

Willier v. Lajeunesse, 2001 ABQB 877

Date: 20011016
Action No. 9603 26283

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF EDMONTON

BETWEEN:

JOHN WILLIER

Plaintiff

- and -

ARMAND LAJEUNESSE AND GOLD STAR
TRANSPORT (1975) LTD.

Defendants

MEMORANDUM OF JUDGMENT
of the
HONOURABLE MR. JUSTICE D.W. PERRAS

APPEARANCES:

Edward M. Robinson and
Craig D. MacKay
Frieser Robinson
for the Plaintiff

Peter D. Gibson
Field Atkinson Perraton LLP
for the Defendants

[1] The plaintiff, a pedestrian, claims damages for allegedly being struck by the defendant Gold Star's freightliner truck driven by the Defendant Lajeunesse.

[2] At the outset counsel for the parties advised the court damages were not an issue.

1. ISSUE

[3] Where injury occurs to a pedestrian by a motor vehicle, the onus of proof, pursuant to s. 180(1) of the *Highway Traffic Act* R.S.A. 1980 CH. 7, that the loss or damage did not “entirely or solely arise through the negligence or improper conduct of the owner or driver of the motor vehicle is on the owner or driver”. Hence the issue here is have the defendants, given the circumstances, met the onus cast on them by s. 180.

2. GENERAL BACKGROUND FACTS

[4] On January 4, 1995 the plaintiff John Willier, who lived on the Sucker Creek Reserve, had walked to town, a distance of about three miles. His apparent intention was to participate in the bingo games, however, as he had been drinking he was not allowed to play. In due course, the plaintiff proceeded to walk home travelling east on the shoulder of Highway 2. Some distance past the intersection of Highways 2 and 750, the plaintiff was struck by the defendant Gold Star’s freightliner driven by the defendant Armand Lajeunesse at about 10:20 in the evening.

[5] The roads were in good condition with a bit of snow on the shoulders, and while it was cold, visibility was clear and the road was dry.

[6] The defendant Lajeunesse, is a truck driver and was on the job on January 4, 1995. He was en route from Grand Prairie to Slave Lake to pick up a load of wood chips with the freightliner and two trailers. The vehicle was well equipped and everything was in working order. He was quite familiar with the road, driving it five or six times a week. Lajeunesse, as well, knew that pedestrians on occasion used the road. After Lajeunesse, going east, passed the intersection of Highways 2 and 750, he noticed another truck and trailer with a cat on it pulled off in a turn out on the north side of Highway 2 but also facing east. The lights were flashing on this unit. His attention was drawn to it. Shortly thereafter the accident between his truck and Willier occurred. Willier suffered a serious transverse, compound fracture of the left humerus and a fracture of epicondyle. He was taken to hospital and treated by Dr. Sunohara, an orthopaedic surgeon.

[7] At trial the evidence presented by the plaintiff was that he was hit on his left arm while walking on the shoulder. Willier gave evidence through an interpreter as Cree is his first language. He was in shock after the blow and was never at any time interviewed by the investigating members of the R.C.M.P. Little can be made of what he said to the ambulance attendants at the time. He did agree that at one point he had crossed to the north side of Highway 2 to talk to the driver of the stopped truck. The driver of the stopped truck, Gary Inkster, testified and recalled speaking to a person that somewhat resembled Willier. Inkster

said the person wanted a ride but after a bit left his area and Inkster worked on his vehicle's lights for a few minutes. He then noticed the freightliner brake and stop a short ways east of where he was stopped.

[8] The defendant Lajeunesse testified he was travelling at about 100 kph when he saw the truck facing east with lights flashing stopped in the pullout on the north side of the road. Lajeunesse testified this whole thing was "unusual" and he wondered if there had been an accident or if the driver was sick. He testified that he glanced at the truck to see if everything was okay, to see if someone was run over or to see if there was trouble. He further testified he slowed to 90 kph and when he looked back to the road someone was in front of his truck, and he swerved to the left and felt he missed the person but stopped and went back and was told by another person to call the police which he did.

3. HAVE THE DEFENDANTS MET THE ONUS?

[9] At the outset, let me say that I am satisfied the defendants are entirely or solely responsible for the loss and damage suffered by Willier.

[10] It is true Willier recalls little of the accident other than that he was hit from behind on the left arm and knocked down. Dr. Sunohara's evidence, which I accept, is to the effect that the serious transverse fracture of the left humerus of Willier could only be accomplished by a significant blow to the back of the humerus and elbow pushing it forward and inward and that the break was inconsistent with a fall to, for example, the pavement which would result more likely in an oblique fracture of the arm.

[11] Dr. Sunohara's evidence as to the mechanics of the injury comports with Willier's evidence and militates against Lajeunesse' evidence that he was presented with a right side profile of someone just in front of his truck moving at a trot north to south.

[12] The police investigation, unfortunately, at night turned up little evidence as to how the accident occurred.

[13] Cst. Neidermeyer, the main investigating officer, was not made aware of the mechanics of the injury or even the injury to Willier. He agreed on cross-examination his examination of the truck and trailer for marks, smudges or smears would have been much more thorough and completed in daylight instead of at night with a flash light. He also agrees that Willier at some point ought to have been interviewed.

[14] At trial, considerable evidence was adduced by both parties relating to whether or not Willier could have run across the road and, if so, at what speed.

[15] Willier, as it turns out, had broken his leg years ago and apparently it still bothered him if he moved too fast. I have reviewed the evidence relating to Willier's gait and speed and ability to run but I find that such evidence is not helpful or necessary to make a determination

in this case. Similarly, the evidence of Mark Sawa, the accident reconstructionist engineer, while deeply interesting, is not necessary to determine the issues even though I have considered it in terms of how much distance a trailer truck needs in order to stop, assuming it is going 90 kph, when faced with a pedestrian crossing in front of the truck travelling at 2.2 mph and all the various permutations and combinations therefrom.

[16] I am satisfied on the evidence that Mr. Lajeunesse had his attention drawn to the Inkster unit and observed it for trouble, etc., and lost sight of where he was on the road. Consequently, when he looked back he was too late to avoid clipping Willier, who I find was walking on the shoulder of the road, on the left upper arm with either his truck or the trailer. Dr. Sunohara's evidence, which as I said I accept, is very compelling evidence that Willier was hit from behind with significant force sufficient to seriously fracture his humerus and elbow by driving the bone forward and inward. In fact, the fracture was a compound one; i.e., the bone was through the skin.

[17] In short then, the defendants, I find, have not been able to meet the onus cast on them by s. 180, the plaintiff having established that he was a pedestrian on a highway and injured by the defendants' motor vehicle. Therefore, I find the defendants are totally liable for Willier's loss and damage.

[18] Since damages have been agreed on or at least are not an issue, the plaintiff will have judgment and costs with interest pursuant to the appropriate legislation and regulations.

[19] If there is an issue as to costs such are to be spoken to within 30 days.

HEARD on the 27th day of September, 2001.

DATED at Edmonton, Alberta this 16th day of October, 2001.

J.C.Q.B.A.