

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Sheikh v. Struys*,
2012 BCSC 1071

Date: 20120718
Docket: M103619
Registry: Vancouver

Between:

Gohar Alam Sheikh

Plaintiff

And

Jason Bradley Struys

Defendant

Before: The Honourable Madam Justice S.C. Fitzpatrick

Reasons for Judgment

Counsel for the Plaintiff:

Douglas Chiu

Counsel for the Defendant:

Vanessa Marshall

Place and Date of Trial:

Vancouver, B.C.
June 4-7, 2012

Place and Date of Judgment:

Vancouver, B.C.
July 18, 2012

Introduction

[1] The plaintiff, Gohar Sheikh, and the defendant, Jason Struys, separately attended a Vancouver Canuck's game in Vancouver in the evening of November 20, 2009. After the game, they both returned to a lot next to the hockey arena where they had parked their respective vehicles. They each then, along with many others who had attended the game, attempted to exit the parking lot to go home.

[2] What ensued was a collision between the parties' respective vehicles while trying to exit the parking lot. Dr. Sheikh alleges that while he was backing up, Mr. Struys drove his vehicle such that it collided with the back of his vehicle. Mr. Struys denies that he did so and says that Dr. Sheikh was the one who backed up such that he collided with the front of Mr. Struys' vehicle.

[3] Accordingly, liability for the accident is denied by Mr. Struys.

[4] If liability is established, Dr. Sheikh claims non-pecuniary damages of \$30,000 and special damages of \$1,004.11.

Background Facts

[5] Dr. Sheikh is a licensed chiropractor in British Columbia and has been practicing for some 19 years. He practices out of his own clinic, Elign Chiro Health, located in Burnaby, B.C.

[6] Dr. Sheikh is 44 years old and resides in North Vancouver with his wife and two sons, ages six and four.

[7] On the evening of November 20, 2009, Dr. Sheikh attended a Vancouver Canuck's game at what used to be called GM Place, but is now called Rogers Arena. He attended with his wife and his older son, who was four years old at the time.

[8] The Sheikh family were travelling in a 2003 Acura MDX, which is a larger vehicle, being an SUV. The vehicle has headrests for each of the seats and also has

tinted windows, save for the windows next to the driver's seat and also next to the front passenger seat.

[9] The Sheikh family parked in a public parking lot at Expo Boulevard and Abbott Street which is just next to the arena. Dr. Sheikh parked the SUV by driving straight into a parking spot fronting onto the street and facing the arena.

[10] Mr. Struys is 27 years old. He is a dairy farmer and he resides in Agassiz, B.C. He has driven farm vehicles since he was 10 or 11 years old and he is, therefore, quite comfortable driving vehicles with a manual transmission.

[11] Mr. Struys also attended the Vancouver Canuck's game on the night of November 20, 2009. He was accompanied by his friend, Travis Dunn.

[12] Mr. Struys and Mr. Dunn drove in from Agassiz that night in Mr. Struys' 1995 Jeep Cherokee. The Jeep Cherokee has a manual transmission. Mr. Struys had purchased that vehicle about four to five years ago. When he purchased the vehicle, there was some minor damage to the front bumper. Nevertheless, he indicates that the vehicle was in good condition for its age and specifically, was in good running condition in relation to the lights, brakes, engine and steering.

[13] When Mr. Struys and Mr. Dunn came into Vancouver, they parked in the same parking lot as had the Sheikh family. However, when he was parking, Mr. Struys drove through an empty parking stall into the parking stall in which he parked. The result of this was that the front of Mr. Struys' vehicle was pointing towards the entrance of the stall. Mr. Struys' vehicle was near the Sheikh vehicle in the sense that it was also facing the street and the arena, but was slightly to the left of the Sheikh vehicle. The two vehicles were separated by a laneway in the parking lot.

[14] When Mr. Struys and Mr. Dunn came into Vancouver, they first went for dinner before the hockey game. Mr. Struys had a beer at dinner, but did not consume any further alcohol at dinner or at any later time. Both Dr. Sheikh and

Mr. Struys denied being under the influence of alcohol or drugs at the time of the collision and I accept the evidence of both of them in that regard.

[15] After the game, both the Sheikh family and Mr. Struys and Mr. Dunn returned to their respective vehicles in the parking lot. This occurred later in the evening although Dr. Sheikh testified that there was sufficient lighting in the parking lot. The weather was, like many Vancouver winter evenings, damp and cold. The parking lot was crowded. There were many other people parked in that lot who had also attended that game and everyone was in the process of reaching their vehicles and attempting to exit the parking lot to go home or elsewhere.

[16] Both Mr. Struys and Dr. Sheikh were also attempting to exit the parking lot to go home.

[17] Dr. Sheikh says that when his family entered the car, the SUV was cold so he started the car and put the heat, defoggers and wipers on. He testified that there was a busy line of traffic behind him in the laneway so he just left the car in “park” and let it heat up and defrost. He noticed vehicles parked across the lane from his vehicle which were also attempting to exit the parking lot. These vehicles would have included the vehicle of Mr. Struys, although it is apparent that Dr. Sheikh was not particularly aware of Mr. Struys’ vehicle.

[18] After about five or ten minutes in “park”, Dr. Sheikh says that he put his SUV in reverse and put his foot on the brake to indicate to traffic in the laneway that he was ready to come out. It appears that at that time, there continued to be a steady stream of vehicles already in the laneway who were trying to exit the parking lot.

[19] Dr. Sheikh then said he noticed on his left side that there was a Dodge truck which had stopped. Dr. Sheikh formulated the view that the driver of the Dodge truck had stopped so as to allow him to reverse into the laneway. Dr. Sheikh says that he made direct eye contact with the driver of the Dodge truck and that the driver nodded at him, indicating that he was to reverse into the laneway. Dr. Sheikh was

somewhat more certain at trial that the driver had nodded at him than at his examination for discovery.

[20] Given Dr. Sheikh's view that he had been given ample room to move into the laneway by the driver of the Dodge, he began to reverse slowly. He also says that during the course of reversing, he completed a rotation all around him to make sure that the area behind him was clear. He says that he looked to the left and scanned all of his mirrors to his right. He then continued to turn the wheel to complete his exit of the parking stall. He conceded that when he turned back to the wheel to complete the turn, he was faced forward with his arm around the passenger seat and as such, could not see to his left.

[21] Dr. Sheikh says that while he was reversing, he felt a sudden smash in the back of his car. The SUV had collided with the vehicle being driven by Mr. Struys. Dr. Sheikh had not noticed Mr. Struys' vehicle before that time and only became, evidently, aware of it once the collision had occurred. Dr. Sheikh described the collision as "very sudden", "felt terrible" and a "terrible jolt".

[22] Mr. Struys' version of what occurred that evening is markedly different from that of Dr. Sheikh. He said that he and his friend Mr. Dunn returned to the parking lot and also found that it was very busy with many hockey game attendees all trying to exit the parking lot at the same time. Mr. Struys had difficulty finding his car key and he spent 10 to 15 minutes locating a spare copy. Given that the parking lot was still busy at that time, he and Mr. Dunn sat in the Jeep with the vehicle in neutral gear for a further 5 to 10 minutes.

[23] Mr. Struys similarly noticed there was a long line of vehicles in the laneway attempting to exit the parking lot. He confirmed that the vehicle of Dr. Sheikh was on the opposite side of the laneway facing in the same direction and slightly to the right of his Jeep.

[24] Mr. Struys' evidence differed from Dr. Sheikh in the sense of the direction in which the vehicles were moving in the laneway.

[25] Also similar to Dr. Sheikh, Mr. Struys noticed the Dodge truck in the laneway. Mr. Struys noticed that the Dodge truck had stopped in the laneway and he formulated the view that the driver of the Dodge truck was stopped for the purpose of letting *him* enter the laneway. Mr. Struys confirmed at trial that he made eye contact with the driver of the Dodge truck. He, like Dr. Sheikh, felt that the driver of the Dodge truck was being considerate in allowing him to enter the laneway notwithstanding the many others who were attempting the same thing.

[26] Mr. Struys says that once space was opened up in the laneway, as a result of the Dodge truck having stopped in the laneway, Mr. Struys proceeded to pull out into the laneway. He put the car into first gear and began to move slowly into the laneway. After he had proceeded out approximately five to seven feet, he saw that Dr. Sheikh's SUV had started to back up into the laneway. Mr. Struys says that he stopped because he was not sure that Dr. Sheikh could see him in the course of him backing up. Mr. Struys did not honk his horn or give any other warning to Dr. Sheikh. Mr. Struys says that he did not attempt to reverse his vehicle since he did not have time to do so safely given that these events happened very quickly. Nevertheless, he said that Dr. Sheikh did not, as Mr. Struys expected, stop his reversal of the SUV into the laneway and he proceeded to back up into the Jeep.

[27] The result from Mr. Struys' point of view was that Dr. Sheikh's vehicle, while in reverse, proceeded to collide with his vehicle which was stationary and already partly in the laneway.

[28] Mr. Struys describes the impact as very minor or hardly noticeable.

[29] Mr. Dunn confirms Mr. Struys' version of events in terms of their activities prior to the game and their return to the parking lot that evening. He confirmed that the traffic was congested. Mr. Dunn was, however, somewhat distracted while sitting in the Jeep since he was checking his phone or text messages.

[30] Although somewhat distracted at the time, Mr. Dunn confirmed that at one point Mr. Struys did pull out into traffic in the laneway since the traffic had stopped to

let them go. He confirmed that they were pulling forward into the laneway after having made contact with the other vehicle, being the Dodge truck. Mr. Dunn described the collision as a “minor event”.

[31] The point of collision was at Dr. Sheikh’s back bumper, just to the left of centre, and Mr. Struys’ passenger side front bumper.

[32] After the collision, Dr. Sheikh says that he moved back into his parking spot. He then says that he exited his SUV and walked over to Mr. Struys’ vehicle. He says that Mr. Struys stepped out and that when Mr. Struys got out, the first thing Mr. Struys said was something to the effect that he was “sorry”, he “didn’t mean to do that” and that he had been “talking and distracted” and his foot had “slipped on the gas pedal”.

[33] Mr. Struys confirmed that he and Dr. Sheikh both exited the vehicles to survey the situation. Mr. Struys says that Dr. Sheikh had not pulled back into his stall after the collision. He says that Dr. Sheikh took his information. Mr. Struys did not ask for Dr. Sheikh’s information because he considered that the collision was very minor and not an issue. In fact, it was apparent to Mr. Struys at that time that there was no damage to his vehicle whatsoever. Mr. Struys also looked at Dr. Sheikh’s vehicle and could not see any damage. Mr. Struys stated that after the collision, they got back into their vehicles quickly so as not to block traffic any longer than necessary.

[34] Mr. Struys flatly denied that he had indicated anything to Dr. Sheikh that could be termed an apology or an admission of fault in respect of the accident. He denies that the accident was his fault and contends that the accident was Dr. Sheikh’s fault.

[35] Unfortunately, the only potential witness to the collision was the driver of the Dodge truck who had gestured to both parties in some fashion. Neither Dr. Sheikh nor Mr. Struys thought to stop that person and ask the driver on his or her view on the issue.

[36] Mr. Struys' version of events (that Dr. Sheikh had backed into him once he had pulled into the laneway after the Dodge truck had let him in) was communicated by Mr. Struys to Mr. Dunn after Mr. Struys returned to the Jeep. Mr. Dunn says that Mr. Struys made no comment to him that he was responsible for the accident or that he had indicated to Dr. Sheikh that he took responsibility for the accident.

[37] Later, at ICBC, the adjusters identified that there were some minor abrasions to the back bumper of the Sheikh SUV to the left of the trailer hitch. They estimated the cost of repair to be \$690.40. Dr. Sheikh has not had the SUV repaired. The ICBC adjuster confirmed that there was no damage to the trailer hitch.

[38] With respect to Mr. Struys' vehicle, as he himself noted immediately after the collision, there was absolutely no damage to his car arising from the collision.

Discussion and Analysis

[39] The theory of Dr. Sheikh on the liability issue is that while he was in the process of reversing the SUV, Mr. Struys' vehicle "lurched out" of his parking spot and then struck Dr. Sheikh's vehicle suddenly and without warning.

[40] Dr. Sheikh says that the testimony of Mr. Struys as to how the collision occurred should not be accepted by the Court. It is the case that Mr. Struys was somewhat contradictory as between his discovery and trial evidence as to whether or not he made eye contact with the driver of the Dodge truck. At trial he said he did make eye contact and on discovery he said he did not recall. Dr. Sheikh alleges that there are other consistencies in the evidence of Mr. Struys, but I do not view them as material inconsistencies, not in light of the overall evidence. What is material is that whatever happened as between Mr. Struys and the Dodge truck driver, Mr. Struys considered that the open space in the laneway had been left by the driver of the Dodge truck so as to allow him to move into the laneway.

[41] There was, as stated above, a discrepancy concerning the flow of traffic. Although it is not critical in terms of my decision, I view Mr. Struys' version of events - that the direction of traffic was moving from his right to left - as more consistent

with how the parties indicated their vehicles were moving into the laneway and also where the point of impact occurred on the vehicles.

[42] It is of considerable importance that Mr. Struys was the only person involved in this accident who had a clear view of what was happening (particularly in relation to the driver of the Dodge truck). I do not accept Dr. Sheikh's theory that Mr. Struys' vehicle somehow "lurched out" of his parking stall. I found Mr. Struys a credible witness in that he gave his evidence in a straight forward and direct manner. I accept his evidence that he was slowly moving into the laneway.

[43] Mr. Struys' evidence is supported by the evidence of Mr. Dunn. While Mr. Dunn was admittedly distracted in checking his messages, if Mr. Struys had in fact "lurched out" or suddenly moved into the laneway, I consider that would have been a noticeable event even to Mr. Dunn. He noticed no such thing. Mr. Dunn also was a credible witness who gave his evidence in a direct and straight forward manner. He did not attempt to embellish his recollection of events to the benefit of his friend, Mr. Struys. I do not, therefore, see that Mr. Dunn was biased in any way. Accordingly, his testimony strongly supports the version of events of Mr. Struys.

[44] I accept that Dr. Sheikh also considered that the driver of the Dodge truck was stopping for him in order to allow him to exit into the laneway. However, it is clear that when he began to fully reverse into the laneway, he was fully turned to his right and could not, therefore, see what was happening on his left side. In particular, he could not see that by that time, Mr. Struys had started to pull into the laneway and was then situated behind him and to Dr. Sheikh's left side.

[45] At that point, having noticed that Dr. Sheikh was starting to reverse into the laneway, Mr. Struys did what any normal person would do - he stopped. He then assumed that Dr. Sheikh would stop his SUV so that one of them could decide who would have to pull back into their parking spot to allow the other to proceed. Nevertheless, this did not happen and Dr. Sheikh's SUV continued to reverse and strike Mr. Struys' Jeep.

[46] Dr. Sheikh argues that Mr. Struys could have reversed back into his parking spot, but did not. He also argues that Mr. Struys could have honked his horn to alert Dr. Sheikh that he was already in the laneway, but did not. Nevertheless, this accident occurred within a matter of seconds and Mr. Struys is not to be faulted for failing to act in that regard. In fact, as Mr. Struys points out, if he was to have reversed back into his parking stall, he would have had to complete various shoulder and rear checks to make sure there was no person or vehicle in that stall. These manoeuvres would have clearly taken longer to complete than was available to avoid the collision.

[47] I find as a fact that Dr. Sheikh's SUV reversed back into Mr. Struys' Jeep while Mr. Struys was partially into the laneway and had stopped there. I also find as a fact that Dr. Sheikh could not see Mr. Struys' Jeep at the time of the collision. Further, I find that Dr. Sheikh could not see what was happening behind his vehicle as he was reversing into the laneway and, therefore, he has no knowledge as to how the collision occurred.

[48] Dr. Sheikh contended that Mr. Struys should have paid more careful attention as to what was going on in front of him. Mr. Struys was said to have mistakenly assumed, without any eye contact with the driver of the Dodge truck, that the Dodge truck had stopped for him, which resulted in him colliding with Dr. Sheikh's SUV.

[49] In my view, it does not matter which party was the one being allowed to enter the laneway by the driver of the Dodge truck. The driver of the Dodge truck may in fact have been stopping for both of their vehicles in that respect. There is no evidence one way or the other as to whether the Dodge truck had stopped for Dr. Sheikh, Mr. Struys or both of them. The point is that the Dodge truck had stopped and both parties assumed, based on their contact with the driver of the Dodge truck, that he or she was stopped for them. As such, it has not been shown that Mr. Struys "mistakenly" assumed that the Dodge truck had stopped for him.

[50] While Mr. Struys did not mention in his ICBC statement that he had been motioned into the lane by the driver of the Dodge truck, I accept his explanation that

this omission was because that driver was not involved in the accident. There was no point identifying the driver since no one had any contact details for him or her in any event. Mr. Struys did indicate in his statement that no witness to the collision had come forward, which was true.

[51] It is beyond dispute that the onus of proof is on the plaintiff at all times to prove that the defendant was negligent and that his negligence caused or contributed to the accident: *Singleton v. Morris*, 2010 BCCA 48 at para. 34; *Rai v. Fowler*, 2007 BCSC 1678 at para. 28.

[52] The mere fact that an accident occurs does not give rise to a presumption of negligence: *Simmons v. Koenig*, 2001 ABQB 152 at paras. 113, 114 and 131.

[53] The *Motor Vehicle Act*, R.S.B.C. 1996, c .318 addresses the duty of care owed by a driver who is reversing his vehicle:

Caution in backing vehicle

193 The driver of a vehicle must not cause the vehicle to move backwards into an intersection or over a crosswalk, and must not in any event or at any place cause a vehicle to move backwards unless the movement can be made in safety.

[54] Mr. Struys submits and I agree that Dr. Sheikh clearly was not able to reverse in safety, or else the collision would not have occurred. This is particularly so given my finding that Mr. Struys did not lurch out into the laneway, but proceeded slowly to enter the laneway and then stopped only when then he saw Dr. Sheik's vehicle reversing back into him.

[55] Mr. Struys relies on a number of authorities.

[56] In *Blehm v. Corby* (1994), 92 B.C.L.R. (2d) 270, the plaintiff pulled in behind the defendant's stationary truck. The defendant then reversed into the plaintiff. The Court of Appeal held that "there is no doubt" that the defendant was at fault: para. 7. The Court overturned the trial judge and apportioned full fault to the defendant. *Blehm* is on all fours with this case.

[57] Dr. Sheikh submits that if there is any issue concerning liability, then fault should be apportioned pursuant to the *Negligence Act*, R.S.B.C. 1996, c. 333, s. 1(2):

Apportionment of liability for damages

1 (1) If by the fault of 2 or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree to which each person was at fault.

(2) Despite subsection (1), if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability must be apportioned equally.

(3) Nothing in this section operates to make a person liable for damage or loss to which the person's fault has not contributed.

[58] In *Ellis v. Bruch*, 2005 BCSC 1026, two vehicles backed out almost simultaneously from opposite driveways into each other. The Court held that both drivers were negligent and apportioned liability 50/50. The distinguishing factor here is that Dr. Sheikh was the only party reversing his vehicle at the time of impact. I have found that at the time of impact, Mr. Struys was not moving and in fact, had stopped and assumed that Dr. Sheikh would stop also until they sorted out how they would deal with the situation.

[59] Dr. Sheikh relies upon *Gilbert v. Bains*, 2010 BCPC 0152. In that case, the Court found the evidence of both parties and the witness unsatisfactory. Despite making certain findings of fact as to certain circumstances relating to the accident, the Court was unable to reach a conclusion as to what actually occurred and also determine who was at fault. As here, the claimant alleged that the defendant had driven into her car and the defendant alleged that the claimant had backed into her car. Some of the facts found by the Court did point to a certain level of fault against the defendant in that the Court found that she could have avoided the impact with the plaintiff by driving around her. In addition, the defendant was found to have failed to pay enough attention to what was going on in front of her so as to honk her horn. She was also too close to the claimant which affected her reaction time in avoiding the collision.

[60] I agree with Mr. Struys' counsel that *Gilbert* is distinguishable. Here, Mr. Struys was fully aware of what was happening in front of him and took reasonable care to ensure that the laneway was clear before he entered it. He entered the laneway but also stopped when he saw that Dr. Sheikh was starting to reverse his vehicle, so as not to exacerbate the situation. He thought that Dr. Sheikh would stop reversing so that they could sort out who was going to proceed first. Further, I find that Mr. Struys was not in a meaningful way able to avoid or even attempt to avoid the collision. He was not able to reverse safely in time. He did not honk his horn but I attribute that to the fact that these events happened very quickly. As such, I do not see any basis upon which to find fault in Mr. Struys' actions.

[61] Dr. Sheikh also relies on *Luvera v. Benedict*, 2010 BCSC 1781. The facts of that case - dealing with an intersection/right of way collision - are unhelpful to a determination of this case.

[62] I find that Dr. Sheikh has not proven, on a balance of probabilities, any negligence on the part of Mr. Struys. Nor did Dr. Sheikh discharge the burden under the *Motor Vehicle Act* in proving that he was able to move back "in safety" while reversing his vehicle.

[63] Accordingly, I find Dr. Sheikh entirely responsible for the collision. As such, there will be no apportionment of liability between the parties pursuant to the *Negligence Act*.

[64] Given my findings on liability, it is unnecessary to address the damage claims advanced by Dr. Sheikh.

Conclusion

[65] The action is dismissed, with costs in favour of Mr. Struys.

"The Honourable Madam Justice S.C. Fitzpatrick"