

SUPREME COURT OF NOVA SCOTIA

Citation: *Hankey v. Hughes*, 2022 NSSC 241

Date: 20220817

Docket: Tru. 469357

Registry: Truro

Between:

Amanda Marie Hankey

Plaintiff

v.

Henry Newton Hughes and Donald Wayne Cates

Defendants

DECISION

Judge: The Honourable Justice Jeffrey R. Hunt

Heard: August 10, 2022, in Truro, Nova Scotia

Written Release: August 17, 2022

Counsel: Jennifer Langille/Daniel Wood, Solicitors for the Plaintiff

Sheree Conlon Q.C./Ben Johnson, Solicitors for the
Defendants

By the Court:

Introduction

[1] On July 10, 2017, Amanda Hankey and Henry Hughes were operating motor vehicles which became involved in a collision in a convenience store parking lot. Ms. Hankey has advanced a personal injury claim against Mr. Hughes and Donald Cates, the owner of the vehicle being driven by Hughes.

[2] The parties have agreed to bifurcate the issues of liability and damages. The liability only trial proceeded before me on August 10, 2022.

[3] This matter is somewhat unusual in that the collision was caught on CCTV. Based on the video evidence and other testimony, I have determined that the Plaintiff, Amanda Hankey, is solely at fault for the accident.

[4] Following the collision, the Defendant, Henry Hughes, exercised extremely poor judgment in attempting to hide the fact that he was the operator of Mr. Cates' vehicle. This was because, at the time in question, he was suspended from driving due to a failure to pay child maintenance. This issue, however, is distinct from the question of how liability for the accident ought to be apportioned.

[5] The following are my reasons for concluding that the Plaintiff's claim against the Defendants must be dismissed.

Issues

[6] There is only one issue. This is the question of how liability for the accident ought to be apportioned between the parties.

Position of the Plaintiff

[7] The Plaintiff acknowledges in her pre-trial brief that she is at least partly responsible for this collision. Her submission is that both parties, however, contributed in some measure to the accident.

[8] She suggests that an equal division of liability is most appropriate.

Position of the Defendants

[9] The Defendants argue that responsibility for the accident should fall entirely on the Plaintiff.

[10] They submit that Ms. Hankey has changed her story about what happened and consequently her evidence is unreliable.

[11] The Defendant, Henry Hughes, says that the CCTV evidence conclusively demonstrates he did nothing wrong in his operation of the minivan. The Plaintiff negligently drove her vehicle into the side of the vehicle he was operating. For this reason, liability ought to rest solely with her.

Summary of the Evidence

[12] I intend to undertake a brief overview of the evidence. Only a single witness was presented by each side. The CCTV evidence was admitted by consent of both parties.

[13] It is not my intention here to re-state or summarize every submission or item of evidence. I will address the central elements and core items of relevance.

[14] I have however reviewed, weighed, and considered all the evidence in coming to my conclusions – even if I do not refer to every individual item here.

[15] It should be noted, however, that not every item proffered in evidence is of equal value.

[16] For example, the law says that I must not consider inadmissible hearsay evidence. This means that I cannot consider, for their truth, statements advanced in evidence and attributed to people who were not called as witnesses or

made available for cross-examination (unless this is specifically allowed).

The law also states that I must not consider opinion evidence from people who are not qualified as experts – except on a limited range of issues on which lay persons are permitted to offer opinion evidence.

[17] Finally, I am not to consider matters that are not relevant to the issues I have to decide.

[18] I have followed these rules of evidence in reaching my conclusions in this decision.

Evidence – Amanda Hankey

[19] Amanda Hankey is a 34-year-old personal home care worker. On July 10, 2017, she was driving her standard transmission 2017 Honda Civic hatchback on East Prince Street in Salmon River, Nova Scotia. Her two younger children were with her in the vehicle. She decided to make a stop at the East End Mini Mart to pick up lunch items.

[20] Ms. Hankey was coming from Salmon River and driving towards Truro on East Prince Street. She described making a right hand turn into the parking lot of the convenience store. Her evidence was that she knew the store and parking

lot extremely well. She had grown up in the area and been in and out of the lot countless times.

[21] She described the parking area as being large and having a horseshoe configuration. Her position was that there was an established “throughfare” or laneway through which vehicles drove, with parking taking place off to the sides. She noted there were no distinct markings or arrows to direct traffic flow.

[22] She was first asked to describe how she typically would make her turn into the lot. She gave an account of what she said her usual practice was. Then she was asked to comment on her specific recollection of the day of the accident.

[23] She acknowledged that she had a mixed ability to recall events around the collision. There were certain parts she remembered very well and other elements she did not recall.

[24] In terms of what she did remember, she stated that she recalls pulling into the lot and then the sound of the collision. Her air bags went off. She remembered panic and having blood inside her mouth from biting her tongue. She recalled that the other driver was not considerate and seemed most concerned with not having the police called to the scene.

[25] She did not remember seeing the other vehicle prior to the collision. She said she was looking and driving straight ahead and does not recall seeing the other vehicle at all before impact.

[26] Ms. Hankey was asked to view the video of the collision. She did so and answered a series of questions on issues such as her intended destination in the lot, vehicle speed and memory of the collision.

[27] She was directed to a number of instances where her description of events has changed. She said that, while she originally believed she was stopped at the point of collision, having seen the video, she now accepts she was still driving forward at the point of the impact.

[28] She was directed to a treatment note created by her physiotherapist, Christine Hurst. In the report the therapist wrote, in part, as follows:

She was taking off seatbelt @ time of impact, air bag blew & tangled Lt arm.

[29] Ms. Hankey did not deny she told this to the therapist. She did deny, however, that this could have been the case. She said she would have been using her right hand to shift into neutral as opposed to taking off her seatbelt. Additionally, she stated that she would not have taken off the belt until she was fully stopped. Her view was that, as the video showed her vehicle still moving

forward, this was confirmation to her that she would not have been touching the seat belt. She testified this would only happen once she had fully stopped and engaged the parking brake.

[30] There were other clearly incorrect accident details in the therapy report. For instance, the note says Ms. Hankey was stopped in the parking lot when she was T-boned. Ms. Hankey acknowledged that she would have told Christine Hurst these details. Her explanation was that she experienced a great shock from the accident and was foggy on the events as a result.

[31] In cross-examination Ms. Hankey confirmed that her intention on entering the lot was to pass in front of the store and park on the far side of the lot.

[32] Ms. Hankey confirmed again to counsel that she had no recollection of seeing the Defendant's vehicle prior to impact.

[33] She acknowledged initially believing that she had come to a stop prior to impact. The video footage demonstrated to her that this was incorrect.

[34] Defence counsel challenged Ms. Hankey on her position that there was an accepted "throughfare" bisecting the parking lot on which vehicles would not park. Scenes from the CCTV footage were played which demonstrated that vehicles parked where Ms. Hankey indicated they did not. Ms. Hankey

ultimately seemed to accept that various drivers did not respect what she referred to as the “unwritten rule” of how people drove and parked in the lot.

[35] Ms. Hankey was referred once again to the physiotherapy progress note.

She accepted that she told the therapist that she was parked at the point of impact. As to the reference to her removing the seat belt at the point of impact, she again stated that this had to be an error. She acknowledged she was unsure what she told the physiotherapist, but the reference to the seatbelt was clearly incorrect.

[36] Also introduced into evidence, by virtue of Civil Procedure Rule 18.21(2), were excerpts of Ms. Hankey’s oral discovery transcript. These served to add to the concerns of the Court with respect to the consistency and reliability of her account over time.

Evidence - Henry Hughes

[37] Mr. Hughes was the sole witness called in the defence case. On the date of this accident, he was operating a 2005 Dodge Caravan owned by the second Defendant, Mr. Cates. Mr. Cates was Mr. Hughes’ mother’s partner and Mr. Hughes testified they were in the process of moving the registration for the vehicle from Mr. Cates to the then girlfriend of Mr. Hughes.

[38] At the time of the accident Mr. Hughes was suspended from driving due to arrears of maintenance payments. He testified this had been the case for a couple of months.

[39] Mr. Hughes testified that he was diagnosed with an astigmatism but that it did not affect his driving. His evidence was that it only impacted his reading, and he did not require corrective lenses for driving.

[40] He provided his account of the accident. He believed the accident happened around lunch time which he said was a busy time at the store. At the time of the collision, he was in the process of leaving the parking lot. He said he had backed out of his parking spot after checking his mirrors and satisfying himself there was nothing around. After backing up out of the parking spot, he put the vehicle in drive and began to move forward.

[41] Mr. Hughes testified that, as he was in the process of driving forward and scanning to see the route he was going to take to exit the lot, he suddenly saw the Plaintiff's vehicle coming at his driver's side. He said it all happened too suddenly for him to take any avoiding action. The other vehicle hit him before he could react.

[42] The Defendant was asked to describe what happened after the accident. He said the Plaintiff apologized to him a number of times immediately after the collision. Mr. Hughes acknowledged asking the Plaintiff if she would say his girlfriend had been driving the minivan.

[43] In cross-examination, Mr. Hughes estimated that his last eye exam prior to the accident had likely been five years earlier. This had taken place at the Registry of Motor Vehicles.

Contents of the Video

[44] As noted earlier in these reasons, the Court had available to it a CCTV video showing the collision.

[45] The CCTV camera was positioned on the front of the convenience store building and was set to cover a substantial portion of the store parking lot. It had complete coverage of the area where the impact took place.

[46] The video excerpt introduced in the trial was approximately 45 minutes long. The clip shows the approximately two and a half minutes before the accident, followed by the collision itself and the aftermath.

[47] As the video begins, the Defendant's minivan is parked near to the east entrance of the lot. We see the Defendant exit the store and enter the vehicle. After a few moments, he backs out of his parking spot and then begins to move forward in preparation for making his exit from the lot.

[48] At that point the Plaintiff vehicle appears in the video and enters the parking lot from East Prince Street. The vehicle appears to be moving somewhat fast, but it is difficult to make a clear determination on this point.

[49] What is clear however is that the Plaintiff's vehicle continues to drive in the direction of the Defendant's vehicle which is now away from its parking spot and moving forward in preparation for leaving the lot. Ms. Hankey's vehicle continues to drive toward the minivan and appears to be making a slight rightward turn just prior to impact, which makes the impact into the Defendant's vehicle even more pronounced.

[50] The front passenger corner of the Plaintiff's vehicle struck the driver's side of the Defendant's minivan. It was a reasonably significant impact due to the speed the Plaintiff's vehicle was travelling.

Applicable Law

[51] I have considered the law advanced by both sides. This is not a legally complicated matter. While the parties emphasize different parts of the relevant legislation and caselaw, in essence, they agree on the standard that must be applied.

[52] Sections 100(1) of the *Motor Vehicle Act*, RSNS 1989, c. 293, as amended, provides that drivers of vehicles in parking lots have a duty to drive in a careful and prudent manner, having regard to all the circumstances:

Duty to Drive Carefully

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.

[53] Multiple cases could be cited for the same and related principles. The parties referenced cases such as:

Landzatt v. Central Amusement, [2000] NSJ No. 472 (T.D.)

Dorie v. Williams, 1994 CarswellNS 409 (T.D.)

Ashim v. Zia, 2014 ONSC 6460

MacNeil v. Gillis, 1995 NSCA 14

Millott Est v. Reinhard, 2001 ABQB 1100

Skoda v. Kim, 1997 CarswellBC 2500

James v. Verma (1975), 14 N.S.R. (2d) 142 (A.D.)

[54] Section 3 of the *Contributory Negligence Act*, RSNS 1989, c. 95 is also relevant:

Apportionment of liability

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.

Interpretation of Section

(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.

[55] The Court has reviewed all the case law cited by the parties as well as others.

[56] Both drivers had an obligation to drive prudently and to exercise reasonable judgment in all areas of operation. This would include most particularly with respect to speed and attention to other vehicles.

Findings

[57] Ms. Hankey was not a strong witness. She exhibited significant issues with recall and the consistency of her account. Her efforts to explain changes in her description of events were strained and unsatisfactory. I accept that the

accident was very upsetting to her. Her young children were in the vehicle and their upset no doubt have impacted her recollection.

[58] Her explanation for what she was seeing and doing in the moments prior to the impact was difficult to pin down.

[59] While important parts of her account did change over time, one key component did not. She was consistent in saying that she did not see the Defendant's vehicle prior to the collision. She did not vary on this point.

[60] The evidence of Mr. Hughes was straightforward and consistent. This included the acknowledgment of his very misguided and short-lived attempt to conceal the fact he was the driver of the minivan. This was motivated by the fact he had been suspended from driving as a result of steps taken by the Nova Scotia Maintenance Enforcement Program.

[61] While there can be obvious consequences to his driving without a licence, these are not at issue in this civil case. Responsibility for the collision must be assessed based only on the driving. Gatchalian, J. has recently discussed the law on this issue in *Ledson v. Carter*, 2022 NSSC 189. I adopt her summary of the relevant law. I have also reviewed and considered the comments of Matthews, J.A. in *MacNeil v. Gillis*, 1995 NSCA 14, to the effect that bad

behavior alone will not be determinative of negligence. For behavior to impact the apportionment of negligence, it must be causative of the accident.

[62] In terms of his account of the accident itself, this did not vary. It made sense and accorded with the video evidence. Despite his very ill-judged actions motivated by his license status, I accept the accuracy and truthfulness of his account of the accident itself.

[63] A focus of the defence case in this matter was on the issue of what might have been distracting Ms. Hankey in the moments before the crash. Her account to the therapist about becoming entangled in the seatbelt was obviously pointed to. The defence also correctly pointed out, however, that the source of the inattention is really a secondary issue. If Ms. Hankey steered her vehicle into the side of the Defendant's vehicle, the driver of which had done nothing wrong and was there to be seen, then her responsibility is clear.

[64] I have assessed the actions of the Defendant in his operation of the minivan. My finding is that his driving was careful and prudent in the circumstances. His vehicle was there to be seen. I cannot find any negligence on his part that contributed to the accident.

[65] The Plaintiff has not discharged her burden on proving the Defendant was negligent in the operation of the minivan or that he failed to take an available opportunity to avoid a collision.

[66] Whatever the cause of her inattention, the Plaintiff drove her vehicle into the side of the Defendant's vehicle in a manner which was negligent. She was solely liable for the collision. There is no need to resort to section 3 of the *Contributory Negligence Act*.

[67] I appreciate that this liability finding may be upsetting to Ms. Hankey as she was adamant that she would never have driven negligently with her children in the vehicle. What has to be remembered is that even the best driver can become momentarily distracted or experience a lapse of focus, as occurred in this case.

Finally, I want to note that, even if the video did not exist, I would have reached the same conclusion with respect to responsibility for this collision. The fault lies with the Plaintiff. The video simply serves to confirm what can be derived independently from the testimony of the two drivers and other evidence.

Conclusion

[68] There was a single issue in this proceeding. The issue of damages was severed from the question of which of the two drivers was responsible for this parking lot collision.

[69] Based on the evidence of the parties, and the assessment of CCTV footage of the crash, it is my conclusion that responsibility for the accident rests solely with the Plaintiff, Amanda Hankey. She failed to operate her vehicle in a careful and prudent manner in the circumstances. Her negligence resulted in the collision between the two vehicles.

[70] Accordingly, the Plaintiff's claim is dismissed. Defence counsel will produce an order to this effect.

[71] In the event the parties are unable to agree on costs, they ought to direct written representations to the Court within 30 days of this decision.

Hunt, J.