IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Behragam v. Paviglianiti,*
2019 BCSC 818

Date: 20190523
Docket: M156354
Registry: Vancouver

Between:

Javad Behragam

Plaintiff

And

Peter Daniel Paviglianiti

Defendant

Before: The Honourable Madam Justice Burke

Reasons for Judgment

Counsel for the Plaintiff:	K.J. Miles R.N. Bisbicis P.R. Bisbicis E. Yacout, Articled Student
Counsel for the Defendant:	H.D. Neumann N.N. Langrana
Place and Date of Trial:	Vancouver, B.C. November 28-30, 2018 February 5-7, 2019
Place and Date of Judgment:	Vancouver, B.C. May 23, 2019

INTRODUCTION

[1] The plaintiff, Mr. Javad Behragam, claims damages for injuries he sustained the morning of September 23, 2013 when his bicycle collided with a vehicle owned and driven by the defendant, Peter Paviglianiti. The plaintiff was attempting to ride through the traffic circle on West 10th Avenue and Birch Street in Vancouver, British Columbia.

[2] On impact, the plaintiff was unconscious for at least 10-15 minutes. He has been diagnosed with a brain injury and suffers from some memory issues. The plaintiff claims that the defendant is entirely liable for causing the motor vehicle collision.

[3] Liability and damages have been severed. The issue in this trial is liability.

THE FACTS

[4] Mr. Behragam was an avid cyclist. In the months leading up to the accident, Mr. Behragam commuted to work on his bicycle approximately 45-60 minutes each way from his home in East Vancouver to his business on West 4th Avenue. He did this five days a week.

[5] Mr. Behragam was born in Iran in 1964 and came to Canada in December 1989. He is a potter by trade and owns and operates a pottery business called “U Paint I Fire.”

[6] The accident occurred on September 23, 2013 at approximately 10:45 a.m. At this time, Mr. Behragam was travelling westbound on West 10th Avenue in a designated bike lane. Mr. Behragam approached a roundabout at Birch Street and continued through the intersection. As he passed the west side of the center in the intersection, he collided with the left door of a northbound 2011 Ford Ranger pickup truck, driven by the defendant, Peter Paviglianiti. Mr. Behragam was knocked off his bicycle as a result. As indicated, he was unconscious for at least 10-15 minutes and sustained a variety of injuries.

[7] At the time of the accident, Mr. Behragam was wearing a black helmet and riding a blue bicycle. He was wearing a yellow and black jacket with reflective tape and a navy blue undershirt with jeans. The bicycle had an orange reflector on the wheel. Mr. Behragam indicated that the bicycle was in good operating order with new brake pads recently installed.

PARTIES' POSITIONS

[8] Mr. Behragam argues that the defendant is 100% liable. He submits that he was the dominant driver in this situation because he had already established prior and substantial entry in the roundabout at the time the defendant reached the intersection. Thus, he submits, the defendant had to yield the right of way.

[9] The defendant, Mr. Paviglianiti, maintains that he entered the intersection before or "at the same time" as the plaintiff. As such, he submits that he was the dominant driver and that the plaintiff was the servient driver. In other words, he submits that he had the right of way.

[10] Mr. Paviglianiti also submits that the point of impact—the mid-driver side of the truck—confirms that he was the dominant driver with the right of way. In his submission, the point of impact demonstrates that he would have been visible to the plaintiff. Further, he says, it establishes that he was in the roundabout either before or "at the same time" as the plaintiff.

LEGAL PRINCIPLES

[11] Section 173(1) of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318 [*MVA*] provides:

> 173 (1) Except as provided in section 175, if 2 vehicles approach or enter an intersection from different highways at approximately the same time and there are no yield signs, the driver of a vehicle must yield the right of way to the vehicle that is on the right of the vehicle that he or she is driving.

[12] That statutory right of way however is not absolute. As noted by MacDonald, C.J.B.C. in *Lloyd v. Hanafin,* [1931] 43 B.C.R. 401 at 402:

> … The vehicle coming from the right has by statue or by-law the right of way, but where the other vehicle has reached the intersecting street substantially ahead of the one having the right of way he is not obliged to wait upon the other if the way appears to be clear.

[13] As has been noted in the jurisprudence, a driver approaching the intersection from the right cannot exercise a right of way with impunity when there is a danger of colliding with another vehicle in the intersection. The right of way becomes subject to the reasonable and substantial prior entry of that vehicle into the intersection. By reason of a driver's reasonable and substantial prior entry, that driver becomes the dominate driver. See *Pemberton v. Schreiber* (1997), 32 B.C.L.R. (3d) 187 (C.A.); *Cornell v. Jones* (1993), 38 A.C.W.S. (3d) 1163 (B.C.S.C.); *Fewster v. Milholm* [1943] 4 D.L.R. 566.

[14] In *Cyr v. Koster*, 2001 BCSC 1459, a case involving an accident in a gas station parking lot "intersection", the Court held that the driver who had the right of way under s. 173(1) was entirely responsible for the accident due to the fact that the driver from the left was "more than passed through the imaginary center of the intersection and was then struck by the now servient driver": at para. 23.

[15] In coming to this conclusion, the Court relied on *Aune v.* Goodman, [1981] B.C.J. No. 1225 (S.C.) and *Walker et al v. Lenzin et al* (1963), 43 W.W.R. 1 (B.C.C.A.). The Court in *Cyr* affirmed the statement from Spencer J. in *Aune* that "a person approaching an intersection from the right, although entitled to the statutory right of way is not entitled to approach and proceed into the intersection without regard to traffic which may be coming from his left": at para. 19.

[16] In addition, as noted by the Court in *Olchowy v. Tomkulak,* 2008 BCSC 1927 at para. 59:

> The plaintiff had the burden of proving, on a balance of probabilities, that she entered the intersection sufficiently in advance of the defendant as to be able to clear the intersection without causing an immediate hazard to the defendant who had the right-of-way.

[17] In this case, the defendant Mr. Paviglianiti was the driver on the right and, in the normal course, the plaintiff Mr. Behragam would have yielded the right of way. The question, however, is whether the plaintiff had already made a reasonable and substantial entry into the intersection such that he become the dominate driver and was not obliged to wait upon the defendant.

[18] The plaintiff relies on the statutory definition of the term “intersection". The defendant instead suggests a definition that is specific to this certain roundabout. This debate over the definition of intersection was the subject of argument relating to the expert reports. I will deal with that later.

APPLICATION TO THE FACTS

Plaintiff’s Evidence

[19] At the outset, I will first note that the plaintiff, Mr. Behragam, does not recall what occurred in the moments just prior to the impact. He says, however, that on the morning of September 23, 2013, he was cycling westbound on 10th Avenue. He had been on that route for approximately 30-35 minutes. As he came up to the West 10th Avenue and Birch Street intersection, he did not observe any cars, bikes, or pedestrians in the vicinity.

[20] Approximately two meters before entering the pedestrian crosswalk, he looked both ways and noticed no parked cars, bikes or pedestrians at that point either. He says that in his many years of cycling, he always slows down at intersections because of the potential for pedestrians, cars, and other bikes. Prior to the accident, Mr. Behragam was cycling at approximately 14-17 km/hour. He also said he knows that he looked left and right on that occasion because that is what he always does.

[21] While cycling through the traffic circle, Mr. Behragam recalls “all of a sudden” seeing a white truck in the northwest part of the circle. He explained that it all went by very fast but that he would estimate that the truck was travelling at 40-50 km/hour. Mr. Behragam’s 40-50 km/h speed estimate, I understand, is framed by the

fact that he did not see the truck coming and that the impact of the collision was forceful enough to leave him significantly injured. I find this is his best estimate of speed based on the shock and suddenness of the collision.

[22] Mr. Behragam says that he tried to brake and swerve left in order to avoid the accident but that it was too late. He and his bicycle came into contact with the left fender and door of the truck before falling to the ground. The next thing Mr. Behragam remembers is waking up in the hospital.

Defendant's Evidence

[23] Mr. Paviglianiti has a different recollection. Just prior to the collision, he recalls travelling southbound on Birch Street in his 2011 Ford Ranger pickup truck after running errands for his business. He was on his way home to 1316 West 11th Avenue. Mr. Paviglianiti indicated he was very familiar with the 10th Avenue and Birch Street intersection, having travelled through it many times to get home. He knew to be particularly cautious in this area due to the number of cyclists who use the route. He indicated that this area is often busy with bikes and is a popular bike route. He also noted that there is a "long slow hill" on West 10th Avenue from Oak to this intersection.

[24] On this particular day, Mr. Paviglianiti stopped north of the intersection to allow a southbound vehicle parallel park approximately two or three car lengths from the intersection. He then continued southbound towards the intersection. In response to a question from counsel, Mr. Paviglianiti says he always looks left when approaching the intersection to ensure there are no oncoming vehicles, cyclists, or pedestrians. While he does not have an independent memory of specifically looking left on this day, this is his regular practise. Mr. Paviglianiti said his intention was to look for bicycles heading east and pedestrians heading south. He said he did not observe any westbound traffic.

[25] As he entered the intersection, he had his foot on the clutch and was travelling slow—approximately 5 km/hr. As his vehicle approached the west side of

the raised median, he felt and saw a “dark” impact just beside his head. At this point, he was looking straight ahead and heading south. The force of the impact was such that, if his window had been open, the cyclist would have come through into the front passenger seat. He did not see a cyclist until after the collision.

[26] Mr. Paviglianiti described the location of the impact as being just beyond the roundabout traffic sign positioned for traffic heading east. When asked, he noted that the traffic sign would be at a 3:00 position and the impact would be at a 4:00 position.

[27] Mr. Paviglianiti immediately slammed on his brakes and came to a stop about one-and-a half to two feet later. He opened his door and saw someone lying on the ground beside his vehicle on the concrete roundabout. The plaintiff’s bicycle was largely under his truck by the passenger’s side backdoor. The plaintiff himself was unconscious. Mr. Paviglianiti said he was in a state of shock and his immediate concern was for the cyclist. He or someone else called 911 within seconds and first responders attended. At some point, Mr. Paviglianiti spoke to the police. He left the accident scene about 30 minutes later.

[28] Mr. Paviglianiti was cross-examined extensively on whether he had his foot on the clutch (which he testified to in support of his evidence that he was only driving 5 km/hr). He continued to insist that he did have his foot on the clutch.
Mr. Paviglianiti also admitted in cross-examination that he could not be sure as to whether the damage to his driver’s door was caused by the collision, or, whether it was caused by a previous incident when he scraped a pole backing out of a parking space.

[29] In cross-examination, Mr. Paviglianiti was not clear on whether he had a specific recollection that he looked left at the intersection or whether he was relying on his general practise. Furthermore, the most he could say was that he used his peripheral vision to observe left. In his direct testimony, he indicated that he looked left. This, however, was in response to a leading question. The weight attached to the answer is therefore impacted. This, as noted in *Bye v. Newman,* 2017 BCSC

1718 at para. 56, is particularly so when dealing with critical testimony. The most that can be said as a result in this case is that the defendant would ordinarily look left. I find that he does not have a specific recollection of doing so on the day in question.

[30] I accept that both parties are genuine in their recollections.

Police Evidence

[31] Det. Tasaka, who attended the scene of the accident very shortly after, provided helpful and reliable testimony. In doing so, he explained the contents of the "General Occurrence" police report that he authored following the incident. In that report, he attaches a graphic "Traffic Collision Worksheet", which is a hand-drawn diagram of the accident. The defendant submits that the diagram cannot be relied on due to the fact that it was drafted by Det. Tasaka's partner that day, Cst. Jensen, who did not testify. I am satisfied, however, that the diagram is reliable. Det. Tasaka was able to authenticate the diagram and testified that it was an accurate representation of the accident scene that he saw firsthand.

[32] Det. Tasaka was able to observe the final resting place of the defendant's truck. He testified that the solid lines on the "Traffic Collision Worksheet" diagram represented the officers' observations at the scene of the accident. He testified that the dotted lines represented what the officers understood the paths of the vehicle and bicycle were prior to the collision. The dotted line drawings were based on their own observations at the scene but also based on a conversation with the defendant and an attempted conversation with the injured plaintiff. Det. Tasaka confirmed that the notes and diagram were made contemporaneously at the scene of the accident.

[33] As noted in the police report, Det. Tasaka took a statement from the defendant in which he stated that "when he reached the 4 o'clock position he heard a loud bang" and stopped his vehicle immediately. Det. Tasaka confirmed, using the diagram as a reference, that if the traffic circle was oriented at 12:00 south and 6:00 north, the collision did, indeed, occur at the 4:00 position.

[34] I accept that the accident occurred at the 4:00 position. The officer's information is reliable and it corroborates the defendant's statement, which was maintained at trial, that the accident occurred at the 4:00 position.

[35] I turn now to Mr. Robin Brown's expert report to see if it assists on this point.

Expert Evidence

[36] Mr. Brown is a professional engineer with a specialty in motor vehicle accident analysis and reconstruction. He spoke about the dynamics of the collision. He provided an opinion as to when the bicycle and pickup truck entered the intersection. He was also asked to assess the driver's ability to avoid the collision.

[37] Mr. Brown described the accident site as follows:

> West 10th Avenue, in the accident area is an undivided 2 lane residential street and designated City of Vancouver bicycle route. The roadway runs in predominantly in (*sic*) an east and west direction. 10th Avenue has a total width of 7.2 meters. The north and south sides of 10th Avenue are bounded by raised concrete curbs, grass boulevard and sidewalks. Parking is permitted on the south side of 10th Avenue. West 10th Avenue east of Birch Street descends a slight downgrade measured at 1.5 to 2%. The road surface was constructed of asphalt that was in good repair.
>
> Birth Street is a 2 lane undivided residential roadway that runs in a north and south direction. Birch Street intersects West 10th Avenue at approximately 90 degrees. Birth Street has a total width of approximately 10.6 meters north of West 10th Avenue and 8.5 meters south of west 10th Avenue. The southeast corner of the intersection has a curb bulge that reduces the road with (*sic*) at the intersection. The east and west sides of Birch Street are bounded by raised curbs, grass boulevards and sidewalks. Birch Street was level and the road surface was constructed of asphalt that was in good repair.
>
> The intersection is uncontrolled with a raised circular medial in the center of the intersection. The center median was 6.2 meters in diameter. The median forms a roundabout for vehicle and bicycle traffic. The west side of the center median was 2.2 meters east of the west edge of the west side of Birch Street. The north side of the median was 0.5 meters south of the north edge of 10th Avenue.
>
> The presence of parked vehicle on the west side of Birch Street north of 10th Avenue requires southbound vehicles to move to the west as they approach the intersection. Southbound vehicles were observed to turn to the left and then right to travel through the intersection and avoid driving on the raised center median area.

[38] Mr. Brown noted that the relatively minimal damage to the Ford truck's side panels, in the absence of structural damage to the bicycle, would indicate that the bicycle's forward speed was low at impact and consistent with the lower end of the speed range he was asked to assume (10-15 km/h).

[39] Mr. Brown noted that the "small dents in the front door were likely from the bicycle handlebars" and the "smooth depression in the rear cab was likely from the rider contacting the side panel as he fell from the bicycle." Mr. Paviglianiti in his evidence advised that the latter damage was pre-existing (he had scraped a pole in a parking lot while backing up). He ultimately agreed in cross-examination, however, that there could have been additional damage resulting from the accident.

[40] Mr. Brown also provided an opinion with respect to the Paviglianiti truck's speed and the visibility of the Behragam bicycle:

> If the bicycle and Paviglianiti Ford were traveling at the same speed the bicycle would have been about 1.6 meters east of the impact position … when the Paviglianiti Ford entered the intersection. If the Paviglianiti Ford were traveling faster than the bicycle, the bicycle would be less than 1.6 meters from the impact when the Paviglianiti Ford entered the intersection. At a lateral distance of 1.6 meters to the east of the Paviglianiti Ford the driver would have an unobstructed view of the bicycle.

[41] In Mr. Brown's opinion, the defendant would have had an unobstructed view while the plaintiff was crossing the intersection to the impact area. At 10 km/h, this would be about 3.25 seconds. If the defendant had commenced perception at 2.5 metres north of the intersection, he could have stopped and avoided the collision. The plaintiff would have been about 4.2 metres east of the impact area near the centre of the intersection at that time.

[42] Mr. Brown also discussed "perception reaction time", meaning the time it takes a driver to identify and react to potential hazards. He testified that the most important factor affecting perception reaction time is driver expectancy. There are three rates of reaction time depending on the situation. Those situations are: (1) "brake"; (2) "alert"; and (3) "surprise."

[43] Brake reaction time is applied when, for example, a driver has their foot on the brake when approaching a stop light or is otherwise anticipating that they will have to stop. This is the shortest reaction time at 0.6 seconds in daylight.

[44] Alert reaction time is applied when, for example, a driver approaches an intersection and is paying attention to whether a pedestrian or car is around but does not see the need to stop right away. The alert reaction time in daylight is 0.7.

[45] Surprise reaction time is applied when, for example, there is an unexpected event that causes the driver to brake. This is the longest reaction time at 1.1 seconds in daylight.

[46] Mr. Brown's conclusions as to driver visibility were as follows:

> Mr. Behragam would have travelled a distance of about 9 metres from the west edge of the east side of Birch Street to the impact area. The Paviglianiti Ford would have travelled about 1.6 metres from the north curb line of 10th Ave. to the impact area.
>
> If the vehicle were travelling at the same speed the bicycle would have been in the intersection for about 5.5 times the length of time the Ford truck was in the intersection.
>
> When the Paviglianiti Ford entered the intersection the Behragam bicycle was about 1.6 metres east of the path of the Ford. The bicycle and rider would be in full view of Mr. Paviglianiti.

[47] The defendant critiques Mr. Brown's "narrow" definition of the term "intersection". The plaintiff maintains that Mr. Brown is merely using the definition as set out in s. 119 of the *MVA.* The defendant says the intersection at issue would be more appropriately defined as a concentric circle with a 16-metre radius, which would ultimately result in a wider intersection that might put the defendant in the intersection before the plaintiff.

[48] The defendant sought to introduce the report of Mr. Kurt Ising, a professional engineer, who would ultimately support the defendant's broader definition of the term "intersection."

[49] In an oral ruling on February 7, 2019, I allowed the defendant to file Mr. Ising's report despite the plaintiff's objections. I did note, however, that it was still

open to the plaintiff to argue that the report be given little or no weight if the underlying assumptions relied upon by Mr. Ising were not made out in evidence.

[50] The plaintiff opted not to cross-examine Mr. Ising. Thus, the report was simply filed and no *viva voce* evidence was given. While the plaintiff maintained in final argument that Mr. Ising's qualifications were never established, I prefer to deal with this matter on other bases. It was not until final argument that it was made clear that the purpose of the report was effectively to establish a wider intersection and thereby argue that the defendant had been in the intersection longer than the plaintiff (and was, as a result, the dominant driver).

[51] Ultimately, Mr. Ising's report is of no assistance to the Court. In contrast to the report of Mr. Brown, Mr. Ising did not visit the accident site. Further, Mr. Ising uses a definition of the term "intersection" that is at odds with the statutory definition in s. 119 of the *MVA.* Furthermore, various factual elements upon which Mr. Ising relied in his report were not established on the evidence, making the report of little to no value to the Court: *Mazur v. Lucas*, 2010 BCCA 473.

[52] The definition of intersection in s. 119(1) of the *MVA* reads as follows:

> "**intersection"** means the area embraced within the prolongation or connection of the lateral curb lines, or if none, then the lateral boundary lines of the roadways of the 2 highways that join one another at or approximately at right angles, or the area within which vehicles travelling on different highways joining at any other angle may come in conflict;

[53] As argued by the plaintiff, the intersection in this matter is defined by the prolongation or connection of the lateral curb lines as per the statutory definition. The defendant was unable to provide any convincing argument otherwise.

FINDINGS

[54] Ultimately I am persuaded on the basis of the evidence that the point of impact was at the 4:00 position on the traffic circle as originally identified by the defendant and the police reports. The accident occurred in the northwest quadrant of the intersection. It is clear that the defendant did not see a cyclist at all and that the

plaintiff saw the defendant at the very last minute. The evidence establishes that the cyclist entered and was in the intersection first. The defendant was focused on traffic coming from the west. He looked right but did not appear to look left. Careful review of the testimony reveals that the defendant *may* have glanced left but it was more likely that he just relied on his peripheral vision. By this point in time, the cyclist was well established in the intersection and, as Mr. Brown indicates in his report, had already travelled at least five times the distance of the truck.

[55] I find it more than likely that the defendant was moving faster than 5 km/h when he entered and drove through the intersection. I also find it unlikely that he was driving as fast as the plaintiff indicates (40-50 km/h). It is a more reasonable conclusion that he was travelling at a speed similar to the plaintiff, approximately between 15-20 km/h.

[56] “Prior entry” into an intersection does not mean priority by a matter of a few feet or by a fraction of a second ahead of another vehicle. Rather, it means entry into an intersection after ensuring it can be cleared safely without obstructing the path of another vehicle under the normal circumstances: *Olchowy* at para. 46.

[57] In this case, however, I conclude that the plaintiff did in fact enter the intersection sufficiently in advance of the defendant. The plaintiff thereby became the dominant driver. Both the police diagram and Mr. Brown’s diagram situate the westbound cyclist past the halfway mark in the intersection. In contrast, the defendant vehicle in both diagrams is situate very close to the commencement of the intersection travelling south on Birch Street.

[58] This conclusion is also supported by Mr. Brown’s analysis on speed and reaction time. For all these reasons, I find that the plaintiff was the dominant driver.

CONCLUSION

[59] The standard of care, as set out in *Cyr*, is to “use reasonable care to satisfy himself in a timely way that there was no traffic proceeding into the intersection from his left”: at para. 22. The defendant breached that standard of care.

[60] Notwithstanding the fact that he had the initial right of way, the defendant became the subservient driver when the plaintiff entered the intersection. The defendant was not driving with sufficient prudence and did not keep a proper lookout. As he indicated, he did not see the plaintiff before the collision.

[61] I do not find the plaintiff contributorily negligent in this matter. The plaintiff testified that he swerved at the last minute to avoid the collision, but that it was too late. As set out in *Gerbrandt v. Deleeuw*, [1995] B.C.J. No. 1022 (S.C.) at para. 10:

> …. [O]ne 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.

[62] This is applicable in the circumstances of this case. The defendant is therefore 100% liable for the accident.

[63] Finally, I note I am not seized of the issue of damages in this matter.

The Honourable Madam Justice E. Burke