

SUPREME COURT OF NOVA SCOTIA

Citation: Mosher v. LeFort Estate, 2009 NSSC 129

Date: 20090420

Docket: HFX 186382

Registry: Halifax

Between:

Susan Louise Mosher

Plaintiff

- and -

Estate of the late Joseph Gerard LeFort

Defendant

- and -

Ferguson Brown and Laurie MacIsaac

Third Parties

Judge:

The Honourable Chief Justice Joseph P. Kennedy

Heard:

September 2, 3 and 4, 2008, in Halifax, Nova Scotia

Final Written

Submissions:

Last brief submitted September 26, 2008

Written Decision:

April 20, 2009

Counsel:

David Richey for the Plaintiff

Philip Chapman for the Defendant

Wendy Johnston for the Third Parties

By the Court:

[1] This was a hearing to determine liability.

[2] In Halifax on September 19th, 2000, at approximately 4:30 p.m., the Plaintiff - Susan Mosher (Mosher) - was a passenger in a Chevrolet pick-up truck being operated by the Third Party, Ferguson Brown (Brown). He was the boyfriend of Mosher and he had just picked her up at her place of work, was headed home, north on Highway 102 (outbound) approaching the Hammonds Plains Road Exit (Exit No. 3).

[3] Mosher was located in the front seat passenger side.

[4] When this Brown driven pickup truck was about 0.3 kilometres south of Exit No. 3 it was involved in a collision with a van motor vehicle driven by the Defendant, Joseph Gerard LeFort (LeFort).

[5] Highway #102 in this area is comprised of four lanes; two in each direction separated by a concrete median. At the time of the accident, this highway was undergoing construction. Northbound traffic was reduced to one lane to accommodate bridge repair work. LeFort was approaching behind the Brown driven vehicle,

headed in the same direction. He was in the left-hand lane as Brown was merging into that lane as the temporary construction signs directed. There is a significant turn in the northbound lanes just prior to where this collision took place. LeFort would have just come around that turn when he encountered Brown and vehicles ahead of Brown merging into the left lane.

[6] It is how this collision happened that is central to this matter. Who was responsible for the accident? I am dealing with liability only.

[7] The Third Party, Laurie MacIssac (MacIssac), was the registered owner of the vehicle driven by Brown. Brown had been assisting MacIssac with work at his property. MacIssac consented to Brown's use of his vehicle to pick up Mosher. The parties agree that there is no liability on the part of the owner, MacIssac.

[8] Unfortunately, the Defendant LeFort is deceased as of February 2001. His death was not in any way connected to this accident. He was not discovered and he did not get to testify at this hearing.

EVIDENCE

[9] Brown, the driver of the pick-up truck, testified he was northbound on Highway # 102 when he noted a “construction ahead sign with a flashing light” as he was going around a curve on the No. 102 Highway. This sign was located before entering the turn.

[10] He next sees a “merge ahead sign” after he had negotiated the turn and a line of traffic in his right lane travelling at approximately 20 kilometres an hour, “getting down to around 10 kilometres per hour”. He said that the traffic became “stop and go” as he approached the point where the traffic was merging into the left lane. He testified that he put on his four-way flasher lights. “I kept looking in the rearview mirror, checking for cars coming down the left lane”. There were “no vehicles in the left lane”. He said that as he moved over into the left lane as directed, “I saw a vehicle in the left lane about 20 feet behind”. He heard brakes squeal and saw the van “swerving back and forth”. “I told Mosher we were going to be hit”.

[11] That van vehicle was the LeFort vehicle. “He was moving fast. He hit the brakes. He had no place to go.” He said he knew the way that he hit (the Brown

vehicle) that he was moving fast. He said he didn't have the left lane blocked off, he was moving into that lane. "The car in front of me had the left lane blocked off. I was following the other cars that were merging."

[12] After the collision, the other driver LeFort came over to talk and I asked him "What were you thinking about?" He responded, "I don't know, I was in a hurry. I wasn't paying much attention to the road." He heard LeFort tell the R.C.M.P. officers (after they had arrived), "It's my fault".

[13] The Plaintiff Mosher also testified. She was the passenger in the Brown driven pickup truck. She is a non-driver.

[14] She confirmed that Brown had engaged the four-way flashers.

[15] As Brown began to merge into the left-hand lane he alerted her, saying "hold on, we're going to be hit". She said they were "half way between lanes" when struck. "We were already in the left lane when hit - at an angle". "We were hit, spun around, and hit again".

[16] Mosher said that she also spoke to LeFort after this collision. She testified that he apologized, “I’m sorry, it’s all my fault”.

[17] The investigating police did not take statements or at least there were none before this Court. No independent witnesses to the accident came forward or were identified.

[18] As indicated LeFort died before he was able to be discovered.

[19] There is, though, some evidence that the Plaintiff argues is corroborative of what LeFort is alleged to have said to Mosher and Brown at the scene.

[20] An employee of LeFort’s insurer, The Principal Insurance Company of Canada, had compiled information (notes) about the accident (Exhibit No. 6). The document is hand-written, presumably by the agent of the company, and manifestly reflects conversation with LeFort. I determined it to be admissible as both reliable and necessary, with reasons given during the *voir dire*.

[21] Under the printed titled “Mechanism of the Accident” the following is recorded:

I/S (insured) RE (rear-ended) truck due to sudden stop. Both truck and I/S spun around, hit truck second time then bounced off concrete divider.

[22] The Plaintiff argues that this information provided to his insurer by LeFort confirms that he rear-ended the Brown vehicle and corroborates the responsibility that LeFort acknowledged at the scene.

THE LAW

[23] The basic rule of the road applicable to marked lanes for traffic as set out in the **Motor Vehicle Act**, R.S.N.S. 1989, c.293 reads:

Rules for Laned Traffic

111 Whenever a street or highway has been divided into clearly marked lanes for traffic, drivers of vehicles shall obey the following regulations:

...

- (b) a vehicle shall be driven as nearly as is practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that the movement can be made with safety;

Signal required

119 (1) The driver of any vehicle upon a highway before starting, stopping or turning from a direct line shall first see that such movement can be made in safety ... and, whenever the operation of any other vehicle may be affected by such movement, shall give a signal as required in this Section plainly visible to the driver of such other vehicle of the intention to make such movement.

(2) The signal required by this Section shall be given either by means of the hand and arm in the manner specified in subsection (3) or by a mechanical or electrical signalling device...

[24] Other relevant provisions of the **Motor Vehicle Act**, R.S.N.S. 1989, c. 293

(“**Act**”) read:

83 (2) It shall be an offence for the driver of any vehicle or for the motorman of any street car to disobey the instructions of any official traffic sign or signal placed in accordance with the **Act**, unless otherwise directed by a peace officer. *R.S., c. 293, s. 83.*

...

100 (1) Every person driving or operating a motor vehicle on a highway or any place ordinarily accessible to the public shall drive or operate the same in a careful and prudent manner having regard to all the circumstances.

...

101 A person operating or driving a vehicle on a highway shall operate or drive the same at a careful and prudent rate of speed not greater than is reasonable and proper, having due regard to the traffic, surface and width of the highway and of all other conditions at the time existing, and a person shall not operate or drive a vehicle upon a highway at such a speed or in such a manner as to endanger the life, limb or property of any person. *R.S., c. 293, s. 101.*

[25] The relevant provisions of the **Contributory Negligence Act, R.S.N.S. 1989,**
c. 95 read:

3 (1) Where by the fault of two or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree in which each person was at fault but if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally.

(2) Nothing in this Section operates so as to render any person liable for any damage or loss to which his fault has not contributed. R.S., c. 95, s. 3.

...

5 In every action, the amount of damage or loss, the fault, if any, and the degrees of fault are questions of fact. R.S., c. 95, s. 5.

FINDINGS OF FACT

[26] I accept Brown's testimony as to how the collision took place. He was a good witness. I watched and listened to his testimony. His explanation as to what happened makes sense to me. His testimony is corroborated by the testimony of his passenger, the Plaintiff Mosher. There is no evidence that contradicts Brown's version of events.

[27] Rather I find it to be corroborated by the report given by the deceased LeFort to his insurance company. While that report confirms a rear ending "due to a sudden stop", there is no suggestion in this document that LeFort believed that the Brown vehicle had improperly come into his left lane. LeFort's description of how the collision occurred seems to me to confirm his apparent disposition to accept blame subsequent to the collision.

[28] Brown's testimony as to the excessive speed of the LeFort vehicle, given the circumstances is unchallenged. Again I point out that LeFort didn't get to give evidence on this matter.

ARGUMENT

[29] The Third Party, Brown, denies all liability for the collision. Brown asserts that the Defendant, LeFort, is entirely and completely liable for the collision.

[30] Brown was in the process of lawfully merging into the left-hand lane of traffic on Highway #102 after determining that it was reasonable to do so. The evidence shows that Brown began reducing his speed in preparation for entering a temporary work area. Brown testified that he was merging in compliance with traffic signage indicating that the right-hand lane was closed ahead and was directing that traffic to merge left.

[31] Brown submits that the accident happened due to the speed LeFort was travelling and his inattention to the surrounding circumstances, his failure to appropriately react to signage and the slowing traffic generally, and the Brown vehicle specifically, in time to avoid the collision.

[32] Counsel representing the estate of LeFort has submitted that Brown is responsible for this collision, he having moved into the left lane in front of LeFort

without having first determined that the left lane was clear and that it was safe to do so.

[33] It is a general principle of law that to succeed in a claim in negligence, the claimant must demonstrate all the elements of the cause of action: duty owed, standard of care, damage, causation and proximity. In the present matter, the sole issue for determination is liability. As such, the issue is confined to whether the Defendant and/or Third Parties were in breach of a standard of care, and whether this breach caused the collision.

CONCLUSION

[34] I conclude on the totality of the evidence that the Defendant LeFort did not drive “in a reasonable and prudent manner with regard to the circumstances” herein.

[35] I am satisfied that the signage warning north bound drivers of a proximate construction zone and the requirement to merge was in place at all relevant times as Brown and Mosher testified.

[36] Either of these warnings would have caused a prudent driver in the left-hand lane to exercise caution and reduce speed, as the evidence discloses that other traffic encountering those circumstances was doing.

[37] Mosher and Brown testified to the merging process that drivers were executing.

[38] That process had caused traffic to be reduced to “stop and go” in order to comply with the merger directive.

[39] I conclude that in addition to the traffic sign, the behaviour of the traffic in the right-hand lane – slow-moving, backed up and merging – would have caused the prudent driver in the left-hand lane to drive in a manner that safely allowed for merging.

[40] LeFort acknowledged in discussion after the accident that he was “inattentive” and, according to Brown, travelling at excessive speed given the circumstances.

[41] If Brown saw the signage prior to entering the turn why wouldn't LeFort ? I am satisfied that the sign was located as Brown testified. Particularly, I am satisfied that there was a "construction ahead" sign located before the turn that should have alerted approaching traffic in both lanes to reduce speed and exercise heightened caution.

[42] In totality I find that LeFort in these circumstances was negligent in the operation of his vehicle, in that he was travelling too fast for existing conditions and was inattentive to circumstances that demand heightened care.

[43] Does Brown have any responsibility for the collision – was there contributory negligence?

[44] I acknowledge the heavy onus of care placed upon a driver changing lanes that I made reference to in *Erickson v. Metro Transit* (2000) 189 N.S.R. (2d) 94 at ¶ 52.

[45] That onus of care I find to have been satisfied by Brown.

[46] Firstly, this was not a lane change on impulse or without notice - this was a dictated merging process that was being executed by all traffic in the right-hand lane and was forecast by signage. Secondly, I am satisfied that Brown had engaged his 4-way caution lights prior to moving into that lane. Finally, I accept Brown's testimony that the left lane was clear when he began his merge.

[47] I do not conclude that Brown acted in a careless or negligent manner and I do not see what he could have done to avoid this collision.

[48] This collision happened because of the imprudent driving of LeFort and there is no contributory negligence on the part of Brown.

[49] The matter will now move to the assessment of damages.

Chief Justice Joseph P. Kennedy