COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Lutley v. Southern,*
2011 BCCA 299

Date: 20110629
Docket: CA038508

Between:

Pamela Lutley

Respondent/Cross-Appellant
(Plaintiff)

And

Shelley Lorraine Southern

Appellant/Cross-Respondent
(Defendant)

Before: The Honourable Mr. Justice Donald
The Honourable Madam Justice Newbury
The Honourable Mr. Justice Chiasson

On appeal from: Supreme Court of British Columbia, September 17, 2010.
(*Lutley v. Southern*, 2011 BCSC 117, Vancouver Docket No. M070440)

Counsel for the Appellant:	J.W. Joudrey
Counsel for the Respondent:	T.J. Delaney
Place and Date of Hearing:	Vancouver, British Columbia June 6, 2011
Place and Date of Judgment:	Vancouver, British Columbia June 29, 2011

Dissenting Reasons by:
The Honourable Mr. Justice Chiasson

Majority Reasons by:
The Honourable Mr. Justice Donald (p. 15, para. 54)

Concurred in by:
The Honourable Madam Justice Newbury

Reasons for Judgment of the Honourable Mr. Justice Chiasson:

Introduction

[1] This appeal concerns the determination of right of way and allocation of responsibility for an accident involving a motor vehicle crossing a through street and a motor vehicle in the curb lane of the through street.

Background

[2] The appellant was travelling west on 67th Avenue towards Oak Street, which is a busy thoroughfare in Vancouver, British Columbia. At the intersection of these streets there is a flashing green light for traffic on Oak Street, which turns red when activated by a pedestrian and a stop sign for traffic traveling west on 67th. Oak Street is six lanes, numbered by the trial judge one to six proceeding from the east side of Oak Street.

[3] The appellant stopped at the stop sign. The north and south traffic on Oak was stopped and remained stopped as the appellant drove through the intersection. As she exited the intersection, the right (passenger side) rear bumper of her vehicle was struck by the right front bumper of the respondent's vehicle.

[4] The respondent had been travelling in the west curb lane (number six). The block north of 67th is an extraordinarily long block. When she was approximately one and one-half normal city blocks from 67th or perhaps a little further, she observed the 67th light turn from red to flashing green. She testified that "the two lanes on my left had not started to proceed". The respondent stated that it took her four to six seconds to get to the intersection. She first saw the appellant's vehicle when it was in front of her. The respondent slammed on her brakes, but was unable to stop.

[5] The accident was witnessed by Mr. Nagy. He was travelling south on Oak Street and stopped for the red light. After the light turned to flashing green and he was about to proceed, he observed the appellant in the intersection. She had

crossed the northbound curb and middle lanes and was entering the northbound lane beside the middle of the intersection. He and the other north and south bound vehicles that had stopped for the red light, remained stationary as the appellant crossed the intersection.

[6] Mr. Nagy described the appellant's speed as normal. She seemed to hesitate periodically. She testified that she made eye contact with the Oak Street drivers as she proceeded across the intersection.

[7] The respondent sued the appellant. The trial judge held the appellant 60% at fault and the respondent 40%. The appellant contends she should not have been found at fault. The respondent cross-appeals asserting that the trial judge erred in allocating only 60% of the fault to the appellant.

The trial judgment

[8] After describing the scene, in para. 6 the trial judge turned to the evidence of the respondent. She saw the 67th Avenue light "from some distance". Initially, it was red, but turned to flashing green. "At that point she noticed that...vehicles ahead of her and to the left were not moving forward immediately with the change of light to flashing green". The judge observed that the respondent "recalled thinking at the time that there could be some obstruction like a vehicle or pedestrian in the intersection holding up traffic".

[9] The judge continued in para. 7:

> The [respondent] reacted positively at first by taking her foot off her accelerator thus allowing her vehicle to slow down while she rolled down her window to listen for the sounds of trouble, such as screeching tires. After that it isn't clear what the [respondent] was thinking. It seems that her mind ceased to process what she had seen. It happens. She failed to realize that if she did not brake, she would not be able to stop at the intersection if she had to.

[10] The appellant had intended to turn left to proceed south on Oak Street, but saw a no-left-turn sign that in fact was inoperative because it was Saturday. She

decided to proceed through the intersection and subsequently to find a way to proceed south.

[11] The judge had the following to say about the appellant at para. 9:

> The [appellant] also noticed the vehicles on Oak Street slowing down and stopping. She testified that she did not see any light signal, and that she could not see lane 6 or the [respondent] travelling in it. She reasoned that there must be a light controlling the Oak Street traffic and that it must be red because the vehicles were slowing down. However, clearly she was not confident that this was so. She testified that she took precautions to avoid the consequences if she was wrong. She sought to establish eye contact with the Oak Street drivers, and then to further minimize the risk she decided to accelerate through the intersection, and thus reduce the time of exposure to danger.

[12] The judge briefly discussed the evidence of Mr. Nagy who "had slowed to a stop at the intersection and had a clear view of the accident". He thought the respondent "was travelling at an excessive speed", but could not say how many kilometres per hour. The judge stated that Mr. Nagy saw the appellant enter the intersection, but did not know whether his light was red or green at that time. The judge concluded that he could not "find that the [appellant] was lawfully in the intersection at any time before the accident".

[13] The judge concluded that the respondent "was negligent and in breach of her statutory duties by failing to slow down sufficiently to be able to stop at the intersection. He observed that the respondent's view of the intersection was obstructed and stated "[s]he should have applied her brakes as soon as the obstruction appeared and come to practically a stop at or near the intersection".

[14] The judge found the appellant "negligent and in breach of her statutory duty in failing to maintain a proper lookout and by accelerating through the intersection when it was not safe to do so". He continued:

> [15] Relying on eye contact was insufficient. Who could say that all of the other drivers noticed the [appellant's] searching look into their eyes, and what any of them inferred from it, and by what sign language they assured her that they would not enter the intersection while she proceeded through it? It was futile to begin with because she had no communication with at least one of those drivers, i.e. the [respondent].

> [16] As for accelerating through the intersection, while it may have reduced the time for exposure, it proved by virtue of the collision not to be effective. Counsel for the [respondent] suggested that it would have been better for the [appellant] to move very slowly lane-by-lane through the intersection and stop wherever it appeared that an Oak Street driver was about to move into the intersection. Whether that would have sufficed, I can't say, but it would likely have been safer. To keep a proper lookout the [appellant] needed to take her time and make sure of the cross traffic she had to deal with. She failed to do so. It is not a mitigating factor that she did not see lane 6 or the [respondent] in it.
>
> [17] The [appellant] testified that as she first began to cross lane 6, she looked northward up that lane and saw no other vehicle, the suggestion being that the [respondent] was some distance from the intersection at that point and must have covered that distance at a very high rate of speed. I cannot accept that evidence. The [appellant] could not have had a view up lane 6 until she had entered that lane and the time for her to travel from that point to the point of collision could not have been more than a second, and it was possibly less. In other words, by the time that the [appellant] was able to see lane 6, the [respondent] had to be very close to the intersection, and it was already too late for both drivers to stop, and there was initially no room to swerve away. On the evidence, both vehicles were travelling too quickly in the circumstances.

Positions of the parties

[15] The appellant contends the judge made palpable and overriding errors of fact, erred in finding the appellant was not lawfully in the intersection and in his allocation of liability.

[16] The respondent frames the issues on appeal as:

> A. Did the trial judge make a palpable and overriding error when he found as a fact the [appellant] left the stop sign and started to cross Oak Street when the light was flashing green for traffic on Oak Street?
>
> B. Did the trial judge make a palpable and overriding error when he found the [appellant] negligent for leaving the stop sign and failing to keep a proper lookout as she crossed Oak Street?

[17] On her cross-appeal she states the judge erred by "failing to take into account the [appellant's] negligent decision to enter the intersection in the first place, and placing too great an onus on the [respondent] under s. 131 of the *Motor Vehicle Act* when apportioning fault".

Discussion

[18] A review of the transcript shows that the trial judge and the parties spent a good deal of time considering whether the Oak Street light was red when the appellant entered the intersection. This may have led to the judge's statement he could not find that the appellant "was lawfully in the intersection at any time before the accident". In my view, that determination does not depend on whether the light was red when the appellant entered the intersection, although logically on the evidence it is an irresistible inference that the light was red at that time.

[19] As a matter of law, the appellant, having stopped at the stop sign, was entitled to proceed and she had the right of way. Section 175 of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318 states:

> 175 (1) If a vehicle that is about to enter a through highway has stopped in compliance with section 186,
>
> (a) the driver of the vehicle must yield the right of way to traffic that has entered the intersection on the through highway or is approaching so closely on it that it constitutes an immediate hazard, and
>
> (b) having yielded, the driver may proceed with caution.
>
> (2) If a vehicle is entering a through highway in compliance with subsection (1), traffic approaching the intersection on the highway must yield the right of way to the entering vehicle while it is proceeding into or across the highway.

[20] The vehicles in lanes 2, 3, 4 and 5 had not entered the intersection and were not approaching it so closely as to constitute an immediate hazard. They were stopped. That is clear from the evidence of the appellant, Mr. Nagy and the respondent.

[21] The appellant testified that she knew there was a light for the Oak Street traffic although she could not see the colour due to the sunlight. On her examination for discovery she said the traffic on Oak Street stopped as she approached the 67th Avenue stop sign. At trial during her evidence in-chief and under cross-examination she stated the Oak Street traffic stopped after she stopped at the stop sign.

[22] Mr. Nagy testified:

> Q ... as you approached the intersection, what colour was the light?
> A ... it was red.
> Q ... what did you do?
> A I stopped.

He confirmed that both the north and southbound lanes were stopped for the appellant.

[23] The respondent testified that the cars that had been stopped at the 67th Avenue red light did not move forward when the light turned green and remained stationary at all times as she approached and entered the intersection. That is, even if the light was flashing green when the appellant entered the intersection, the cars in lanes 2, 3, 4 and 5 were stopped.

[24] Even if the light was green when the appellant entered the intersection, the respondent did not constitute an immediate hazard. An immediate hazard has been defined as "an approaching car is an immediate hazard if the circumstances are such as to require the driver of that car to take some sudden or violent action to avoid threat of a collision if the servient driver fails to yield the right-of-way" (*Keen v. Stene* (1964), 44 D.L.R. (2d) 350 at 359 (B.C.C.A.)). The Court made it clear that the circumstances of a driver stopped at a stop sign are fluid.

[25] In the present case, there is no suggestion that the respondent's vehicle represented an immediate hazard when the appellant entered the intersection. The appellant was at least a normal block or block and one-half away. As between the appellant and the respondent, the appellant had the statutory right of way.

[26] In my view, the trial judge erred concluding he could not find that the appellant was at any time lawfully in the intersection. I reject the respondent's assertion that the appellant was negligent in entering the intersection.

[27] Was the light red? The judge had this to say in para. 11:

> Counsel for the [appellant] submits that the traffic light on Oak Street must have been red at the time that the [appellant] entered the intersection because of the testimony that the Oak Street vehicles came to a stop at the intersection. That is problematic because I accept the [respondent]'s evidence on the point. Her testimony was given in a straightforward and credible manner and was not contradicted directly by any other evidence. The disturbance of other vehicles slowing down and stopping was something that the [respondent] said she saw after the light turned flashing green. It seems to me that the light turned flashing green just as or just before the [appellant] began to accelerate through the intersection. It is possible that the [appellant] had wholly entered the intersection while the light was red, but I doubt it, and I cannot find that the [appellant] was lawfully in the intersection at any time before the accident.

[28] In my view, in rejecting the appellant's contention the Oak Street light was red when she entered the intersection based on the evidence of the respondent, the judge misapprehended the evidence. The respondent did not see the appellant until immediately before the collision. That is, she had no idea what colour the light was when the appellant entered the intersection. The respondent did not state she observed other cars "slowing down and stopping ... after the light turned flashing green", which might suggest they were stopping for the appellant. After stating that the 67th Avenue light was red as she travelled south on Oak Street, the respondent testified, "the light changed to a flashing green for me ... the two lanes on my left had not started to proceed" and " [a]s I'm proceeding towards 67th ... there's a few cars to my left that are not proceeding". That is, the cars at the intersection had stopped for the red light.

[29] The trial judge appears to have been alive to this evidence. He stated in para. 6:

> She saw the traffic light from some distance. It was red at first, but then turned to flashing green as she got closer. At that point she noticed that some of the vehicles ahead of her and to the left were not moving forward immediately.

[30] The judge also appears to have misapprehended the evidence of the appellant on this point. He stated in para. 9 that the appellant "noticed the vehicles on Oak Street slowing down and stopping" and that she reasoned the Oak Street traffic light "must be red because the vehicles were slowing down". The judge

observed that the appellant "clearly was not confident that this was so" because she sought eye contact with the Oak Street drivers "to avoid the consequences if she was wrong".

[31] The appellant's assumption was not based on the Oak Street traffic slowing down. She stated that she assumed the light was red because the Oak Street traffic stopped. Under cross-examination she testified:

> Q ... you're inferring from the fact that they just stopped, that the lights were red for them.
>
> A Yes.

[32] As noted, Mr. Nagy testified that the light was red when he approached the intersection and he stopped. He stated further that when the light turned flashing green and he was about to move, he noticed the appellant's vehicle in approximately the middle of the intersection. It was his view that the light must have been red when the appellant entered the intersection – "It would have to be to reach the centre lane" – although he conceded he was surmising.

[33] The judge's comment in para. 9 that the appellant obtained eye contact because she was uncertain whether the light was red and his discussion of eye contact as noted in para. 15, appear not to appreciate why the appellant made this effort. She denied she did so because she was uncertain what colour the light was. Her evidence was that she wanted to make sure the drivers did not do something unexpected. In my view, this exhibited caution. The appellant wanted to be certain that each driver knew she was there. In fact, it would appear that they did so because none of them moved after the light turned green.

[34] Although, the colour of the light when the appellant entered the intersection was not determinative of whether she entered the intersection lawfully, there appears to have been no basis for the trial judge's rejection of the appellant's contention that she entered when the Oak Street light was red or his conclusion that she was not confident this was so.

[35] Having concluded that the appellant had the right of way as she crossed Oak Street, I turn to the legal position of the respondent. She was passing to the right of a row of cars stopped at an intersection. At the intersection was a flashing green light.

[36] The respondent was entitled to travel in the curb lane, but s. 158(2) of the *Motor Vehicle Act* provides that despite this fact:

> ... a driver of a vehicle must not cause the vehicle to overtake and pass another vehicle on the right
>
> (a) when the movement cannot be made safely

[37] This Court in *Fabellorin v. Peterson* (1994), 93 B.C.L.R. (2d) 105 stated:

> Section 160 [now s. 158] imposes a heavy onus on the driver of a vehicle attempting to pass other vehicles on the right. More especially is this so when the vehicles ahead have stopped or slowed on the roadway other than at an intersection or a crosswalk when there is no apparent reason for their doing so. The very fact that they have done so should alert the driver of the overtaking vehicle, intending to pass, that there must be some reason for the drivers ahead of him to have acted as they did and this should have alerted the overtaking driver to exercise extra caution to ensure that he or she can pass on the right safely.

[38] Had the light at 67th and Oak Street been merely green, pursuant to s. 127(a)(iii) the respondent would have been obliged to yield the right of way to the appellant who was lawfully in the intersection when the green light was exhibited. Because the light was a flashing green light, pursuant to s. 131(5)(a), the respondent was obliged "to approach the intersection or signal in such a manner that ... she [was] able to cause the vehicle to stop before reaching the signal or any crosswalk in the vicinity of the signal if a stop should become necessary". Clearly, the respondent did not do so and the trial judge so found.

[39] After citing ss. 125 and 186 of the *Motor Vehicle Act* (s. 125 requires obedience to an applicable traffic control device; s. 186 requires a driver to stop at a stop sign), in para. 13 the trial judge referred to "a general duty to drive safely, maintain a proper lookout, and not to proceed forward until it is safe to do so". Insofar as this general duty relates to the appellant's entry into and passage through

lanes one to five of Oak Street, I am unable to see any basis to conclude the appellant did not satisfy the duty.

[40] The judge rested his conclusion of negligence specifically on a "breach of a statutory duty to maintain a proper lookout and ... acceleration through the intersection when it was not safe to do so". I am unsure to what statutory duty the judge referred. As the appellant traversed the intersection she certainly was keeping a lookout, as evidenced by her eye-contact efforts, in addition to the fact she had the right of way. As to acceleration, insofar as this connotes inappropriate speed, it is instructive to examine the evidence that related to the use of the word and the appellant's speed.

[41] The following was an exchange during the appellant's cross-examination:

> Q Ms. Southern, you leave the stop sign, you start crossing the street, you make no stops until the collision occurs; correct?
>
> A That's right.
>
> Q And the whole time you're accelerating?
>
> A I don't know. I — I think I'm accelerating through, I'm going through, I'm driving through at a normal rate of speed. I accelerated as I left the stop sign.
>
> Q And you're accelerating the whole time up until the collision occurred?
>
> A I'm driving through.
>
> Q You were accelerating the whole time until the collision occurred?
>
> A If that's the proper terminology, I'll accept that.
>
> Q Well, let's -- let's just say -- it's not the terminology. I'm suggesting those are the words that you used?
>
> A Okay. Then if those are the words I used, I -- I agree.

[42] The discovery exchange to which counsel referred was:

> Question 285, page 49:
>
> Q And from the time that you left your stopped position at the stop sign up until the time that the collision occurred, we know that you didn't make any stops. You know you don't know how fast you were going, but do you know if you were accelerating, de-accelerating or going about the same speed?

> A I can tell you that I would have been accelerating at an appropriate amount to cross six lanes of traffic with the experience I have in driving.

[43] Mr. Nagy described the appellant's speed as normal. He also stated that the appellant "sort of moved forward and then slowed down and then moved forward again".

[44] In my view, the evidence does not support an inference that the appellant's speed was inappropriate.

[45] In the context of left turning vehicles, this Court has made it clear that a dominant driver is entitled to assume that the servient driver will obey the rules of the road. The words of Mr. Justice Legg in *Pacheco v. Robinson* (1993), 75 B.C.L.R. (2d) 273 (B.C.C.A.) are instructive:

> In my opinion, a driver who wishes to make a left hand turn at an intersection has an obligation not to proceed unless it can be done safely. Where each party's vision of the other is blocked by traffic, the dominant driver who is proceeding through the intersection is generally entitled to continue and the servient left-turning driver must yield the right of way. The existence of a left-turning vehicle does not raise a presumption that something unexpected might happen and cast a duty on the dominant driver to take extra care. Where the [appellant], as here, has totally failed to determine whether a turn can be made safely, the [appellant] should be held 100 percent at fault for a collision which occurs.

[46] Legg J.A. continued:

> As stated by Cartwright, J. in *Walker v. Brownlee*, [1952] 2 D.L.R. 450 (S.C.C.) at 461:
>
> > While the decision of every motor vehicle collision case must depend on its particular facts, I am of opinion that when A, the driver in the servient position, proceeds through an intersection in complete disregard of his statutory duty to yield the right-of-way and a collision results, if he seeks to cast any portion of the blame upon B, the driver having the right-of-way, A must establish that after B became aware, or by the exercise of reasonable care should have become aware, of A's disregard of the law B had in fact a sufficient opportunity to avoid the accident of which a reasonably careful and skilful driver would have availed himself; and I do not think that in

> such circumstances any doubts should be resolved in favour of A, whose unlawful conduct was fons et origo mali.
>
> [Emphasis added.]

[47] In the present case, the trial judge stated in para. 17:

> ... by the time that the [appellant] was able to see lane 6, the [respondent] had to be very close to the intersection, and it was already too late for both drivers to stop

[48] The respondent was under a positive obligation to be able to stop before entering the intersection. She was unable to do so. The appellant was lawfully in the intersection and entitled to the right of way. The respondent was passing stopped vehicles on her left with clear knowledge of potential danger at the intersection. On the evidence of the respondent and Mr. Nagy, it is apparent that the appellant had been in the intersection for some time. The respondent gave various estimates of how long the 67th Avenue light had been green (from four to six seconds; it turned green when she was approximately three normal city blocks away; there was ample time for a pedestrian or motor vehicle to traverse the intersection). The appellant had no indication that there was a vehicle in the curb lane or that the respondent would enter the intersection in complete disregard of her statutory obligations.

[49] Lane six presented a new danger to the appellant. While in my view her speed through the intersection was not inappropriate, she testified that she did not slow down before entering lane six. The judge rejected her evidence that she looked up the lane and he concluded both vehicles were, at that point, travelling too quickly. Had the appellant slowed it is possible that she may have seen the respondent, although this also may have placed her into a position where the collision would have been more serious.

[50] While a dominant driver is entitled to assume servient drivers will obey the rules of the road, a dominant driver cannot act unrealistically. It is an unfortunate reality that servient drivers like the respondent do disregard their obligations and dominant drivers cannot ignore that fact. A dominant driver passing through an

intersection who is confronted with a new risk – a seemingly empty curb lane the view of which is obstructed – must proceed with some caution.

[51] An appellate court rarely will interfere with a trial judge's apportionment of liability (*MacDonald (litigation guardian of) v. Goertz*, 2009 BCCA 358, para. 58), but will do so if the judge has made a palpable and overriding error of fact, misapprehended the evidence or erred in principle. It is an error of law not to take into account the fact a party was the dominant driver (*Bedwell v. McGill*, 2008 BCCA 6, para. 59) or to fail to recognize the significance of a servient driver's negligence (*Gautreau v. Hollige*, 2000 BCCA 390, para. 18; quoted in *Bedwell*)

Conclusion

[52] In my view, the trial judge erred in law by failing to conclude that the appellant was lawfully in the intersection and had the right of way and in failing to address the onerous responsibility of the respondent. The respondent was passing on the right of stopped vehicles, was the servient driver and obliged to yield the right of way to the appellant and was entering an intersection with a flashing green light with the obligation to be able to stop her vehicle before entering the intersection. I would place the majority of fault on the respondent and would apportion liability 85% against her and 15% against the appellant.

[53] I would allow the appeal to the extent of varying the apportionment of liability and dismiss the cross-appeal.

"The Honourable Mr. Justice Chiasson"

Reasons for Judgment of the Honourable Mr. Justice Donald:

[54] I am indebted to my colleague for his summary of the facts in this case. I regret that I am unable to agree with his conclusion.

[55] Both drivers proceeded in the intersection at lane 6 without knowing whether it was safe to do so. Neither could see the approach of the other. They were both careless in causing the accident.

[56] With all due respect for the contrary view, I do not think the apportionment of fault in this case depends on the statutory provisions governing the right of way. Each party can assert a right of way but, on the facts, neither exercised the common law duty of care in a situation requiring caution.

[57] In my judgment, it was not an error to find the parties roughly equal in liability. While the apportionment might have been reversed or assessed at 50:50, the judge's determination is within a reasonable range and I would not disturb it.

[58] I would dismiss the appeal and cross-appeal.

"The Honourable Mr. Justice Donald"

I agree:

"The Honourable Madam Justice Newbury"