Prince George Registry
No. SC753/83

IN THE SUPREME COURT OF BRITISH COLUMBIA

PRINCE GEORGE, B.C.

January 3, 1985

BETWEEN:

FRANK KRIZAY

PLAINTIFF

AND:

JANET CHRISTINE KING and DAVID WAYNE ROY

DEFENDANTS

AND: INSURANCE CORPORATION OF BRITISH COLUMBIA

THIRD PARTY

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE WALLACE

V.R. CURTIS, Esq. appearing for the Plaintiff

D. BYL, Esq. appearing for the Defendant, Janet Christine King

M.J. HARGREAVES, Esq. appearing for the Third Party

THE COURT: (Oral) The following are my reasons for judgment in this case. The accident which is the subject matter of this occurred on July 7th, 1982. The car in which Mr. Krizay,

the plaintiff, was a passenger left the road and rolled over one or more times before coming to rest. Mr. Krizay suffered a fracture of the odontoid process of the cervical vertebrae from which, fortunately, he has made an excellent recovery. The following issues remain to be resolved:

Liability:

a) Cause of Accident:

The evidence of Mr. Shelton reveals it was raining heavily at the time of the accident. The driver, Mr. Roy, did not give evidence and the plaintiff had no recollection of the events. From Mr. Shelton's evidence one can infer that Mr. Roy's speed was excessive for the conditions that prevailed at the time, the heavy rain, gravel road, and the sharp turn. In the absence of any other cause I find that the accident resulted from Mr. Roy's negligence in that he was driving at an excessive speed in the circumstances that prevailed.

b) Contributory Negligence:

The Plaintiff was guilty of contributory negligence in riding in a vehicle driven by one whose ability to drive, the plaintiff knew, or ought to have known, was impaired by alcohol. There's evidence that Mr. Roy and the plaintiff were members of a group of young people, approximately ten, who had been drinking beer and wine during the afternoon at a beach at West Lake. There is no direct evidence before me that

Mr. Roy's conduct or driving prior to the accident indicated that he had consumed sufficient liquor to have his ability to drive impaired. Mr. Shelton, called on behalf of the defendant, King, did not describe events which could put a reasonable plaintiff on his guard before accepting a ride in the car that Mr. Roy was driving. However, counsel for I.C.B.C. has led evidence that Mr. Roy had a breathalyzer reading of .150 and .170 immediately after the accident and counsel introduced a report of Mr. Samila that a person of Mr. Roy's build and state of health with such a reading would be noticeably intoxicated. The apparent intoxication of the defendant, Roy, and his companions was also confirmed by Cst. Applejohn both when he attended at the scene of the accident and when he took Mr. Roy to the station for the breathalyzer test.

In the light of such evidence and taking into account the condition of the plaintiff and his companions which might be attributable to the shock and trauma of the accident itself, I can only conclude that had the plaintiff been more attentive and concerned about his own safety and less preoccupied about enjoying himself at the beach by consuming a number of beers he would have noted that Mr. Roy had drunk to the extent that it had created a risk of harm to those who drove with him. He

would have declined the opportunity of being a passenger in a vehicle driven by Mr. Roy. An individual has a responsibility to take all reasonable steps to avoid risk of harm to himself. He cannot avoid this responsibility by a self-imposed incapacity to observe or judge the sobriety of the driver of the car in which he intends to become a passenger.

I find the plaintiff contributed to his injuries by failing to observe that the driver of the vehicle, Mr. Roy, was impaired to a degree which gave rise to a possible risk of harm to those who drove with him. This failure to observe and assess Mr. Roy's ability to drive most probably arose from the fact that the plaintiff himself had consumed a considerable amount of alcohol prior to the accident. In such circumstances a person in the position of the plaintiff must bear a substantial portion of the responsibility for the injury he sustained. I assess the degree of contributory negligence related to the plaintiff's failure to appreciate Mr. Roy's impaired condition at 25 per cent.

Turning to the issue of contributory negligence which relates to the plaintiff's failure to wear a seatbelt.

Mr. Joyce, an engineer, gave evidence on this issue. The value of his report is contained in the

photographs of the damaged vehicle and of the rear seat-belts available in this new model Volvo. They were a combination lap and shoulder-belt which became effective as a restraining device after one-inch movement. Mr. Joyce is to be commended in that unlike evidence so often given on this issue, he very carefully refrained from speculating as to the degree and direction of the various forces which would take effect as the car rolled down the embankment. I accept his general observation that as the car rolled and eventually come to rest upon its roof, a passenger inside would be thrown about and outwards when centrifugal force was applied. It's clear that seat-belts are designed to restrain passengers from being thrown around in a vehicle and thus assist in avoiding and reducing the detrimental effect of injuries such as suffered by the plaintiff, where the forces involved have been applied to the head and neck region.

I can only conclude that the failure of the plaintiff to "buckle up" contributed to the risk of injury to which he was exposed. I find that the plaintiff was negligent in failing to take the reasonable precaution of fastening his seat-belt and that his failure to do so contributed in part to his sustaining the injuries to his neck. In fixing the degree of contributory negligence I am taking into

consideration the relative potentital of risk of harm which accrues from a) accompanying a driver whose ability to drive is impaired, and b) failure to wear a seat-belt.

In my opinion the extreme risk of harm created by the former practice, has been well established over the years. The same history of potential risk of harm has not been established through one's failure to wear seat-belts. In fact, some still deny their value, or dispute their value. I don't share that opinion. However, no one questions the risk of being a passenger in a car driven by one who is impaired.

Accordingly, I fix the plaintiff's contributory negligence for failing to wear a seat-belt at ten per cent.

Quantum of Damages:

As previously stated the plaintiff is a very fortunate person. Although he sustained a serious fracture of the odontoid process of the cervical vertebrae he has made a most fortunate recovery. I accept his evidence of disability without hesitation. He is not a person inclined to exaggerate his condition, rather the opposite in the case. It was difficult for counsel to draw from the plaintiff a description of the pain and discomfort he must have experienced wearing a halo brace for some three

months. He had the brace applied at Shaughnessy Hospital in Vancouver shortly after the accident and he was in traction for two days. Subsequently, he wore a vest which was attached to the brace for approximately three months. He was apparently mobile during this period, partying and driving, and indeed becoming involved in an accident. He wore a soft collar for another three weeks and he experienced pounding headaches for some two to three months for which he took pain-killers, -- Tylenol medication. He has two scars on his forehead where the brace was attached although the cosmetic effect of these scars is minimal. He experiences a grating noise when rotating his neck. The extent of such rotation is somewhat restricted. Dr. Ducharme stated in his reports that he has no significant disability. His middle finger was fractured but healed normally.

I fix general damages for pain and suffering, loss and enjoyment of life and disability at $16,000.

a) Lost Wages:

Mr. Krizay is a journeyman steel fitter. He had a good work record. Unfortunately he had quit his job in October, 1981, intending to take some time off. He looked for work in January, '82, but, because of the depressed conditions, he was unable

to get a job prior to the July accident. He was disabled by the accident until January of 1983 when he again sought work. Again, by reason of the depressed economic conditions, he could not find work until April of 1983. He has been working relatively regularly since that time. It is acknowledged by plaintiff's counsel that the defendants are not to bear the consequences of the depressed economic conditions that prevailed in Prince George during the period in question.

I fix his loss of income at $2200 per month and giving him the benefit of the doubt I conclude that had he not been injured he would have, in all probability, obtained employment for one-third of that six-month period of disability. Accordingly, I award the plaintiff $4400 lost wages. The plaintiff is entitled to pre-judgement interest on the general-damage award from the date of the accident and on the lost-wage award from January the 1st, 1983, at the rate paid on monies held in court from time to time over that period.

Turning to the third party claim of I.C.B.C. against the defendant, Roy. As I noted previously, Mr. Roy did not appear at this trial nor did his counsel, Mr. Gow. In my view, on the evidence of Mr. Samila and the evidence of Cst. Applejohn, the defendant has satisfied the onus of establishing on a balance of probabilities that Mr. Roy was driving his motor

vehicle while he was under the influence of intoxicating liquor to the extent to be incapable of the proper control of the vehicle. A third party, I.C.B.C., is entitled to a declaration to that effect and costs of that issue. Costs, of course, follow the cause.