CA 003133
VANCOUVER REGISTRY

# Court of Appeal

ORAL REASONS FOR JUDGMENT

Before:

The Honourable Mr. Justice Macfarlane
The Honourable Mr. Justice Esson
The Honourable Mr. Justice Cheffins

VANCOUVER, B.C.

JANUARY 14, 1986.

BETWEEN:

LLOYD ALLAN WETTON and
CAROLYNN DIANNA WETTON

PLAINTIFFS
(RESPONDENTS)

AND:

COMMERCIAL STOCK AUDIT CO. LTD.
and JULIE MARGARET BOLIN

DEFENDANTS
(APPELLANTS)

W.G. Parrett, Esq. appearing for the Appellants
D. Byl, Esq. appearing for the Respondents

(On appeal from the judgment of Trainor, J.)

MACFARLANE, J.A.: We do not need to hear from you Mr. Byl.

This is an appeal from the judgment of Mr. Justice Trainor, pronounced October 5, 1984, in which he found the defendant Bolin solely liable for injuries to the plaintiff resulting from a motor vehicle accident on June 29, 1982.

The trial judge assessed damages for loss of income to the date of trial in the amount of $35,000 and damages for loss of future earning capacity in the sum of $24,000.

The facts are that on June 29, 1982, at about one o'clock in the afternoon, the plaintiff, Lloyd Allan Wetton, was travelling in a southerly direction on Victoria Street in Prince George on a motor cycle. When he was about a block away from the intersection of Victoria Street and Second Avenue he was able to see a van driven by the defendant Bolin standing at the intersection nearest the centre line. Other vehicles were preceding the plaintiff down this street and they passed through that intersection ahead of him. He was, however, a considerable distance behind the vehicle in front of him.

The defendant Bolin intended to make a left turn at the intersection and had activated the left-turn signal on her vehicle. The plaintiff does not recall seeing that signal in operation.

The plaintiff, having seen the other vehicles go through the intersection and having seen the plaintiff's van in a stationary

position at the intersection, took his eye off the defendant's vehicle.

The defendant Bolin then put the vehicle in motion, travelling through one lane and struck the plaintiff's motorcycle in the curb lane on Victoria Street.

The defendant Bolin at the time she put the vehicle in motion was carrying on a conversation with a passenger in her vehicle and she did not see the motorcycle until she struck it. The plaintiff did not see the van in motion until it was two feet from him.

The trial judge found that the motorcycle was in the intersection when the van was put in motion. In giving judgment he said:

> "She obviously did not see the motorcycle that was there to be seen and approaching her with its headlight on, and it could well be that she was engaged in conversation and started to make the turn without proper regard for what was in the intersection.
>
> Section 176 of the Motor Vehicle Act provides that she should have yielded 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. On the facts as I find them the motorcycle was in the intersection when she started to turn, so she had an obligation to yield, but even if the motorcycle had not yet entered the intersection, it was approaching

> "at the usual speed of traffic along a roadway in the city; approximately, in the estimate of the plaintiff, 20 to 25 miles an hour. So it was that close that it did constitute an immediate hazard. On either basis I am satisfied that she should have yielded and that the fault for the accident is entirely that of the defendant. There is no contributory negligence by the plaintiff."

The appellant submits that the judge was in error in finding no contributory negligence on the part of the plaintiff. Counsel for the appellant submits that if the plaintiff had kept his eyes on the van he would have seen the left-turn signal operating and would have seen the van begin to move. He submits he could have slowed his motorcycle down and could have avoided the accident.

I think the oft cited dictum of Cartwright, J., in Walker v. Brownlee and Harmon (1952) 2 D.L.R. 450 at 461 is pertinent here:

> "While the decision of every motor vehicle collision case must depend on its particular facts, I am of the 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 skillful 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."

The facts establish that the plaintiff did not see the defendant's vehicle move until it was too late to avoid a collision. The plaintiff had seen the van in the intersection. He was entitled to assume the driver of that vehicle would not disregard the law. It was not negligence, in my view, on his part to take his eyes off the van in the circumstances. At the moment the defendant put the van in motion the motorcycle was in the intersection and so close it would constitute an immediate hazard; it was too late for the plaintiff to avoid an accident. I think the judge was correct in finding that there was no contributory negligence on the part of the plaintiff.

The appellant then submits that the damages awarded by the trial judge were excessive. The trial judge awarded $35,000 for loss of income to the date of trial. That was for the period extending from June 29, 1982 to November 16, 1984.

The earnings record of the plaintiff for the years 1976 to the year 1981 reveals that he earned between $10,000 and $16,783 in those years. In 1978-1979 he earned in excess of $16,000. Those earnings were as a labourer. At the date of the accident he had acquired a new job as an insulation salesman and there was evidence that such a salesman could earn as much as

$30,000 a year. The plaintiff had only worked a short time in that occupation prior to the accident.

The injuries suffered in the accident were such that he could not take any labouring job during the period of his recovery. He also could not perform his job as an insulation salesman because that involved climbing ladders and other heavy work.

The judge assessed the loss of income to the date of trial on the basis of an earning capacity of about $16,000 a year and I think that the sum of $35,000 for the period up to trial was a fair and reasonable assessment of the loss.

The trial judge assessed damages of $24,000 for loss of future earning capacity. He approached that question not on the basis that the plaintiff would be unable in the years ahead to fully achieve his potential, but rather on the basis of how much money was required to retrain him for an occupation that would earn him the sum of money that he would have expected to earn had it not been for the accident.

The plaintiff, on the advice of his doctor, did not return to a labouring job or any job during the period of his recovery. Instead he decided to go to university and to obtain a degree in social work. He was still doing that at the date of

trial and he claimed damages on the basis that it would take him another four years to complete that training. The judge thought that was not reasonable, but thought that a reasonable period in the circumstances for the retraining would be one and a half years. On that basis he found the loss of $24,000. I do not think he was in error in doing so.

I would dismiss the appeal.

ESSON, J.A.: I agree.

CHEFFINS, J.A.: I agree.

MACFARLANE, J.A.: The appeal is dismissed.

A.B.M. JA
A.B.M.
J.A.