Court Of Appeal Finds Bicyclist 60% At Fault In ICBC Injury Claim

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I am pressed for time today so this ICBC Injury Law update will be short on detail.

In reasons for judgement released today by the BC Court of Appeal (Quade v. Schwartz) a Trial judgement holding a bicyclist 75% at fault for an intersection collision with a motorist was overturned and the Court of Appeal determined that the cyclist was 60% at fault for the the collision.

I blogged about the trial level judgement when it was released and you can read my previous post for background.

Today the Court of Appeal found the trial judgement to be plainly unreasonable and engaged in the following analysis in finding a lesser degree of fault for the cyclist:

*[14] The **Negligence Act**, R.S.B.C. 1996, c. 333 provides, by s. 6, that apportionment of fault is a question of fact. Accordingly, apportionment of fault should not be varied on appeal unless the appellant can demonstrate some palpable or overriding error in the trial judge's assessment of the facts, or there are "strong and exceptional circumstances": see **Stein v. "Kathy K" (The)**, [1976] 2 S.C.R. 802; **Ryan v. Victoria (City)**, [1999] 1 S.C.R. 201 and **Housen v. Nikolaisen**, [2002] 2 S.C.R. 235.*

*[15] The defendant also relies upon the standard of review applicable on appeal from proceedings conducted on summary trial under Rule 18A. It must be demonstrated that the judge's conclusion cannot reasonably be supported: see **Orangeville Raceway Ltd. v. Wood Gundy Inc.**, 59 B.C.A.C. 241, 6 B.C.L.R. (3d) 391, and **Colliers Macaulay Nicolls Inc. v. Clarke**, [1989] B.C.J. No. 2455.*

*[16] Apportionment of fault is made not as an assessment of the relative degrees to which the parties' conduct is implicated causally in the damages suffered, but rather on the relative blameworthiness of the parties' conduct. In **Cempel v. Harrison Hot Springs Hotel Ltd.**, 100 B.C.A.C. 212, 43 B.C.L.R. (3d) 219 Mr. Justice Lambert said:*

[19] ... The Negligence Act requires that the apportionment must be made on the basis of "the degree to which each person was at fault". It does not say that the apportionment should be on the basis of the degree to which each person's fault caused the damage. So we are not assessing degrees of causation, we are assessing degrees of fault. In this context, "fault" means blameworthiness. So it is a gauge of the amount by which each proximate and effective causative agent fell short of the standard of care that was required of that person in all the circumstances.

[20] The approach to apportionment that I have described is supported by the decisions of this Court in Ottosen v. Kasper (1986), 37 C.C.L.T. 270 (see particularly at p.277) and Dao v. Sabatino (1996), 29 C.C.L.T. (2d) 62 (see particularly at p.75). In the Ottosen case the point was put in these words:

The words used are the words of fault. The question that affects apportionment, therefore, is the weight of fault that should be attributed to each of the parties, not the weight of causation.

[Emphasis added]

[17] In this case, the judge said the plaintiff's conduct was "extremely careless and showed little concern for safety" (para. 63).

[18] In considering the defendant's relative blameworthiness, the trial judge said only that he should have appreciated the need to be vigilant for the potential of a cyclist approaching in the curb lane.

*[19] With respect, this characterization of the defendant's relative degree of blameworthiness fails to take account of a number of matters. First, there is no reference to the duty owed by a left-turning driver under s. 174 of the **Motor Vehicle Act** to yield the right of way to oncoming through-traffic that is so close as to constitute an immediate hazard.*

[20] On the trial judge's findings of fact, there is no doubt that the plaintiff had the statutory right of way. She found that:

1. when the defendant was starting to cross the northbound lanes, the plaintiff was in a well-lit area (para. 41);

2. the defendant should have had an unobstructed view of him (para. 42);

3. the defendant should have seen the plaintiff before pulling out in front of him because the plaintiff was there to be seen (paras. 43 and 60);

4. the plaintiff was south of the intersection when the defendant started to turn left; and

5. the plaintiff was an immediate hazard when the defendant began his left turn (para. 56).

*On all of these findings, the plaintiff enjoyed the statutory right of way under s. 174 of the **Motor Vehicle Act**, and was entitled to expect that the defendant would yield the right of way to him. In the judge's words, the plaintiff "had no reason to suspect that Mr. Schwartz would pull out in front of him" (para. 57).*

[21] Yet there is no mention of these facts, nor of the defendant's breach of statutory duty in the trial judge's assessment of the relative blameworthiness of the two parties.

[22] I infer from the trial judge's holding that the plaintiff was "extremely careless", and from the apportionment of fault that she made, that she considered the plaintiff's negligence in failing to have a lighted headlight on his bicycle to be far more blameworthy conduct than the negligence of the defendant as detailed above. It is difficult to understand why this would be so, and the judge provides no explanation.

[23] There is no doubt that in riding at night without a lighted headlight, the plaintiff demonstrated a lack of reasonable care for his own safety. There is also little doubt that the absence of a headlight on the bicycle made it more difficult for oncoming motorists to see the plaintiff.

*[24] In **Chesley v. Irvine**, [1987] B.C.J. 520 (C.A.), a motorcyclist rode into a Kamloops intersection in the hours of darkness without a headlight on the motorcycle. The cyclist collided with the defendant who was making a left turn in his vehicle in the intersection. The trial judge held the motorcyclist 40% responsible, and the driver of the left turning vehicle 60% responsible. In this Court, Mr. Justice Taggart said:*

Each driver here had a duty of care to the other. Each was required to maintain an appropriate look-out for other vehicles. Each had a duty to take care to avoid an accident. In addition, the defendant, as the driver turning left across two lanes in which southbound traffic might be expected, had an obligation to insure that she could safely make the turn.

The judge found her look to the north for southbound traffic was casual and insufficient. I see no basis upon which we could or should interfere with that conclusion. But what the defendant was looking for was a vehicle

with lights on. That is what she should have been looking for. She did not see that kind of vehicle for the good reason that it was not there. The vehicle that was there had no lights on.

In my opinion, the plaintiff in these circumstances cannot rely on his full dominant position on the highway and the judge was in error in according him that dominant position. Furthermore, the defendant's vehicle was there to be seen by the plaintiff. Unlike the plaintiff's motorcycle, the lights of the defendant's vehicle were on, as was her left turn signal. The plaintiff failed to see it and, consequently, failed to take, so far as can be ascertained, any action to avoid the collision.

In the circumstances of this case I think we are entitled to intervene and reapportion the degrees of fault. I would allow the appeal and find the plaintiff 60% at fault and the defendant 40%.

[25] Lambert J.A. in concurring reasons said:

The Supreme Court of Canada adopted the line of English authorities. The stricture is imposed on this court that we should not vary an apportionment unless we are convinced it is clearly wrong. Mr. Justice Ritchie, for the Supreme Court of Canada, said it would require a very strong and exceptional case.

But when we can indentify the specific point on which we conclude there was an error by the trial judge that affected his apportionment then that will be a very powerful circumstance to persuade us that his apportionment must be reconsidered.

In this case, immediately before the trial judge made his apportionment he said:

"Nonetheless he was in the dominant position."

Referring to the plaintiff on his motorcycle. But the significant factor is that the headlight of his motorcycle was not on. The fact that that headlight was not on did not cause him to lose his dominant position, but it made the dominant position much less significant a factor than it would otherwise have been. That reduced significance does not seem to have been considered by the trial judge at the point in his judgment where he made his apportionment.

[26] In the result, the Court varied the parties' relative degrees of fault, holding the defendant 40% at fault, and the plaintiff 60% contributorily negligent.

[27] In that case, the trial judge's error appears to have been in holding that the plaintiff continued to enjoy the statutory right of way when his failure to have a lighted headlight made it more difficult for the defendant to see her approaching. In the words of Lambert J.A., the absence of a headlight on the plaintiff's vehicle: "made the dominant position much less significant a factor than it would otherwise have been".

*[28] The same reasoning may be said to apply in this case. However, the significant difference between the two cases is that in the circumstances of the case at bar the trial judge specifically found that the defendant <u>should</u> have seen the plaintiff before he pulled out in front of him, and the plaintiff was there to be seen. I interpret these findings to mean that although the absence of a headlight on the bicycle was a negligent act on the plaintiff's part, it had relatively little to do with the defendant's failure to see the plaintiff given the well-lit nature of the intersection. According to the judge's findings, even without a headlight the defendant should have seen the plaintiff and should have yielded the right of way to him. Thus, while the absence of a headlight on the plaintiff's bicycle may have diminished the importance of his statutory right of way it cannot be said to have displaced it to the extent that is seen in **Chesley**.*

[29] In my respectful view, the trial judge's apportionment of fault, on her findings of fact, was plainly unreasonable and a palpable and overriding error.

[30] I would allow the appeal and vary the apportionment of liability by holding both the plaintiff and the defendant equally at fault for the accident.