No. 5872/85
Prince George Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

GLENDA SWAILE

PLAINTIFF

AND:

ANDREW HORST MUELLER and I.C.B.C.

DEFENDANTS

REASONS FOR JUDGMENT

THE HONOURABLE JUDGE HARDINGE

D. Byl, Esq. ✓ Counsel for the Plaintiff

T. Cole, Esq. Counsel for the Defendants

Place and date of Trial: Prince George, B. C.
4, February, 1986

The plaintiff seeks damages for injuries she suffered when a vehicle which she was driving struck a stationary car owned by the defendant.

The accident took place on Highway 97 about 12 miles south of Prince George in an area where it runs in a generally North-South direction. From the point of collision the highway is straight and relatively level for a distance of a little over half a mile to the south which was the direction from which the plaintiff's vehicle came. The highway was paved and divided into two lanes, (one for traffic in each direction); each lane was 11 feet wide. In addition to the traffic lanes there was, on both sides of the road, a paved shoulder approximately four feet wide. The shoulders were marked off from the traffic lanes with a solid white line.

On the night of the accident the highway was dry. There

was no artificial light in the area and little if any natural light from stars or the moon. Traffic was light. The speed limit on this section of the highway was 90 KmH.

The defendant, while also travelling north towards Prince George had encountered difficulties with his car. He testified that about five minutes before he reached the place where the accident happened the engine of his car started to cut out. He slowed down and as he did so he noticed smoke coming from the engine compartment. When he reduced the speed of his car still more the engine cut out completely. He then steered his car onto the shoulder of the road where he brought it to a stop and got out, first to try to determine the cause of the trouble himself and then to attempt to enlist the assistance of a passing motorist. The accident happened about thirty minutes later.

According to the defendant, when he brought his car to a halt he took it as close as he could get to the point where the ground beyond the paved shoulder dropped off. He did not estimate the width of the ground between the edge of the paved shoulder and the drop off. The police officer who attended the scene of the accident after it occurred took no measurements at all. The distance from the edge of the pavement to the point where the ground drops off was measured by the plaintiff's husband a day or so before the trial. However, as that was almost 30 months after the accident and there was no evidence

that the highway has remained unaltered in that time, I can attach no weight to his measurements.

The defendant stated that when he stopped a portion at least of his car might have been protruding as much as 2 1/2 feet out into the northbound lane of the highway. The car was a medium green colour and was recently cleaned. Although his car was equipped with four way flashing hazard lights he did not attempt to activate them nor did he leave his parking lights on. He did not have any flares nor reflecting triangles that he could have set out to warn other traffic of the presence of his car on the edge of the highway.

The defendant did have a battery operated lantern. The lantern was not one of those that have a bulb inside a glass or plastic shield. Instead two bulbs were mounted in the base of the lantern protected by a metal ring. The defendant used the lantern to inspect his engine in his attempt to discover what had caused it to stall.

Minutes before the accident happened the defendant had succeeded in flagging down a south bound car. The driver of that car parked on the opposite side of the highway at a point estimated by the defendant to be half a block south of the accident scene. What he meant by that I have no idea as the highway in the vicinity of the accident scene is in open country.

The defendant, acccmpanied by the man who had stopped

to attempt to assist him, had just returned to the front of the defendant's car, the hood of which was raised to enable them to inspect the engine, when the collision occurred. Photographs entered as exhibits disclose that the right front portion of the plaintiff's vehicle struck the left rear of the defendant's car.

The plaintiff testified that she was travelling north on the highway at about 11:00 p.m. She said she had been proceeding at about 90 KmH but had, for no particular reason, slowed down slightly shortly before the accident took place. She did not recall specifically if her vehicle headlights were on high or low beam but said that as she could recall seeing no oncoming traffic for some time prior to the collision she assumed her headlights were on high beam.

The plaintiff said she first saw the defendants car when her vehicle was only about seventy-five to one hundred feet south of it. At the same time she said she saw another vehicle stopped on the opposite side of the road to that of the defendant. The plaintiff went on to say that when she saw the defendant's car sticking out a distance she estimated to be "at least 2 feet," into her lane she froze. She said she did not attempt to steer to her left to avoid striking the defendant's car. While she said she believed she took her foot off the accelerator she did not recall applying her brakes. It was no more than two seconds after she saw the defendants

car that, the plaintiff said, she struck it.

I find that the defendant was negligent in the manner in which he permitted his car to remain partially on the travelled portion of a principal highway without taking any precautions to warn the drivers of other vehicles of its presence. He did not take the elementary precaution of checking to see if his flashing hazard lights or parking lights were operable and, if they were to activate one or the other of them. He had a type of lantern that, while it might not be ideal for the purpose, could, if hand held be shone in the direction of traffic that might be approaching from the south in the lane which was partially obstructed by his car, but he made no attempt to do so. Finally the defendant apparently took no steps at all to determine if in fact there was any traffic approaching from the south before he effectively concealed whatever illumination his lantern might have provided beneath the upraised hood of his car.

Assuming the plaintiff's pick up truck was at least as wide as the defendant's car, the width of which he estimated was six feet and that the plaintiff was travelling in the centre of the north bound traffic lane, the right side of her vehicle would have been 2 1/2 feet from the line dividing the travelled portion of the highway from the paved shoulder. That is the same distance the defendant estimated his car may have been protruding out onto the highway. All the evidence as to distances was based on estimates. It is not, therefor, difficult to

understand why the accident happened.

Given that the defendant's negligence was the immediate cause of the accident the question arises as to whether the plaintiff was guilty of contributory ~~negligence~~ negligence. Although the night was dark and there was no artificial lights in the immediate vicinity, it was not a night when visibility was restricted by rain or fog. The accident happened on a straight stretch of the highway when there was nothing to obstruct the plaintiff's view. As the defendant's car had been washed the same day the lenses over its tail lights were clear and each measured about 2 to 3 inches in height by 10 to 12 inches in width. The rear of the defendant's car faced south so that had the plaintiff had her headlights on high beam and had she been maintaining an adequate lookout she might well have realized she was coming upon a situation in which she would have to stop or alter the course of her vehicle before that realization did come upon her.

The defendant's negligence was greater than that of the plaintiff and he must be held primarily liable. I have considered the authorities to which I have been referred by counsel. As is to be expected, some of them are helpful in determining how liability should be apportioned however none of the decisions are based on facts quite the same as in the present case. I have concluded that in the circumstances of this case the defendant's negligence was 75% the cause of the accident and that the

plaintiff was contributorily negligent to the extent of 25%.

It was agreed that the plaintiff's pecuniary damages for damage to her vehicle and wage loss amounted to $8,210.80. In addition she suffered a simple fracture to the distal end of her left radius.

After the accident the plaintiff was taken to hospital where she was given medication to relieve her pain. The next day her lower arm was placed in a plaster cast. The cast was removed six weeks after the accident and a tension bandage was then applied. She was given physiotherapy for about ten days after the cast was removed.

Fortunately the fracture healed without complications and the plaintiff was able to return to work ten weeks after the accident. For about three weeks after she went back to work the plaintiff felt some pain and discomfort but thereafter suffered no ill effects. For general damages for pain, suffering, and loss of enjoyment I award the plaintiff $4,000. Altogether the plaintiffs damages amount to $11,210.80. The defendant did not counter claim, therefor the plaintiff is entitled to judgment for 75% of her total damages together with Court Order Interest at the rates applicable from the date of the accident and 75% of her costs.

Prince George, B. C.
February 20, 1986