COURT OF APPEAL FOR ONTARIO

CITATION: Gardiner v. MacDonald, 2016 ONCA 968
DATE: 20161220
DOCKET: C61788

Cronk, Juriansz and Roberts JJ.A.

BETWEEN

Ben Gardiner and Samantha Gardiner

Plaintiffs (Respondents)

and

Andrew MacDonald, as Litigation Administrator for the Estate of Mark MacDonald, The City of Ottawa, Raymond Richer, 1292002 Ontario Ltd., (o/a Grace O'Malley's), Peter Hamilton, Geoffrey Garrett, Sean Hilliker, Tucker McCabe, The Clocktower Brew Pub Ltd., Jane Doe, John Doe, Carleton University Students' Association Inc., (o/a Oliver's Pub), GSA Carleton Inc., (o/a Mike's Place) and Intact Insurance Company (formerly known as ING Insurance Company of Canada)

Defendants (Appellants)

and

State Farm Mutual Automobile Insurance Company, Added by Order pursuant to Section 258(14) of the *Insurance Act*, R.S.O. 1990 C.1.8

Third Party

Jonathan de Vries and Patrick W. Brennan, for the appellants, the City of Ottawa and Raymond Richer

Peter J.E. Cronyn, for the respondents

Paul Muirhead, for Intact Insurance Company

No one appearing for State Farm Mutual Automobile Insurance Company and Andrew MacDonald, as Litigation Administrator for the Estate of Mark MacDonald, although duly served.

Heard: December 15, 2016

On appeal from the judgment of Justice Giovanna Toscano Roccamo of the Superior Court of Justice, sitting without a jury, dated January 26, 2016, with reasons reported at 2016 ONSC 602, 95 M.V.R. (6th) 299, and, if leave be granted, from the costs order of Justice Giovanna Toscano Roccamo, dated April 29, 2016, with reasons reported at 2016 ONSC 2770.

By the Court:

Introduction

[1] The appellants, the City of Ottawa and Raymond Richer, appeal from the trial judgment assigning 20% liability to them for a serious motor vehicle accident that occurred in Ottawa on January 23, 2008 at the intersection of Heron Road and Riverside Drive. If leave be granted, they also appeal from the trial judge's costs award.

[2] Tragically, the accident in this case resulted in three fatalities and catastrophic injuries for a fourth individual, the respondent Ben Gardiner. In brief, in the early hours of January 23, 2008, the late Mark Macdonald was driving himself and four passengers, including Mr. Gardiner, home after having spent the evening at various pubs. Mr. MacDonald's car entered the intersection on a red light and collided with an OC Transpo bus driven by the appellant,

Raymond Richer, an employee of the City of Ottawa. Mr. Richer was driving through the intersection on a green light.

[3] Mr. MacDonald's estate admitted liability for the accident and the parties eventually agreed on the respondents' damages. The issues at trial were whether Mr. Richer was negligent in his operation of the City bus and, if so, whether his negligence caused or contributed to the accident and the respondents' damages.

[4] The trial judge concluded that Mr. Richer was negligent in his operation of the City bus. Among other things, she found that he was travelling at an excessive rate of speed and that he was looking from left to right, rather than in front of him, when he approached and then entered the intersection. She concluded that, but for his negligent acts, Mr. Richer could have avoided the collision with Mr. MacDonald's car. She assessed Mr. Richer and the City of Ottawa as 20% liable for the respondents' damages.

Main Appeal

[5] The appellants advance two main arguments in support of their appeal from the trial judge's liability finding.

(1) Standard of Care

[6] First, the appellants argue that the trial judge erred in her articulation of the standard of care applicable to Mr. Richer in the circumstances.

[7] We disagree.

[8] The trial judge expressly held that Mr. Richer was obliged to observe the standard of care of a reasonably prudent driver in like circumstances. She also stated, at para. 147 of her reasons:

> The duty of care of a dominant driver entering an intersection on a green light vis-à-vis a servient driver required to stop on the red is clearly delineated by long-standing legal authority. Despite having the statutory right-of-way, a driver in the shoes of Mr. Richer is required to yield the right-of-way where, exercising proper care, circumstances dictate he ought not to exercise the statutory right-of-way. The statutory right-of-way ought not to be exercised in circumstances where:
>
> 1. The driver becomes aware or ought to have been aware that the driver without the right-of-way is proceeding through the intersection on a red [light]; and
>
> 2. If circumstances are such that the driver with the right-of-way has the opportunity to avoid a collision. [Citation omitted.]

[9] The appellants do not challenge this description of the applicable duty of care. However, they rely on paragraph 154 of the trial judge's reasons to argue that the trial judge erred by imposing a higher standard of care – that governing a professional driver – on Mr. Richer. Paragraph 154 reads:

> The requirement that Mr. Richer observe the standard of care of a reasonably prudent driver in like circumstances does not preclude a finding that as a professional driver, he should be held to a higher standard. Indeed, the Ontario Court of Appeal has recognized that: "the general standard of care of a

> professional … is a question of law, but the content of the standard of care in a particular case is a question of fact" … In other words, Mr. Richer's conduct may be judged through the lens of the "reasonable bus driver in like circumstances". [Citations omitted.]

[10] The trial judge's comments arose from the fact that Mr. Richer is a trained bus driver in the long-time employ of the City of Ottawa. At the time of the accident, he was driving an 'off-line' bus in which his only passenger was another bus driver. The appellants acknowledge that, in driving the City bus on the morning in question, Mr. Richer was acting within the scope of his duties with the City.

[11] We see no error in the trial judge's consideration of Mr. Richer's status as an experienced bus driver or in her treatment of this fact as relevant to the determination of the applicable standard of care to which Mr. Richer was bound at the time of the accident. Nor do we accept the appellants' contention that the trial judge erred by relying on Mr. Richer's status as a professional driver to improperly impose an inappropriate, elevated standard of care.

[12] Mr. Richer himself conceded the relevance of his status as a professional bus driver. As the trial judge stated, at para. 152:

> Mr. Richer admitted that the duties he was bound to observe as a professional driver applied on the night of the collision. He admitted these duties applied even though he was driving a "work bus", out-of-service to the regular public, transporting other bus drivers.

[13] Moreover, as explained by the trial judge at para. 151 of her reasons:

> Mr. Richer admitted that according to the training and experience he acquired in the course of employment and pursuant to the Ministry of Transportation and Official Bus Handbook policies, there was a duty upon him to:
>
> 1) respect the provisions of the *Highway Traffic Act* by observing the posted speed limit;
>
> 2) drive defensively by giving up the right-of-way if by doing so he could avoid possible collision with other vehicles;
>
> 3) make allowances for conditions of the road, by driving in such a way and at such a speed as to maintain vehicle control; and
>
> 4) manoeuvre at a distance and in such a way so as not to preclude safe stopping or averting of a collision.

[14] In this context, the trial judge held, at para. 156:

> On the facts of this case, including the documentary record, I find that Mr. Richer was obliged to drive with due regard to the posted speed limit, while alive to the weather and road conditions, with attention to the traffic, sparse or otherwise, before him as he approached and subsequently entered the intersection at Riverside Dr. and Heron Rd. In addition, as he quite properly conceded, these collective responsibilities were to be carried out in such a manner as not to lose sight of the fact that he, alone, controlled the manoeuvrability and capacity of a vehicle that weighed in excess of 12,000 kilograms. The training he was required to pursue to obtain and maintain his class "C" licence, and the experience that he acquired over 27 years of driving prior to the date of the accident, obliged him to consider all of these factors and to act in such a way while driving

> defensively that would not invite risk and/or preclude his ability to stop or steer the mass and weight of a city bus away from the hazard presented by Mr. MacDonald's SUV.

[15] These findings detail the content of the standard of care applicable in the circumstances of this case. The appellants do not attack these findings, which were amply supported by the evidence at trial.

[16] The appellants also argue that the trial judge erred by holding that Mr. Richer's momentary inattention to the intersection, when he looked right and left and into the mirrors of the bus, constituted negligence. They say this finding was unfair as the relevant bus driver's manual directed him to take these actions and they reflected common practice among bus drivers on approach to an intersection.

[17] We disagree. The manual's direction, like any other best practice, is not a mandatory or absolute requirement. Its application depends on all the surrounding circumstances. More importantly, the trial judge did not look at this factor in isolation but as only one of the constellation of relevant factors that she was obliged to consider. The following passage from her reasons, at para. 192, demonstrates that she took all the relevant evidence into account, as she was required to do:

> I have considered a submission on behalf of Mr. Richer and the City to the effect that neither Mr. Williamson nor Mr. Catania conclusively stated that Mr. Richer did not take reasonable steps to avoid collision when

> confronted with the sudden hazard. I accept that Mr. Williamson admitted in cross-examination that he never suggested Mr. Richer did not act in a timely manner. On the other hand, this evidence must be considered in the context of all of the evidence received, and with due regard to the fact that Mr. Richer drove in a manner that did not adjust for weather and road conditions, and involved speeding and momentary inattention to the intersection ahead of him, when Mr. Richer chose to look left, then into his mirrors, and right before returning his attention to the front of his bus. After that, Mr. Richer had time to comment to Mr. Moran that the SUV was not stopping, steer to the left and brake. Moreover, Mr. Moran, after seeing the emergency himself, had time to move across the bus to another stanchion and crouch down before the impact.

[18] In other words, Mr. Richer's momentary inattention to the front of the road was only one of several factors that, together, made out his negligence on the morning in question. Those other factors included, for example, his speed of travel and his failure to adjust his manner of driving for the prevailing winter road and weather conditions.

[19] In our view, when the trial judge's reasons are viewed in their entirety, they reveal no error in her articulation of the applicable standard of care or in her application of that standard to the facts as she found them. She made no finding that Mr. Richer was bound, on the morning in question, by the standard of care governing a common carrier. Rather, she considered all the applicable circumstances, as she was obliged to do, in determining the standard engaged in this case. She made no error in so doing. As we have said, the standard applied

to Mr. Richer was one that even he acknowledged governed his conduct as a driver at the time of the accident.

[20] This ground of appeal is dismissed.

(2) Causation

[21] The appellants next submit that the trial judge erred in her causation analysis. Specifically, they say that the trial judge erred by failing to make the factual findings necessary to ground her conclusions on causation. For example, although they do not take issue with the trial judge's finding that Mr. Richer was speeding, they say that she erred by failing to determine the actual rate of speed at which the bus was travelling when it entered the intersection, which was essential to the evidence of the expert witnesses that Mr. Richer could have avoided the accident had he been travelling at or under the posted speed limit of 60 kilometres per hour.

[22] We do not accept this submission.

[23] As the trial judge noted, it was not necessary for her to determine, with scientific precision, the exact speed at which the City bus was travelling at the time of impact. Based on the evidence given by Mr. Richer and that of his passenger Mr. Moran, the GPS evidence, and the expert accident reconstruction evidence that she accepted, the trial judge found that: i) Mr. Richer was operating the bus at a rate of speed in excess of the posted speed limit, namely, at a speed

of 65.6 kilometres per hour at a distance of 180 meters south of the intersection; ii) critically, Mr. Richer did not decelerate on his approach to the intersection; iii) the pre-impact speed of the bus exceeded 65.6 kilometres per hour after it entered the intersection; and iv) Mr. Richer was momentarily inattentive to the road ahead when he glanced left and then right, into the side mirrors of the City bus.

[24] These findings were open to the trial judge on the evidentiary record. They amply support her conclusion that Mr. Richer was travelling at an excessive rate of speed at the time of the accident and her acceptance of the expert evidence that, had he not been doing so, the accident could have been avoided.

Costs Appeal

[25] The appellants also seek leave to appeal the trial judge's costs award of $670,596.50.

[26] The trial judge arrived at her costs award after reducing the amount sought for various reasons by $130,000. This was a complicated, multi-party case. The issues in dispute were many and they were narrowed only shortly before trial, after extensive investigation and preparation had been undertaken and numerous expert witnesses had been briefed to testify at trial. The quantum of the costs reductions allowed by the trial judge was squarely within her domain. Although the appellants seek a further reduction, they failed to persuade us

either that there was an error in principle or that the award was plainly wrong. As a result, there is no reason to interfere with the trial judge's broad discretion in setting costs.

Disposition

[27] For these reasons, the main appeal is dismissed, leave to appeal costs is granted and the costs appeal is also dismissed. The respondents are entitled to their costs, fixed in the agreed total amount of $25,000, inclusive of disbursements and all applicable taxes, to be divided among the respondents, as also agreed, as they may determine.

Released:

"DEC 20 2016"
"RGF"

"E.A. Cronk J.A."
"R.G. Juriansz J.A."
"L.B. Roberts J.A."