

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: **Cooper v. Garrett,**
2009 BCSC 35

Date: 20090116
Docket: M054973
Registry: Vancouver

Between:

Frances Cooper

Plaintiff

And

**Brian Penn Garrett, Brian Penn Garrett and Laurel J. Garrett Taylor as
Trustees of the revocable living trust of William Penn Garrett and
Joan Garrett, Hassam Naeem and Bonny's Taxi Ltd.**

Defendants

- and -

Docket: M054493
Registry: Vancouver

Between:

Hassam Naeem

Plaintiff

And

**Brian Penn Garrett, Brian Penn Garrett and
Laurel J. Garrett Taylor as Trustees of the revocable living trust of
William Penn Garrett and Joan Garrett**

Defendants

Before: The Honourable Madam Justice Loo

Reasons for Judgment

Counsel for Hassam Naeem and Bonny's
Taxi Ltd.

A. Thomas (M054973)
J. Noble and K. Anderson (M054493)

Counsel for Frances Cooper

C. A. McTavish

Counsel for Garrett Defendants

P. K. Hamilton

Date and Place of Trial:

December 1 to 3, 2008
Vancouver, B.C.

[1] On Saturday morning, August 6, 2005, Brian Garrett was driving east on Southwest Marine Drive in Vancouver and making a left-hand turn onto the Oak Street on-ramp when he collided with a westbound taxi. He did not see the taxi until after the collision.

[2] The taxi was driven by Hassam Naeem. Frances Cooper was the front seat passenger. Ms. Cooper and Mr. Naeem were injured in the collision. They commenced separate actions that were heard together.

[3] Mr. Naeem has no recollection of the accident. He remembers driving from Burnaby towards the airport with a female passenger in the front seat. When he tries to recall the accident all he hears "...is a blast and nothing more than that. It happened so suddenly."

[4] Ms. Cooper recalls little more. She saw something out of the left corner of her eye. When asked how the accident happened, she replied: "I just saw in the corner of my eye and then smash. That was it."

[5] Mr. Garrett lives in Colorado and was a visitor to Vancouver at the time of the accident. Ms. Cooper resides in Toronto. Counsel agreed that there was no need for the parties to testify at trial as they would have little, if anything, to add. The only witnesses who testified at trial were four accident reconstruction experts.

[6] The two main issues are whether Mr. Garrett was negligent by making his left hand turn when it was unsafe to do so, and whether Mr. Naaem was negligent in speeding or driving above the speed limit.

[7] I commend counsel for narrowing the issues.

THE AGREED FACTS

[8] The following facts were agreed.

[9] Brian Garrett was in Vancouver to attend a seminar. At the time of the collision he was trying to familiarize himself with the route he would need to take to get to the seminar.

[10] The accident occurred on a Saturday morning at approximately 7:40 a.m. Traffic was light, the streets were dry, visibility was good, and it was daylight. At the accident location there are four eastbound lanes and a dedicated left turn lane for traffic entering the Oak Street on-ramp. The length of the eastbound left turn lane is approximately 77 metres. The distance from the mouth of the left turn lane to the raised concrete median facing the end of the left turn lane is approximately 18 metres. There are two westbound through lanes and a third lane that directs westbound traffic to the right onto the Oak Street on-ramp.

[11] Mr. Garrett drove a grey 2002 Oldsmobile Intrigue sedan. Mr. Garrett's vehicle was equipped with an airbag control module which recorded pre-crash and impact data. Mr. Naeem drove a white 1998 Chevrolet Lumina sedan owned by Bonny's Taxi Ltd.

[12] Mr. Garrett drove east and was making a left-hand turn so that he could head north on Oak Street. There were no vehicles ahead of him in the left turn lane. There was a concrete median to his left as he drove down the left turn lane. He did

not stop until impact. From the airbag control module data it was determined that his vehicle speed 5 seconds, 2 seconds, and 1 second before impact, and on impact was approximately 42, 34, 32 and 28 kilometres per hour respectively.

[13] The impact occurred in the left of the two westbound lanes at a point approximately 15 metres from “the mouth of the left turn lane”; that is, where the concrete median ends and the left turn lane is exposed to the lanes for oncoming westbound traffic.

[14] Mr. Garrett was ticketed for failing to yield the right of way under s. 174 of the **Motor Vehicle Act**, R.S.B.C. 1996, c. 318 [**MVA**]. He did not dispute the ticket.

THE EVIDENCE

[15] As Mr. Garrett approached the area where he was going to make his left turn, he slowed down to watch for westbound traffic. He saw two westbound vehicles that turned right onto the Oak Street on-ramp. He “saw the lead one had turn signal lights on which alerted me to what was going on.” He also saw a vehicle further back about a block away. He could not see which lane the vehicle was in but it did not appear to present a problem with him turning left. He does not recall anything obstructing his view.

[16] Mr. Garrett turned left and immediately struck Mr. Naeem’s vehicle. The front passenger side of Mr. Garrett’s vehicle struck the front of Mr. Naeem’s vehicle in what has been described as an almost head-on collision. The collision took place in the left lane of the westbound traffic.

[17] The police took no photographs or measurements of the accident scene. There is, however, a police sketch of the scene.

[18] There are photographs of the damage to the vehicles.

THE EXPERT EVIDENCE

[19] All four accident reconstruction experts dealt with the perception/response time and the steps required for a driver to react to a hazard. Michael Araszewski, an accident reconstruction engineer, made the following conclusions:

- 1) The impact speed of the Garrett vehicle was likely about 28 km/h.
- 2) The impact speed of the Naeem vehicle was likely about 85 km/h.
- 3) The pre-impact vehicle positions were assessed as follows:
 - a) As the Garrett vehicle was at the mouth of the left turn lane, the Naeem vehicle would have likely been about 40 metres from the point of impact; corresponding to a time of about 1.7 seconds.
 - b) As the Garrett vehicle was about 10 metres before the mouth of the left turn lane, the Naeem vehicle would have likely been about 66 metres from the point of impact; corresponding to a time of about 2.8 seconds.
- 4) The potential for the collision to be avoided was assessed as follows:
 - a) The collision would have likely been avoided if the Naeem vehicle speed was about 53 km/h or less for 40 metres prior to impact.
 - b) The collision would have likely been avoided if the Naeem vehicle speed was about 63 km/h or less for 66 metres prior to impact.

- c) If earlier times and positions prior to impact are considered, then the maximum speed of the Naeem vehicle to avoid impact correspondingly increases.

[20] Gerald Sdoutz, an accident reconstruction engineer, concludes with Mr. Araszewski that at impact Mr. Garrett was travelling at about 28 kilometres per hour and Mr. Naeem at about 85 kilometres per hour. Mr. Sdoutz also concludes:

- 1) Mr. Garrett would have had to have finished his decision whether to continue with his left hand turn or stop when he reached the mouth of the left turn lane about 1.7 seconds before the collision.
- 2) When Mr. Garrett finished his decision, Mr. Naeem's taxi was about 40 metres east of the point of impact.
- 3) If Mr. Naeem had been travelling at 53 kilometres or less over those 40 metres, Mr. Garrett would have had sufficient time to clear Mr. Naeem's path.

[21] The opinion of Jean-François Goulet, an accident reconstruction expert, is also generally consistent with the opinion of Mr. Araszewski and Mr. Sdoutz on the perception/response time required for a driver to react to a hazard.

[22] Mr. Goulet videotaped the view Mr. Garrett would have had as he approached the left turn lane and crossed the westbound lanes of traffic. He drove the same route three times. The videotape demonstrated that as Mr. Garrett drove along the left turn lane and before he encroached into the westbound lane, he was able to see the westbound traffic east of Fremlin Street more than a block away.

[23] The three experts generally agree that at the point of impact Mr. Naeem's speed was approximately between 85 and 88 kilometres per hour and Mr. Garrett's speed was approximately 28 kilometres per hour. They also agree that once Mr. Garrett's vehicle encroached on the westbound lane, there was insufficient time for Mr. Naeem to avoid the collision.

[24] Robin Brown, an accident reconstruction expert, was retained by Mr. Thomas, counsel for Mr. Naeem as plaintiff, and asked to review Mr. Araszewski's report.

[25] The gist of Mr. Brown's opinion is that because there were no actual measurements taken after the collision and no witness observations, Mr. Araszewski's opinion about the speeds of the vehicle should be viewed with caution. However, he did not conduct his own analysis.

[26] Mr. Brown also says that Mr. Araszewski may have added another 5 metres to the taxi's resting position based on his interpretation of the very rough police sketch and by doing that overestimated the speed of the taxi.

[27] However, Mr. Araszewski considered that there was no specific data on the exact rest positions of the vehicles and determined that a small variation in the taxi's rest position did not affect the calculated impact speeds to any significant degree.

[28] All of the experts, except Mr. Brown, calculated that the collision could have been avoided if Mr. Naeem was travelling at a lower speed.

THE ARGUMENT

[29] Ms. Cooper argues that Mr. Garrett was negligent in turning left in front of Mr. Naeem's taxi when the taxi constituted an immediate hazard, contrary to s. 174 of the *MVA*, and that Mr. Naeem was negligent for driving too fast and ought to have reduced his speed as he approached the intersection. In *Price v. Hunter* (1997), 36 B.C.L.R. (3d) 304, 38 C.C.L.T. (2d) 197 (S.C.), the plaintiff motorcyclist who had the right of way on a dominant road was rear-ended by the defendant who turned right onto the same road. Mr. Justice Romilly found the plaintiff contributorily negligent for driving at twice the speed limit and failing to slow down when he saw the defendant's vehicle turning onto the highway ahead of him. In *Tulev v. Hall*, [1996] B.C.J. No. 392 (S.C.), in a short, five-paragraph judgment, Meredith J. stated:

[4] The Defendant car driver had the right to expect that the approaching motor cycle would at least be obeying the law. Had the Plaintiff done so, probably the left turning Defendant would have had the right of way by the time the collision occurred. The Defendant driver had no way of knowing that the motor cycle, especially as it was a motor cycle and not a car, would be approaching as fast as it was. The car driver is to be excused for not having expected that the Plaintiff would drive his motor cycle as fast as he did.

[30] Mr. Garrett argues that the evidence is uncontradicted: if Mr. Naeem had been traveling 53 kilometres or less for the last 40 to 60 metres from the point of impact, the collision could have been avoided. He also argues that perhaps Mr. Naeem was behind the two right-turning vehicles and was not visible to Mr. Garrett who saw the westbound vehicles and considered it was safe to proceed. His attention could have been distracted but, at worst, he had a momentary lapse of judgment. On the other hand, Mr. Naeem, a professional driver, was speeding and

contributed to the accident. Mr. Garrett relies on **Merkley v. Gould**, [1989] B.C.J. No. 83 (S.C.), which he argues is similar on its facts. In that case, a speeding sports car crashed into a left-turning bus between the rear passenger door and the rear tires. The bus driver was found 25 percent liable for the accident.

[31] Mr. Naeem as plaintiff argues that his duty to Mr. Garrett began the moment that he crossed into the westbound lane of travel. At that moment, the experts agree that he had no opportunity to avoid the accident, and Mr. Naeem had the right to assume that Mr. Garrett would yield the right of way.

[32] Mr. Naeem as the plaintiff and as a defendant with Bonny's Taxi Ltd., relies on **Pacheco et al. v. Robinson et al.** (1993), 22 B.C.A.C. 185, (*sub nom. Pacheco (Guardian ad litem of) v. Robinson*) 75 B.C.L.R. (2d) 273. In that case, the infant plaintiff was riding his bicycle east. The defendant was driving west and wanted to turn left at the intersection. The plaintiff started through the intersection on a green light and pedalled faster when the light turned amber. He was struck by the defendant. Neither party saw the other until just before the collision. The trial judge found that the plaintiff ought to have exercised caution as he approached the intersection in anticipation of the light change and found him 25 percent liable for failing to keep a proper lookout. The Court of Appeal allowed the appeal and stated:

11 The plaintiff was not bound to guard against every conceivable eventuality but only against such eventualities as a reasonable person ought to have foreseen as being within the ordinary range of human experience. The plaintiff was entitled to proceed on the assumption that all other vehicles will do what it is their duty to do, namely observe the rules regulating traffic.

12 The situation of the plaintiff in the case under appeal is similar in principle to the position of the plaintiff in **Etter v. Trent** (January 29, 1991), Vancouver CA009742 (B.C.C.A.).

...

15 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 defendant, as here, has totally failed to determine whether a turn can be made safely, the defendant should be held 100 percent at fault for a collision which occurs.

...

18 In my opinion, when a driver in a servient position disregards his statutory duty to yield the right of way and a collision results, then to fix any blame on the dominant driver, the servient driver must establish that after the dominant driver became aware, or by the exercise of reasonable care should have become aware, of the [servient driver's] own disregard of the law, the dominant driver had a sufficient opportunity to avoid the accident of which a reasonably careful and skilful driver would have availed himself. In such circumstance any doubt should be resolved in favour of the dominant driver. As stated by Cartwright, J., in **Walker v. Brownlee**, [1952] 2 D.L.R. 450 (S.C.C.) at p. 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*.

[33] Mr. Naeem contends that as the dominant or through driver, even excessive speed on his part does not constitute negligence unless the speed prevented him from taking reasonable steps to avoid the collision: *Morehouse v. Andrews*, [1987] B.C.J. No. 2670 (S.C.); *Santos (Guardian ad litem of) v. Raes*, [1998] B.C.J. No. 389 (S.C.); and *Schucknecht v. Singh et al.*, 2006 BCSC 1025.

[34] The almost head-on collision a split second after Mr. Garrett's vehicle encroached on the westbound lane belies any suggestion that the accident could have been prevented if Mr. Naeem drove at a slower speed: *O'Ruirec et al. v. Pelletier et al.*, 2002 BCSC 601, 114 A.C.W.S. (3d) 352:

[28] The driver attempting to make the left turn is commonly referred to as the "servient driver" and the on-coming driver is referred to as the "dominant driver". The dominant driver is entitled to assume that a servient driver will yield the right of way and the onus of proving any negligence of the dominant driver rests with the servient driver. Any doubt must be resolved in favour of the dominant driver.

...

[44] The case law clearly establishes that the onus was on Mr. Pelletier as the servient [driver] to prove negligence or contributory negligence on the part of Mr. O'Ruirec and that any doubt must be resolved in favour of Mr. O'Ruirec. Mr. Pelletier failed to prove negligence or contributory negligence on the part of Mr. O'Ruirec. Accordingly, Mr. O'Ruirec is entitled to judgment against the defendants, Mr. Pelletier and Ford Credit Canada Ltd., for Mr. O'Ruirec's damages, which remain to be assessed.

ANALYSIS AND CONCLUSION

[35] Section 174 of the *MVA* provides:

174 When a vehicle is in an intersection and its driver intends to turn left, the driver must yield the right of way to traffic approaching from the opposite direction that is in the intersection or so close

as to constitute an immediate hazard, but having yielded and given a signal as required by sections 171 and 172, the driver may turn the vehicle to the left, and traffic approaching the intersection from the opposite direction must yield the right of way to the vehicle making the left turn.

[36] In *Raie v. Thorpe* (1963), 43 W.W.R. 405 (B.C.C.A.), Tysoe J.A. stated at 410 that:

[18] ...if an approaching car is so close to the intersection when a driver attempts to make a left turn that a collision threatens unless there be some violent or sudden avoiding action on the part of the driver of the approaching car, the approaching car is an "immediate hazard" within the meaning of sec. 164 [now s. 174].

[37] Mr. Naeem was entitled to assume that all other drivers would observe the rules of the road. He was not required by law to slow down as he approached the intersection. The existence of the eastbound left turn lane did not cast a duty on Mr. Naeem to take extra care: *Pacheco* at para. 15.

[38] Mr. Garrett never saw the taxi before the collision so that those cases where a left-turning driver wrongly estimates the speed of the approaching vehicle are not of assistance.

[39] Mr. Garrett, if he exercised reasonable care, should have been able to see the taxi coming east past Fremlin Street more than a block away. While he suggests that perhaps a traffic sign partially blocked his view, I find, based on the videotape, that was not the case. If I am wrong and the traffic sign partially blocked his view, he should have taken more reasonable care before he encroached into the westbound lane.

[40] Mr. Garrett would have seen the taxi if he had been looking. He saw the two westbound vehicles turn right onto the Oak Street on-ramp. He saw the right turn signal of one of those vehicles. He may have been so focussed on the right-turning vehicles that he did not see Mr. Naeem, but that does not absolve him from liability. The law required him to yield the right of way to the westbound vehicles.

[41] If Mr. Garrett seeks to cast any blame onto Mr. Naeem for the collision, he must establish that after Mr. Naeem became aware, or by the exercise of reasonable care should have become aware, of Mr. Garrett's disregard of the law, he had sufficient opportunity to avoid the accident: *Walker v. Brownlee* at 461.

[42] Travelling over the speed limit will only constitute negligence if the speed prevented the driver from taking reasonable measure to avoid the collision. However, the experts agree that the moment that Mr. Garrett encroached onto the westbound lane, it was impossible for Mr. Naeem to avoid the collision.

[43] The next issue is whether the collision could have been avoided if Mr. Naeem drove at a lower speed or at the speed limit. The speed of a vehicle and the location of the vehicle are related. It is impossible for Mr. Naeem to have been travelling at about 85 kilometres per hour along Marine Drive and then instantly change to the posted speed limit 40 metres from where the collision occurred. As Mr. Naeem argues, if he had kept to 30 kilometres per hour from the outset, he would have been back in Burnaby when Mr. Garrett ploughed across oncoming traffic that morning. If he sped along at 120 kilometres per hour he would have cleared the area well before Mr. Garrett made his left-hand turn.

[44] While it seems attractive to attribute blame based on the speed of the dominant driver and hypothesize on what would have happened if Mr. Naeem kept to the speed limit, the fact is that Mr. Naeem drove at the speed he did and there was nothing he could have done, driving at the speed he did, to avoid the collision. When Mr. Garrett decided to proceed with his left-hand turn, Mr. Naeem was approximately 40 metres away. He was an immediate hazard and Mr. Garrett should have yielded to him.

[45] I find Mr. Garrett fully at fault for the accident.

[46] I note that counsel for the plaintiffs made no argument as to the costs. If the parties have not otherwise agreed, I find Mr. Garrett liable for the costs of the two actions.

“Loo J. by Dohm A.C.J.”