SUPREME COURT OF NOVA SCOTIA
Citation: Ha's Driving School v. Zive, 2011 NSSC 265

Date: 20110817
Docket: Hfx. No.343732A
Registry: Halifax

Between:

Peter Ha, carrying on business in the name and style of
Ha's Driving School

Appellant

-and-

Sheila Zive

Respondent

Decision

Judge: The Honourable Justice Robert W. Wright

Heard: June 27, 2011 at Halifax, Nova Scotia

Written Decision: August 17, 2011

Counsel:
Counsel for the Appellant - David Grant
Counsel for the Respondent - Andrew Gough

Wright, J.

[1] This is an appeal from the decision of Adjudicator Parker of the Small Claims Court of Nova Scotia rendered on December 28, 2010 in which he dismissed the appellant's action for damages resulting from a car accident which occurred on June 29, 2009.

[2] The adjudicator's ruling embodied in the order for judgment dated December 28, 2010 was that "The claimant was unable to establish that the defendant was negligent in the operation of the vehicle and the facts lead to the conclusion that the driver of the claimant's vehicle was in fact negligent". It was therefore ordered that the claim against the defendant be dismissed with no order as to costs.

[3] The grounds of appeal argued by counsel for the appellant (claimant) are that the adjudicator erred in law by failing to apply the proper standard of care in determining who was negligent and, more specifically, by failing to take into account s.114(c) of the *Motor Vehicle Act* which permits a vehicle to pass on the right of another vehicle which is making, or about to make, a left turn. In his oral submissions, counsel for the appellant amplified his argument that the adjudicator was in error by considering only the liability of the appellant and failing to address the standard of care to be met by the defendant (which amplification I find to be within the scope of the stated grounds of appeal).

[4] In a Summary Report of his findings of law and fact filed with the court on March 24, 2011 the adjudicator, after setting out the procedural history, wrote as follows:

> 5) The Appellant was driving south along Barrington Street in the direction of the Superstore.
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> 6) The Appellant was behind a large commercial white van with no clear back windows which stopped prior to the entrance into the superstore grocery market.
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> 7) The white van stopped to allow the Respondent to exit the Superstore parking lot.
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> 8) The Respondent seeing no traffic proceeding north on Barrington Street proceeded to pull out onto Barrington Street.
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> 9) The Appellant did not wait for the van to pull into the Superstore parking lot and instead decided to pull alongside the right side of the van and after passing the van ran into the Respondent. There was very little room on the street for the Appellant to pass the van on the right.
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> 10) I concluded the Appellant was negligent as he could not see around the van or through the back windows of the van. The Appellant did not recall if the van had signaled to turn into the lot, he only assumed the van was going to turn into the parking lot.
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> 11) The Appellant said "I was moving slowly past the van, I did not stop. I did not see what was in front of the van while behind it or beside it".
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> 12) The Appellant said "I'm familiar with the rules of the road (the Appellant is a driving instructor). No passing is allowed on the right if vehicle is moving".
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> 13) The Appellant said on cross-examination "I would not encourage a student to go around a vehicle".
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> 14) The Respondent's testimony was she went out on Barrington Street to go south and she did not turn onto Barrington Street until there was no traffic.
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> 15) For all these reasons I determined that the Appellant breached the standard of care required of a normally prudent driver by trying to squeeze by the van and being unable to see pedestrians or other cars pulling out of the Superstore parking lot.

[5] Also transmitted to this court are the exhibits entered at trial in the Small

Claims Court which include photographs of the accident scene and the collision damage to the two vehicles. The latter clearly demonstrate that the two vehicles side-swiped one another, the point of impact on the defendant's vehicle being in the area of the right front fender and the point of impact on the appellant's vehicle being along the left side, starting behind the left front wheel and extending along the driver's door.

[6] Although the adjudicator's decision does not so specify, both counsel agreed as common ground that the driver of the appellant's vehicle at the time of the accident was Mr. Paul Israel, accompanied by the appellant owner Peter Ha as a passenger.

[7] Appeals from the Small Claims Court are governed by s.32 of the *Small Claims Court Act*. Such appeals are limited to grounds of jurisdictional error, error of law, or failure to follow the requirements of natural justice. Although the latter has been included in the Notice of Appeal filed with this court, the only ground of appeal actually argued on behalf of the appellant is that of error of law as above recited.

[8] The leading case on the appropriate standard of review to be applied in such cases continues to be *Brett Motors Leasing Limited v. Welsford* [1999] N.S.J. No. 466. In that decision, Justice Saunders provided the following useful summary (at para. 14):

> One should bear in mind that the jurisdiction of this Court is confined to questions of law

> which must rest upon findings of fact as found by the adjudicator. I do not have the authority to go outside the facts as found by the adjudicator and determine from the evidence my own findings of fact. "Error of law" is not defined but precedent offers useful guidance as to where a superior court will intervene to redress reversible error. Examples would include where a statute has been misinterpreted; or when a party has been denied the benefit of statutory provisions under legislation pertaining to the case; or where there has been a clear error on the part of the adjudicator in the interpretation of documents or other evidence; or where the adjudicator has failed to appreciate a valid legal defence; or where there is no evidence to support the conclusions reached; or where the adjudicator has clearly misapplied the evidence in material respects thereby producing an unjust result; or where the adjudicator has failed to apply the appropriate legal principles to the proven facts. In such instances this Court has intervened either to overturn the decision or to impose some other remedy, such as remitting the case for further consideration.

[9] The present case involves common law principles of negligence, one important component of which is the standard of care to be met by the operators of the motor vehicles which collided. Obviously, both drivers owed a duty of care to all other motorists, including each other. The focus of this appeal, however, is whether the requisite standard of care was met by both drivers, which is informed in large measure by the relevant provisions of the *Motor Vehicle Act*.

[10] The appellant relies on s.114(c) of the *Motor Vehicle Act* in support of his argument that his vehicle was proceeding in a lawful manner when it slowly passed the left turning van on the right. That section reads as follows:

> 114 Except as otherwise provided in Section 115, the following rules shall govern the overtaking and passing of vehicles:
>
> . . .
>
> (c) in the event vehicles on a street or highway are moving in two or more substantially continuous lines, clauses (a) and (b) shall not be considered as prohibiting the vehicles in one such line overtaking or passing the vehicles in another such line either upon the right or the left, nor shall clauses (a) and (b) be construed to prohibit a driver overtaking and passing upon the right another vehicle which is making or about to make a left turn.

[11] Clause (a) prescribes the duty of a driver overtaking another vehicle

proceeding in the same direction to pass on the left in a safe manner. Clause (b) prescribes the duty of a driver of an overtaken vehicle to give way to the right and not increase its speed (which has no application here).

[12] Counsel for the appellant further argues that since his client's vehicle was lawfully proceeding around the right side of the left turning van to continue along Barrington Street, the respondent breached s.123(1) of the *Motor Vehicle Act* which prescribes that the driver of a vehicle entering a highway shall yield the right of way to all vehicles approaching on the highway.

[13] Counsel for the respondent refutes the argument that s.114(c) authorizes the passing manoeuvre made by the operator of the appellant's vehicle to the right of the left turning van. In his submission, the proper interpretation of subsection (c) is that it only applies in the situation where there are vehicles on a street that are moving in two or more substantially continuous lines.

[14] Here, the photographs of the accident scene clearly show that this section of Barrington Street is a two lane street. That is to say, it is clear that Barrington Street does not afford "two or more substantially continuous lines" where the accident took place, although there is plainly enough room for a southbound vehicle to pass on the right of another left turning vehicle in the absence of any parked cars along the curb.

[15] Counsel for the respondent further argues in the alternative that s.114(c) is at

best permissive and is subject to the legal duty to ensure that the passing manoeuvre can be completed in safety, which the operator of the appellant's vehicle here failed to do.

[16] Counsel for the appellant counters that the word "nor" in subsection (c) should be interpreted as being disjunctive and therefore represents a separate situation unburdened by the requirement of there being two or more substantially continuous lines. He therefore maintains that the operator of the appellant's vehicle was proceeding in a lawful and authorized manner.

[17] The only case providing judicial interpretation of s.114(c) of our *Motor Vehicle Act* which has been identified is the decision of Justice Richard in *Minkoff v. Knickle* (1981) 48 N.S.R. (2d) 487. The fact situation in that case was partly similar in that one of the vehicles, while travelling on a two lane city street, passed to the right of another vehicle stopped to make a left hand turn. When it emerged from that passing manoeuvre, it collided with the passenger side of a third vehicle which was making its own left hand turn into a driveway from the opposite direction of travel.

[18] In his interpretation of s.114(c) (which was then numbered s.104(c)), Justice Richard concluded as follows (at para. 10):

> In my view, s. 104(c) clearly sets up two distinct situations: (1) where there are two marked lanes of travel on the highway (which was not the case in the instant situation); and (2) where a car stopped with the intention of making a left turn then the overtaking vehicle may pass to the right of the stopped vehicle. That is precisely what [*page491] the defendant did. The Varner vehicle was parked to the left of the north lane indicating that he was about to make a left turn. The defendant was clearly not in violation of s. 104(c) in doing that which he did.

[19] Justice Richard nonetheless found that the driver of the vehicle overtaking the stopped vehicle on the right was negligent in proceeding in that manner without assuring that he could do so with safety (and in not sounding his horn at the time). He went on to find that the driver making the left hand turn approaching from the opposite direction failed to ensure that such turn could be made in safety and was thereby contributorily negligent. In the result, the court apportioned liability in negligence at 50% to both parties.

[20] I have no hesitation in adopting this interpretation of s.114(c) of the Act, thereby concluding that the operator of the appellant's vehicle did not commit a violation of that section in doing that which he did. However, the analysis does not end there. There is no question but that he had a further duty to ensure that this passing manoeuvre could be completed in safety.

[21] Knowing that the van was stopped to make a left turn into the Superstore parking lot, and that the van obstructed his line of vision, Mr. Israel ought not to have fully emerged from behind it to proceed south on Barrington Street without cautiously checking for the presence of other traffic. The adjudicator was therefore correct in finding that he breached the standard of care required of a prudent driver in those circumstances, leading to a finding of negligence on his part.

[22] What is problematic is that the adjudicator focused his entire decision on the negligence of the appellant. He did not address in his decision whether the

negligence of the appellant was the sole cause of the collision. In failing to consider that further question, in my respectful opinion the adjudicator erred in law. It now falls to this Court to make that analysis, based upon the findings of fact made by the adjudicator.

[23] Whether or not the respondent here was lulled into a false sense of security by reason of the driver of the van stopping to allow her to exit the parking lot, she nonetheless had a heavy onus to ensure that her entry onto Barrington Street could be made in safety. In my view, it was entirely foreseeable that another vehicle might emerge from behind the van, whether it was a vehicle passing on the right or a parked vehicle pulling away from the curb.

[24] I interject here that counsel made reference to evidence that was before the adjudicator that the driver of the van had gestured to the respondent to go ahead and make her left turn onto Barrington Street. The adjudicator did not mention this in his Summary Report but even if such a finding of fact had been made, it would not assist the respondent. The duty to see that a left turn, onto or from a highway, can be made in safety cannot be delegated to some other driver, but rather remains on the driver making the turn (see, for example, *Baxter v. Zinck* (1987) 76 N.S.R. (2d) 376).

[25] The finding of fact made by the adjudicator was that the respondent pulled out onto Barrington Street “seeing no traffic proceeding north”. Although there is,

of course, no transcript available from Small Claims Court proceedings, that finding must be taken to mean that the respondent looked only in that direction (i.e., to her left). I therefore conclude that she did not fully discharge her duty to ensure that her left turn making entry onto Barrington Street could be made in safety, given the foreseeability of other south bound traffic emerging from behind the stopped van. That failure, in my view, was also a contributing cause of the collision when the two vehicles sideswiped one another.

[26] Having reached that conclusion, the court must then consider the comparative degrees of fault. In my view, both parties are equally at fault and I therefore apportion 50% liability to both parties.

[27] I should add that I have reviewed the two appellate decisions that I have been referred to by counsel for the respondent following the hearing of this appeal, namely, *Brucks v. Caslavasky*, 1994 45 B.C.A.C. 62 and *Daigle v. Turrett*, 2001 NBCA 38. Both those cases are distinguishable on their facts and do not hold sway in the disposition of this appeal that I have made.

[28] I would therefore allow this appeal in part and since no provisional assessment of damages was made by the adjudicator, this case should now be

remitted to him for that purpose, subject to the apportionment of liability I have made. In the circumstances, I decline to award any costs on the hearing of this appeal.

J.