in the case before me, saying "Slow" on one side and "Stop" on the other, and stated the following in obiter. He referred to ***Pickard v. Smith*** at page 4 and stated:

> In that case it was held that when a person employs a contractor to do work in a place where the public are in the habit of passing, which work will, unless precautions are taken, cause danger to the public, an obligation is thrown upon the person who orders the work to be done to see that the necessary precautions are taken.

[41] That, however, as I noted, is not the end of the matter in terms of liability. I find that the City was negligent, in that its crew acted in the way which I have described. As I said, the question is whether there was an independent duty of care on the plaintiff past that point when she entered the intersection.

[42] What I have found helpful in determining this question is a decision of Mr. Justice Fraser in ***Ann Nelson v. Shinsky*** [phonetic], 62 B.C.L.R. (2d) 302. This case involves a pedestrian and a motor vehicle, and in that respect it is somewhat different, but the principles of law, I believe, are applicable. I will read the headnote in its entirety, as in my view it accurately summarizes both the factual situation and the legal conclusions:

> The plaintiff was southbound in a marked crosswalk at a controlled intersection and had crossed all five lanes of the street and was only a few steps from the opposite curb when she was struck and injured by the right front of the defendant's vehicle, which was eastbound in the curb lane on a green light. The defendant did not see the plaintiff, but only felt and heard the impact. The accident occurred at night, but the intersection was well lit. It was conceded that the plaintiff was negligent. Trial proceeded on the issue of whether the defendant was also negligent.

[43] In this case the defendant was held fifty per cent at fault and the summary of the reasoning of Mr. Justice Fraser contained in the headnote is as follows:

> The duty of a motorist to take care is not something which is triggered by the happenstance of seeing the hazard, but involves some duty to anticipate risk depending on the circumstances. Users of the street are entitled to proceed on the assumption that other users will observe traffic regulations, but the right to drive or walk on that assumption is not absolute. While there is no obligation to maintain special preparation for an unseen emergency or mere possibility, if the possibility of the danger which,

> in fact, materializes is reasonably apparent, the failure to take precautions will be negligence. Here the testimony of witnesses and the photographic evidence established that the plaintiff was visible in the crosswalk and would have been seen had the defendant been maintaining a lookout. In the circumstances, the plaintiff's presence was not an unforeseen emergency, but a reasonably apparent possibility, and given the length of the crosswalk it made no difference whether the plaintiff entered it on a walk signal or not. In the result, the defendant was negligent for failing to maintain a lookout. The plaintiff was negligent in continuing to cross.

[44] Mr. Justice Fraser very carefully reviews a number of decisions which concern motorists who are proceeding lawfully.

[45] I do find as noted that the plaintiff was proceeding lawfully into the intersection on the reasonably-held belief that she was being directed to do so.

[46] Mr. Justice Fraser then summarizes the case law in point form at paragraph 20, page 309. He says:

> I conclude that the law can be stated as follows:
>
> (1) Users of the streets are entitled to proceed upon the assumption that other users of the street will observe traffic regulations.
>
> (2) The right to drive or walk on that assumption is not an absolute one.
>
> (3) There is no obligation as one proceeds to maintain special preparation for an unseen emergency or the mere possibility.
>
> (4) If, on the other hand, the possibility of the danger which, in fact, materialized is

> reasonably apparent, the failure to take precautions is negligence.

[47] The sign that was visible to the plaintiff said "Slow." It was cautionary. She understood that she was proceeding through a red light based on the cautionary instructions of what she perceived the flagperson was indicating to her. The cube van which struck her vehicle was there to be seen, but she did not see it if she looked or she did not look. The possibility of danger existed when she obeyed the perceived directions from the flagperson, and therefore she did have an independent duty of care, as she should have taken further precautions when entering the intersection and not simply have accelerated.

[48] However, I find the degree of negligence on the part of the crew in allowing the sign to be displayed in such a way that it confused the plaintiff is far greater than the negligence on the part of the plaintiff. I ascribe seventy-five per cent of the fault of the accident to the City of Nanaimo, and twenty-five per cent contributory negligence to the plaintiff.

[49] As to quantum, at this time the plaintiff is twenty-one years of age. She suffered, as indicated -- I should not say suffered -- she was involved in a significant collision. Fortunately for her, her injuries were relatively minor, given

the degree of impact. She had soft tissue injuries to her back; she had some pain, as well as glass embedded, a small fragment of glass embedded in her right leg. She had chest pain relating to a strain to her ribs that was originally thought to have resulted from fractured ribs; happily, they were not fractured. She had headaches for a period of time, extreme anxiety when driving for a significant period of time. She had an adverse reaction to certain medications she was given. On the positive side, she was free of almost all of her problems by Christmas of 1995, some three months or a bit more than three months post-accident. She did have a flare-up of her back pain when she began working as a house cleaner much later. Her difficulties with respect to driving have resolved, but she testified she is still somewhat anxious when a passenger in a vehicle. It is not known if she would have persisting problems if doing such work as cleaning houses, as she is no longer cleaning houses.

[50] Counsel for the defendant has urged upon me a series of cases and a range of damages in the approximate amount of six to seven thousand dollars.

[51] Counsel for the defendant points to the early recovery of the plaintiff and the fact that she had a reasonably small number of physiotherapy treatments. He also points to an entry in the clinical records of the family practitioner of the plaintiff, which are notes taken approximately three weeks

since the collision, and that note indicates, "just annoying sore now with respect to the back except when bending down in kitchen."

[52] The picture painted by the physiotherapist at the first visit, however, seems quite a bit different than that, as the first physiotherapy visit was on October 19th, well over a month post-accident. The handwritten notes of the physiotherapist from that entry indicate that, "Since the accident the plaintiff has been resting and lying down and has been off work." The plaintiff was, by the way, a nanny to two young children and had recently begun that employment just about two weeks prior to the accident. At the date of that physiotherapy visit the plaintiff was not driving, and this supports her contention that she had serious anxieties about driving, and indeed started driving herself, she testified, only when tricked into doing so by her father. The physiotherapist's notes also reveal and support the fact that the plaintiff was nauseous due to some of the medication she was taking and suffered from disturbed sleep, and under the heading, "Presenting problems," it says:

> Ache, left lower lateral rib cage, lumbar ache, mid-thoracic intermittent sharp stabbing ache. Headaches. Feels stiff in the morning. Pain symptoms worse by the end of the day. Lifting light objects, sharp mid-thoracic ache. Sitting aggravates ache. Backache.

[53] When Ms. Parker was examined by another family doctor in or about March or April of 1997, that family doctor reported that although she had seen the plaintiff on several occasions after she became the plaintiff's family practitioner, the only formal time they spoke about the results of the collision was in April of 1997. The doctor expressly states at that time, that is the date of this examination:

> The plaintiff told me she had back pain in the mid and lower back area. Examination revealed tenderness and palpable spasm present in the paraspinus muscles in the low thoracic and lumbar spine area. She told me that at that time her back pain was not limiting her life to any significant degree and she regarded it as mild.

[54] I accept, therefore, that the plaintiff has not exaggerated at all the symptoms she experienced from the collision and that there was some residual impact on her, although she treated it as a minor matter, even after Christmas of 1995.

[55] I have reviewed all of the authorities which have been referred to me by counsel. On the basis of those authorities and on the evidence before me, I conclude that $10,000 is an appropriate award for non-pecuniary damages in this case. I also award the plaintiff special damages in the agreed-upon amount of $2,629.10, together, of course, with interest applicable in the usual way.

[56] As to wage loss, as I have indicated, the plaintiff had secured a position as a nanny within two weeks prior to the accident. She was being paid $360 a week. The doctor and her husband, who employed Ms. Parker in the position of nanny, made efforts, particularly Dr. McCall, to keep the position open for Ms. Parker for some period of time. She was not, however, able to return to work, and Dr. McCall ultimately retained another nanny who replaced Ms. Parker. That nanny remained in the employ of the McCalls until she was no longer required by them, that is, until February 8th, 1997. The amount of Ms. Parker's loss to that date, had she been employed as a nanny throughout that entire time, was $26,838.50.

[57] Ms. Parker did have some limited income from a pub at which she was able to obtain employment in the late fall and early winter of 1996 in the approximate amount of $800. She also could have worked at that same pub for an additional shift on New Years' Eve, but elected not to. She also had some unrelated minor surgery during the period of her initial recovery, which may very well have taken her from her nanny job for a period of time, in any event.

[58] Counsel for the defendant has urged me not to award the entire amount Ms. Parker would have earned as a nanny in the situation which she had recently acquired. She submits that the McCalls had previous retained a nanny who was discharged

after a short period of time, and it was as yet too early to tell if Ms. Parker would retain her position.

[59] I do not accept that argument. I also find, as was noted in the evidence by Ms. Parker, that she had had a previous nanny job and that job had lasted for, in her evidence, one year. There is no basis on which I can conclude that Ms. Parker would otherwise not have been employed in that position. I am satisfied she has proved her loss of income, having made allowances for deductions as noted, in the amount of $25,463.50. She is, of course, also entitled to interest on those amounts payable in accordance with the usual rules.

[60] The plaintiff is therefore entitled to seventy-five per cent of each of the amounts noted under the various heads of damage with respect to this claim.

[61] Are there any submissions as to costs?

[62] MR. VANSTONE: Ms. Slater's not here, My Lady. There may be some issues on that which she and I may be able to sort out directly. There's also a concern about the Part 7 issue, which I hope she and I will be able to sort out. And with just a couple of minor misstatements --

[63] THE COURT: Yes, sorry?

[64] MR. VANSTONE: Your Ladyship mentioned at the beginning that the accident happened at twelve-fifteen; it was seven-fifteen.

[65] THE COURT: I thought I said seven fifteen. If a transcript of my reasons are ordered, I will go through them, Mr. Vanstone and attempt to correct any glaring errors. I am sorry that my reasons are not as polished as I might otherwise have wished them to be, but I felt in the circumstances of this case it might be preferable for all concerned to deliver reasons quickly, and that sometimes results in less polish and less accuracy than one would otherwise wish. Did you --

[66] MR. VANSTONE: I thought it was just a misstatement rather than a lack of polish or accuracy, My Lady. And the second thing was the $360 was per week, not per month.

[67] THE COURT: Yes.

[68] MR. VANSTONE: Yes.

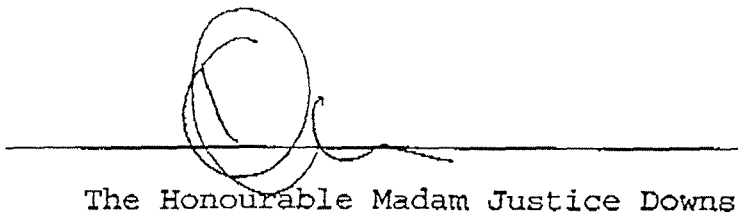
[69] THE COURT: Definitely that, so -- she wasn't employed at $360 per month.

[70] MR. VANSTONE: Per week.

[71] THE COURT: She was not employed at $360 per month.

[72] MR. VANSTONE: Okay. That's all. Thank you very much, My Lady.

[73] THE COURT: Thank you.



The Honourable Madam Justice Downs