

DATE OF RELEASE: April 27, 1995
No. 21487

Kamloops Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN :)	
)	
LEW IESE GERBRANDT)	REASONS FOR JUDGMENT)
	PLAINTIFF) OF THE HONOURABLE
AND :)	MR. JUSTICE HUNTER
)	
JAM IERAY DELEEUEW)	(IN CHAMBERS))
	DEFENDANT)
AND :)	
)	
INSURANCE CORPORATION OF)	
BRITISH COLUMBIA)	
)	
THIRD PARTY)	

APPEARANCES:

DICK BYL	- Counsel for the Plaintiff
JAMES A. HORNE, Q.C.	- Counsel for the Third Party
JAM IERAY DELEEUEW	- Not present or represented

DATE OF HEARING : Monday, April 24, 1995

1 The plaintiff, Lewiese Gerbrandt (Gerbrandt), was injured while driving a motor vehicle on April 10, 1994 near Salmon Arm, B.C. when she came into a head on collision with a vehicle owned and driven by the defendant Deleeuw. She makes application by Rule 18A for judgment against Deleeuw on the issue of liability with damages to be assessed.

2 At approximately 9:30 p.m. on the evening of April 10th Mrs. Gerbrandt was driving a blue Plymouth van northbound on Notch

1995 CanLII 407 (BC SC)

Hill Road near Salmon Arm. Her husband was in the front passenger seat and her son in the rear passenger seat. All were wearing seatbelts. They were returning home from a visit with friends. At that visit they had consumed coffee and tea. Mrs. Gerbrandt was driving at a speed between 40 - 50 k.p.h. in a 60 k.p.h. zone. The visibility was good as well as the weather and the road surface was clear and dry. Mrs. Gerbrandt's vehicle's headlights were on low beam and operating satisfactorily.

3 Mrs. Gerbrandt observed car headlights approaching her from the opposite direction heading south on Notch Hill Road towards an intersection on that road. Mrs. Gerbrandt was then proceeding north toward that same intersection. Mrs. Gerbrandt estimated that the other vehicle was proceeding very fast and certainly much faster than she was driving her van. As the other vehicle approached (operated by the defendant Deleeuw) she noticed that it was weaving from the northbound to the southbound lane. At that point on the road there was a double solid yellow line dividing the north and southbound lanes.

4 As Mrs. Gerbrandt approached the intersection and noticed the weaving of the Deleeuw vehicle, she braked her vehicle. She describes what happened next in paragraph 12 of her affidavit:

"That the Deleeuw vehicle was now coming in my lane of travel directly towards me as I was entering the corner. I thought of turning hard to the right to go into the right-sided ditch, but I instantly recalled that there was a bank and a telephone pole in that location, and there had been a previous accident there where someone had been killed. The accident occurred rapidly, and I did not have a chance to turn to the left or to the right to avoid colliding with the Deleeuw vehicle. The point of impact was in my (northbound) lane of travel. I remember a smash and being jolted. My husband was flung on my lap. He did not answer me when I cried out his name. I remembered my son Caleb in the rear seat. I

turned around calling his name and I saw him flung over the backseat, with his head back, his face split, and a great deal of blood on his face. I called his name and there was no response..."

5 Cst. Chafe, a motor vehicle accident investigator with considerable experience, attended the scene shortly after the accident. He made certain observations and took measurements. He noted scuff marks, gouge marks and skid marks. He completed a "Collision Analyst Investigation Report". He said the following in paragraph 6 of his affidavit:

"That as a result of the observations and investigations that I performed, particulars of which are set out in Exhibit "A", I formed the opinion that the point of impact between the Deleeuw pick-up truck and the Gerbrandt van occurred at 37 to 38 centimetres from the centre of the painted double solid line in the northbound lane of Notch Hill Road, namely, in the lane of travel of the Gerbrandt vehicle. I have also come to the conclusion that the front driver's side of the Deleeuw vehicle and the front passenger side of the Gerbrandt vehicle came into contact at the moment of impact."

6 Mr. Deleeuw in his affidavit "could not say where the point of impact occurred". He had consumed alcohol prior to the accident. In the opinion of one of the police officers Mr. Deleeuw's ability to operate a motor vehicle was impaired by alcohol. He noted a strong odor of beer about Mr. Deleeuw and that he had watery eyes which he appeared to be unable to focus, that he had slurred speech and was unsteady on his feet. Another constable, a qualified breathalyzer technician, performed a breathalyzer test on Deleeuw which produced two readings, one of 210 milligrams of alcohol in 100 millilitres of blood and the other 200 milligrams of alcohol in 100 millilitres of blood. Mr. Deleeuw admitted to being the operator of the vehicle which struck the Gerbrandt vehicle.

7 At the request of the third party the technical investigation of this accident was conducted by Timothy S. Leggett, an accident reconstruction engineer. He draws the following conclusions on page 9 of his report dated April 1, 1994:

1. Based on the interpretation on the accident site data, and the vehicle underbody damage, the Deleeuw pick up was straddling the center line for quite some distance, with its left bumper approximately 3 m into the oncoming lane.
2. The Gerbrandt van was undergoing a severe avoidance manoeuvre, swerving into the oncoming lane, at the moment of impact. The left portion of the van was in the oncoming lane, with the right front portion at the center line. The rear of the vehicle was still in its original lane of travel.
3. If the van had stayed in its original lane and had simply travelled closer to the fog line, no contact would have occurred. There was, as well, a gravel shoulder at the east portion of the highway, which could have been used for a safe vehicle pass."

8 It seems clear from the evidence that it was the front drivers side corner of Deleeuw's vehicle which came into contact with the front passenger side corner of the Gerbrandt vehicle.

9 Counsel for Mrs. Gerbrandt submits that there are two possible conclusions. Either the impact occurred in the northbound lane or Mrs. Gerbrandt, in the agony of the collision, made a last second swerve as a result of which the accident occurred in part in the southbound lane. Mr. Byl, on behalf of Mrs. Gerbrandt, submits that this was a move "in the agony of collision", by Mrs. Gerbrandt, and does not constitute negligent conduct by her, rather the fault of this accident lies wholly with Deleeuw.

10 An often quoted summary of the law concerning the agony of collision is found in an old text, Huddy on Automobiles, 7th

Ed., page 471 and page 335 (this passage is relied upon by the Saskatchewan Court of Appeal in *English v. North Star Oil Limited* (1941) 3 W.W.R. 622 (Sask. C.A.) and *Reineke v. Weisgerber* (1974) 3 W.W.R. 97 (Sask. Q.B.)):

"Under circumstances of imminent danger an attempt to avoid a collision by turning one's course instead of stopping the vehicle is not necessarily negligence. An attempt to stop when a turn would have been a more effective method of avoiding the collision is not necessarily negligence ... one who suddenly finds himself in a place of danger and is required to consider the best means that may be adopted to evade the impending danger is not guilty of negligence if he fails to adopt what subsequently and upon reflection may appear to have been a better method, unless the emergency in which he finds himself is brought about by his own negligence."

11 In *Gill v. C.P.R.* (1973) 4 W.W.R. 593 Mr. Justice Spence speaking for the court said the following:

"It is trite law that, faced with a sudden emergency the creation of which the driver is not responsible, he cannot be held to a standard of conduct which one sitting in the calmness of a Courtroom later might determine was the best course ..."

12 It was dark at the time of this accident and Mrs. Gerbrandt was driving into a curve. Mr. Deleeuw was approaching from the opposite direction. She noticed that he was weaving - she thought over the center line. She was in a quandary as to what she should do. Her first thought was to pull off the road to her right and then she remembered that someone had been killed driving off the road at that location. She is unclear as to what she did next but the accident reconstruction, including the skid and scuff marks on the road surface and the location of the major damage to both vehicles, confirm that she turned suddenly to her left, likely with the hope that the Deleeuw vehicle would pass by on her right.

Unfortunately for her and her family, that did not occur. She was clearly in an emergency situation. The law does not expect the same care from a driver in such a situation as it does from a driver in normal driving circumstances.

13 Counsel for the third party relies, amongst other authorities, on *Gill Estate v. Greyhound Lines of Canada Ltd.* 21 B.C.L.R. (2d) 324. The circumstances in that case in my opinion are quite different from those at bar.

14 I find no contributory negligence on the part of Mrs. Gerbrandt. Deleeuw is wholly responsible for causing this accident. Judgment will be for Mrs. Gerbrandt on the issue of liability together with the costs of this application.

"Hunter J."
HUNTER J.

Kamloops, B.C.
April 25, 1995