COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Mills v. Seifred,*
2010 BCCA 404

Date: 20100910
Docket: CA037071

Between:

Bonnie Lee Mills, Executor of the Estate of Darren James Cavezza (deceased), Anthony Davis Cavezza, an infant by his Guardian Ad Litem, Bonnie lee Mills, Isabella Daryn Cavazza, an infant by her Guardian Ad Litem, Bonnie Lee Mills, Katie Dianne Cavezza, an infant by her Guardian Ad Litem, Bonnie Lee Mills, and the said Bonnie Lee Mills

Respondents
(Plaintiffs)

And

Darren Seifred

Appellant
(Defendant)

Before: The Honourable Mr. Justice Donald
The Honourable Madam Justice Kirkpatrick
The Honourable Madam Justice Garson

On appeal from: Supreme Court of British Columbia, April 4, 2009
(*Mills v. Seifred*, 2009 BCSC 447, Vancouver Docket No. M055177)

Oral Reasons for Judgment

Counsel for the Appellant:	L.G. Harris, Q.C.
Counsel for the Respondent:	W.D. Mussio
Place and Date of Hearing:	Vancouver, British Columbia September 10, 2010
Place and Date of Judgment:	Vancouver, British Columbia September 10, 2010

[1] **KIRKPATRICK J.A.**: Darren James Cavezza died as a result of the injuries he sustained when the motorcycle he was riding eastbound along 16th Avenue in Langley, British Columbia collided with a dump truck and attached transfer that was turning left from the westbound lane of travel on 16th Avenue to enter a lumber yard.

[2] The accident occurred on 1 September 2005. The dump truck was operated by the appellant, Darren Seifred.

[3] The respondent Bonnie Lee Mills was in a common law relationship with Mr. Cavezza at the time of his death and is the executrix of his estate. The other respondents are the minor children of Mr. Cavezza and Ms. Mills.

[4] Liability for the accident was the only issue at trial.

[5] The trial judge, in reasons indexed as 2009 BCSC 447, found both parties to be liable in negligence; the appellant for turning left across the double solid lines dividing the east and west bound lanes of 16th Avenue when it was unsafe to do so, and Mr. Cavezza for riding his motorcycle at an excessive rate of speed and in a manner contrary to the expected standard of a user of 16th Avenue in the circumstances that pertained at the relevant time. She apportioned liability 65 per cent to the appellant and 35 per cent to Mr. Cavezza.

Issues on Appeal

[6] The appellant raises six grounds of appeal. He claims that the trial judge erred in:

a) failing to find that he made a careful and prudent left turn;
b) failing to give due weight to the actions of the defendant;
c) failing to conclude that he was entitled to assume that others, including Mr. Cavezza, would obey the law;
d) giving undue weight to engineering evidence;
e) "other minor" ways; and
f) her apportionment of fault for the collision.

He seeks dismissal of the respondents' action or a variation of the apportionment of liability.

The Accident

[7] In her reasons for judgment, the trial judge described 16th Avenue at the scene of the accident as a two-lane designated truck route divided by a double dividing line in the area of both entrances to a lumber yard on the south side of 16th Avenue. She also described that the two entrances as roughly 127 metres apart, with a gradual incline to the west of the entrances that crests approximately 150.5 metres west of the primary and easternmost entrance to the lumber yard.

[8] In particular, the trial judge described a key piece of evidence as follows:

> [6] The evidence indicates that the lane dividing line along 16th Avenue changes at a location just to the east of the mailbox for the civic address of 24340 16th Avenue. That mailbox is at a key point along 16th Avenue in relation to this case. For ease of reference, I will refer to it as "24340".
>
> [7] At 24340, the two lanes on 16th Avenue are divided by a broken line. Slightly east of 24340, the divided line for eastbound traffic becomes solid; the westbound line remains unchanged. There is a further line change around the Truck Sign. There, the lanes become divided by yellow solid double lines which extend well east of the Primary Entrance.

[9] The trial judge also described the truck sign posted approximately 37.7 metres to the west of the westernmost entrance to the lumber yard for the attention of eastbound traffic denoting that trucks may be pulling onto 16th Avenue from the south. She found that although the posted speed limit for traffic on 16th Avenue in the area was 60 km/h, the majority of traffic on that road ordinarily exceeds the posted speed limit.

[10] The trial judge also found that prior to the accident Mr. Cavezza had passed five eastbound vehicles on 16th Avenue before cresting the hill to the west of the entrances to the lumber yard at a speed of between 95 and 100 km/h, but that he reduced his speed to between 85 and 95 km/h after he had passed these vehicles.

[11] The trial judge also found that Mr. Seifred did not see Mr. Cavezza approaching him on his motorcycle when he began his left hand turn into the lumber yard and that he was probably "somewhat distracted" as he began that turn. She found that Mr. Cavezza was at least 164.7 metres to the west of Mr. Seifred and visible to him before the latter began his turn. Thus the trial judge found:

> [95] ... I find that it is more probable than not, that when Mr. Seifred looked westward along 16th Avenue just prior to launching into his left turn and saw the minivan, it was at least as far away as the Truck Sign. At that moment, Mr. Cavezza was travelling in the eastbound lane ahead of the minivan and was there to be seen by Mr. Seifred before he initiated his left turn. Unfortunately, Mr. Seifred did not see Mr. Cavezza approaching until both men had reached a point of no return.

[12] The trial judge found that Mr. Seifred did not turn quickly, but "swooped" across the eastbound lane on 16th Avenue at a 45 degree angle and entered the mouth of the primary entrance to the lumber yard at that angle. She found that the turn was made at a speed of 10 km/h.

The Relevant Legislation

[13] The relevant parts of sections 155 and 156 of the *Motor Vehicle Act*, RSBC 1996, c. 318 read as follows:

> 155 (1) Despite anything in this Part, if a highway is marked with
>
> (a) a solid double line, the driver of a vehicle must drive it to the right of the line only,
>
> ...
>
> 156 If the driver of a vehicle is causing the vehicle to enter or leave a highway and the driver has ascertained that he or she might do so with safety and does so without unreasonably affecting the travel of another vehicle, the provisions of sections 151 and 155 are suspended with respect to the driver while the vehicle is entering or leaving the highway.

The Standard of Review

[14] An appellate court is only permitted to interfere with factual findings when it has been demonstrated that the trial judge committed a palpable and overriding

error or made findings of fact that are clearly wrong, unreasonable or unsupported by the evidence: *F.H. v. McDougall,* 2008 SCC 53 at para. 55.

[15] The standard of review to be applied in an appeal from a claim in negligence was summarized by D. Smith J.A. in *Moses v. Kim*, 2009 BCCA 82 at paras. 31 - 33:

> [31] The standard of appellate review in negligence cases involves an application of a legal standard to a set of facts and is, therefore, a question of mixed fact and law. Appellate deference to findings of mixed fact and law lies along a spectrum. If an incorrect legal standard or error of principle in the application of a legal test occurs, then the standard of review will be subject to correctness. However, where application of the legal standard is inextricably bound to the trial judge's findings of fact, appellate deference will be subject to the more stringent standard of palpable and overriding error, as the issues on appeal involve the trial judge's interpretation of the evidence as a whole: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at para. 36. The Court summarized the standard of review as follows:
>
> > [37] In our view, it is settled law that the determination of whether or not the standard of care was met by the defendant involves the application of a legal standard to a set of facts, a question of mixed fact and law. This question is subject to a standard of palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law.
>
> [32] This standard of review applies equally to appellate review of the inferences drawn by a trial judge. An appellate court should not retry a case or substitute its findings or inferences for those of the trial judge's unless it is shown that the trial judge made a manifest error, ignored conclusive or relevant evidence, misunderstood the evidence, or drew erroneous conclusions from it: *Housen* at paras. 1, 3, 10, 19 & 103; *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401 at paras. 53-55, 75; *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 S.C.R. 114 at 121.
>
> [33] The standard of review of a trial judge's apportionment of fault pursuant to the *Negligence Act*, R.S.B.C. 1996, c. 333 is also subject to a stringent standard. Appellate courts may not interfere with a trial judge's apportionment of liability unless there is a "gross disproportion" between the apportionment of fault as determined by the trial judge and the apportionment the appeal court would have made: *Crown West Steel Fabricators v. Capri Insurance Services Ltd.*, 2002 BCCA 417, 214 D.L.R. (4th) 577 at para. 27; *Rimmer (Guardian ad litem of) v. Langley (Township)*, 2007 BCCA 350, 48 M.V.R. (5th) 1 at para. 64. In earlier authority, this threshold was described as requiring "very strong and cogent reasons" to disturb the apportionment of liability as determined by a trial judge: *Stermer v. Lawson* (1979), 17 B.C.L.R. 181; *Swyrd v. Tulloch*, [1954] S.C.R. 199.

Discussion

a) Did the trial judge err in failing to conclude that Mr. Seifred made a careful and prudent left turn?

[16] The appellant argues that there was no evidence that Mr. Seifred was distracted when he began his turn and that the conclusion of the trial judge that he likely did not even hesitate before commencing his turn was contrary to the evidence of the driver following Mr. Seifred that Mr. Seifred's turn signal was activated for ten to fifteen seconds before he began his turn. He further submits that the judge ignored the evidence of Mr. Seifred that he made a slow, deliberate, and what the appellant argued was thus a careful turn.

[17] The trial judge carefully reviewed in detail the evidence before her and drew the inference that Mr. Seifred was distracted when he began his turn. I am unable to see any error on her part in drawing such an inference in order to explain why he began his turn when, as the trial judge found, Mr. Cavezza was visible and within 164.7 metres of the primary entrance to the lumber yard.

[18] Similarly, there was evidence to support the trial judge's finding of the trial judge that Mr. Seifred did not hesitate before he began his turn. That evidence was that of Mr. Seifred himself. The fact that Mr. Seifred had his turn signal on for as many as fifteen seconds before he commenced his turn does not lessen his duty to refrain from crossing the double solid lines that separated the east and west bound lanes of 16th Avenue "with safety", nor does it compel the conclusion that his turn was made carefully and prudently. A turn across a double solid line in the face of oncoming traffic is no less fraught with danger than a U-turn across double solid lines, and the reliance by the trial judge on the reasoning in *Dickie Estate v. Dickie* (1991), 5 B.C.A.C. 37 was appropriate.

b) Did the trial judge err in failing to give due weight to the actions of Mr. Cavezza?

[19] The appellant argues that the trial judge's findings at para. 104 of her reasons that "Mr. Cavezza's deliberate conduct violated, in a substantial way, the expected

standard of care of a user of that road in those circumstances. He showed a reckless disregard for the safety of fellow users and created a substantial level of risk for himself and others" ought to have resulted in a more substantial apportionment of liability against him.

[20] In making this submission, the appellant argues that the trial judge underestimated Mr. Cavezza's speed as he approached the scene of the collision.

[21] I am unable to agree with this submission. While there was evidence from some of the lay witnesses that Mr. Cavezza was travelling at speeds well in excess of the posted speed limit prior to the collision, the trial judge accepted the evidence of Mr. Donald Rempel, an engineer who was qualified as an expert in accident reconstruction. His opinion as to Mr. Cavezza's speed was only 8 - 13 km/h less than the range estimated by Bradley Heinrichs, the accident reconstruction expert called by the appellant at trial. Mr. Remple gave the opinion that Mr. Cavezza's speed was between approximately 95 and 100 km/h when he passed the five vehicle convoy, but only 85 to 95 km/h after he completed his pass. Support for Mr. Rempel's conclusion as to Mr. Cavezza's speed prior to the collision was consistent with the estimate of Eric Beck, the driver of one of the vehicles that Mr. Cavezza passed before he crested the hill to the west of the primary entrance to the lumber yard.

[22] The appellant also argues that the trial judge erred in principle in concluding that Mr. Cavezza was in the eastbound lane of travel when he appeared in the appellant's sight line. That conclusion was a finding of fact by the trial judge based upon the evidence that she accepted, primarily from Mr. Rempel. She committed no error in principle in reaching her conclusion with respect to Mr. Cavezza's lane of travel when he first appeared in the appellant's sight line.

[23] The appellant further argues that the trial judge erred in failing to consider other negligent acts by Mr. Cavezza. He contends that Mr. Cavezza failed to return to the east bound lane of travel after passing each of the five vehicles in the convoy that he passed; ignored the truck sign for eastbound drivers just before the primary

entrance to the lumber yard; continued to pass after the double solid line was apparent, and failed to steer his motorcycle onto the right hand shoulder of the road in order to avoid the appellant's vehicle.

[24] I am unable to conclude that the trial judge ignored these actions by Mr. Cavezza. All but the last one were specifically mentioned by her, and must be taken to be included in what she described as "reckless disregard" in the passage quoted above from para. 104 of her reasons. Clearly the description in that quote was intended to include more than Mr. Cavezza's speed.

[25] Insofar as Mr. Cavezza's failure to steer onto the right shoulder is concerned, I am unable to find any error on the part of the trial judge in not finding negligence on Mr. Cavezza's part for such a failure. Clearly Mr. Cavezza took defensive actions when confronted by the appellant's left turn across his path. The trial judge found that Mr. Cavezza did not apply his brakes "optimally" or perfectly. Nonetheless, she found that given the limited opportunity that was presented to Mr. Cavezza, his failure to apply his brakes in a perfect way did not constitute negligence. I am equally unable to accept that in the circumstances that presented themselves to Mr. Cavezza, his failure to take the defensive action suggested by the appellant amounts to negligence on his part.

c) Did the trial judge err in failing to conclude that the appellant was entitled to assume that others, including Mr. Cavezza would obey the law?

[26] Drivers are entitled to assume, within reason, that other users of British Columbia roads will obey the law. Mr. Cavezza was entitled to expect this of the appellant, just as the appellant was entitled to expect the same of Mr. Cavezza.

[27] In *Dickie Estate* the Court stated that a left turning vehicle must use "a very high degree of care" and to keep a "sharp lookout" when crossing a double solid line.

[28] There are many cases where excessive speed has resulted in findings of negligence on the part of users of British Columbia roads, even where they are

involved in collisions that are in part due to the negligence of others. Indeed *Dickie* is one such case.

[29] The trial judge was well aware of the corresponding obligations of the appellant and Mr. Cavezza and, having weighed them, she was entitled to assess the relative liability to be attached to the two users of the road in this case. I see no error on her part in the assessment of the failure of both the appellant and Mr. Cavezza to obey the law.

d) Did the trial judge give undue weight to the engineering evidence of Mr. Cavezza's speed?

[30] The appellant relies upon *McKim v. Oakley,* [1995] B.C.J. No. 1754; 63 B.C.A.C. 132; 10 B.C.L.R. (3d) 277 in support of his ground of appeal that the trial judge gave undue weight to the engineering evidence of Mr. Cavezza's speed. In that case, the trial judge concluded that the sole cause of the accident was the excessive speed of a motorcycle. The trial judge's finding that the appellant's speed was excessive required him to weigh the credibility of four witnesses. The appellant alleged that the trial judge had failed to appreciate the evidence, including the evidence of accident reconstruction experts. This Court refused to substitute its view for that of the trial judge.

[31] In the case at bar, Mr. Rempel made a variety of assumptions in order to arrive at his estimate of Mr. Cavezza's speed as he approached the point of impact. The appellant argues that the assumptions conflicted with the evidence of lay witnesses. As I have already indicated, there was some corroboration of the speed that was calculated by Mr. Rempel in the estimate given by Eric Beck.

[32] In any event, as in *McKim v. Oakley*, even if we were of a different view than the trial judge as to Mr. Cavezza's speed, given that there was evidence to support the finding of the trial judge, we are not at liberty to substitute a different view for that finding.

e) Did the trial judge err in principle in "other minor" ways?

[33] I would also not give effect to the ground of appeal that the trial judge erred in principle in other minor ways. It is not for this Court to parse through what are conceded to be minor issues. Such a process cannot result in a finding of palpable and overriding error, the threshold that must be met before this Court could interfere with a finding by a trial judge.

f) Did the trial judge err in her apportionment of fault for the collision?

[34] The appellant argues that even if he was negligent, his negligence consisted of mere inadvertence in failing to see something he was not expecting to see, whereas Mr. Cavezza was negligent in a variety of ways: travelling at an excessive speed; passing on a double solid line; passing when visibility was obstructed; failing to heed the truck sign and failing to return to the eastbound lane of travel between each of the vehicles that he passed.

[35] I am unable to see any error on the part of the trial judge with respect to a failure on the part of Mr. Cavezza to heed the truck sign. As found by the trial judge, that sign warned of traffic turning onto 16th Avenue from the south side not of traffic turning left from the west bound lane, and the trial judge was clearly aware of its presence.

[36] The trial judge considered each of Mr. Cavezza's failures in her apportionment of liability. It is not open to this court to retry the case or substitute findings or inferences for those of the trial judge unless it is shown that the trial judge made a manifest error, ignored conclusive or relevant evidence, misunderstood the evidence, or drew erroneous conclusions from it. In my view, the appellant has not shown that the trial judge made any manifest error, ignored conclusive or relevant evidence, misunderstood the evidence or drew erroneous conclusions, and there are no strong or cogent reasons for this Court to disturb her apportionment of liability.

Conclusion

[37] It follows from the foregoing that I would dismiss the appeal.

[38] **DONALD J.A.**: I agree.

[39] **GARSON J.A.**: I agree.

[40] **DONALD J.A.**: The appeal is dimissed.

JA.

The Honourable Madam Justice Kirkpatrick