Date: 19990325
Docket: 15769
Registry: Nanaimo

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

SHAWNA McKEE,
an infant by her Guardian Ad Litem
STEVEN McKEE

PLAINTIFF

AND:

JANET McCOY

DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE SHAW

Counsel for the Plaintiff: Mr. Kenneth W. Thompson

Counsel for the Defendant: Mr. Michael J. Hargreaves

Place and Dates of Trial: Victoria, B.C.
January 25 and 26, 1999

[1] This judgment is to determine the issue of liability in a motor vehicle/pedestrian accident.

[2] The plaintiff Shawna McKee was walking across Shelborne Street at Knight Avenue in Saanich, B.C. when she was struck by a motor vehicle driven by the defendant Janet McCoy. The plaintiff suffered serious injuries including breaks to both legs. She was then 14 years old and is now 16. The defendant Mrs. McCoy was 81 at the time of the accident.

[3] The collision occurred after dark, at about 6:45 p.m. on November 6, 1996. It was not raining and the street was dry. There was street lighting in the vicinity of the intersection. The plaintiff was wearing dark clothing.

[4] Shelborne is a through street. Knight is a side street with stop signs for vehicular traffic where it intersects with Shelborne. The area in the vicinity of Shelborne Street and Knight Avenue is residential.

[5] Before crossing Shelborne, the plaintiff stopped at the curb and looked both ways, first to the left (the direction from which the defendant's vehicle was coming) and then to the right. She saw the lights of the defendant's vehicle and determined that she had enough time to cross in front of it in safety. She then started across Shelborne. She did not look to either side while she was crossing.

[6] Shelborne at this point has two lanes in each direction. The plaintiff crossed the curb lane and more than half of the centre lane when she was struck by the defendant's vehicle. In all, the plaintiff travelled approximately 5 metres from the curb to the point of impact.

[7] The defendant was driving at about 45 kph in a zone with a speed limit of 50 kph. She never saw the plaintiff, not even when she was directly in front of the car and in the process of being struck. The defendant was then aware of only "a vague shadow" and felt she may have struck a squirrel or a cat. However, she did stop her car and get out. She then found the plaintiff lying on the roadway and realized what had happened.

[8] The plaintiff claims she was in an unmarked crosswalk and therefore had the right-of-way. She further claims that the defendant was negligent because of faulty lookout.

[9] The defendant contends that there was no unmarked crosswalk at the intersection and therefore she had the right-of-way. The defendant further contends that, in any event, she did not have enough time to see the plaintiff, react and brake sufficiently to avoid striking her.

[10] The relevant sections of the ***Motor Vehicle Act*** R.S.B.C. 1996, c.318 are as follows:

119(1) In this Part: ...
"crosswalk" means
(a) a portion of the roadway at an intersection or elsewhere distinctly indicated for pedestrian crossing by signs or by lines or other markings on the surface, or
(b) the portion of a highway at an intersection that is included within the connection of the lateral lines of the sidewalks on the opposite sides of the highway, or within the extension of the lateral lines of the sidewalk on one side of the highway, measured from the curbs, or in the absence of curbs, from the edges of the roadway;

. . .

"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;

. . .

"pedestrian" means a person afoot, or an invalid or child in a wheelchair or carriage;

. . .

"roadway" means the portion of the highway that is improved, designed or ordinarily used for vehicular traffic, but does not include the shoulder, and if a highway includes 2 or more separate roadways, the term "roadway" refers to any one roadway separately and not to all of them collectively;

"sidewalk" means the area between the curb lines or lateral lines of a roadway and the adjacent property lines improved for the use of pedestrians;

. . .

179(1) Subject to section 180, the driver of a vehicle must yield the right of way to a pedestrian where traffic control signals are not in place or not in operation when the pedestrian is

> crossing the highway in a crosswalk and the pedestrian is on the half of the highway on which the vehicle is travelling, or is approaching so closely from the other half of the highway that he or she is in danger.
>
> (2) A pedestrian must not leave a curb or other place of safety and walk or run into the path of a vehicle that is so close it is impracticable for the driver to yield the right of way.
>
> (3) If a vehicle is slowing down or stopped at a crosswalk or at an intersection to permit a pedestrian to cross the highway, the driver of a vehicle approaching from the rear must not overtake and pass the vehicle that is slowing down or stopped.
>
> . . .
>
> 180 When a pedestrian is crossing a highway at a point not in a crosswalk, the pedestrian must yield the right of way to a vehicle.

[11] I will first deal with the crosswalk issue. For pedestrian traffic along both sides of Knight Avenue as it approaches Shelborne there are no paved sidewalks. The area between the paved surface of Knight Avenue and the property lines of adjacent homes is covered mostly in lawn and in some places gravel.

[12] An exception is an asphalt pathway parallel to Knight Avenue leading towards Shelborne but ending about 15 metres short of Shelborne. Any pedestrian on the asphalt pathway walking towards Shelborne would naturally continue on the grass between the property line and the roadway while traversing the last 15 metres before arriving at Shelborne. That is the route

that was followed by the plaintiff in reaching the Knight and Shelborne intersection.

[13] Counsel for the defendant argues that because there is only lawn beside the roadway of Knight Avenue approaching the intersection, there cannot be an unmarked crosswalk across Shelborne. This submission is based upon the definition of "crosswalk" in the ***Motor Vehicle Act***. The relevant words are "the portion of a highway at an intersection that is included within the connection of the lateral lines of the sidewalk on the opposite sides of the highway." Put simply, the argument is that lawn is not sidewalk and without sidewalks leading up to an intersection, there can be no unmarked crosswalk at the intersection.

[14] This is a novel contention and if it is correct, pedestrians who take care to cross at intersections will find that their careful conduct does not give them right-of-way protection if there happens to be grass, rather than a paved sidewalk leading to the intersection.

[15] In my opinion, the fundamental aim of the ***Motor Vehicle Act*** is to ensure, as best as possible, the safety of highway users) including pedestrians. Thus, if there are two interpretations reasonably open on the wording of provisions of the ***Act***, one of which accords with the objective of safety

while the other does not, then, in my view, the interpretation consistent with safety should be chosen.

[16] I take judicial notice that there are many similar intersections in urban centres in British Columbia where there are lawns without paved sidewalks leading to the intersections. Saanich is no exception. According to Mr. Christopher Pearse, the Director of Parks and Public Works of Saanich, such areas (which he calls boulevards) are generally maintained by the adjacent property owners. Mr. Pearse says that these boulevards are public property and are used by pedestrians for travel. He notes, for example, that public usage of the boulevard which the plaintiff traversed is evident from a trail worn into the grass. Mr. Pearse further says that if adjacent property owners refuse to maintain their boulevards, such that they become unsightly and choked with noxious weeds, the bylaw enforcement personnel of Saanich will direct Mr. Pearse's department to correct the situation. I accept Mr. Pearse's foregoing evidence.

[17] I find that the lawn areas between the roadway of Knight Avenue and the property lines are public property. According to plans put in evidence, those areas are part of the highway road allowance. Under the ***Municipal Act*** R.S.B.C. 1996, c.323, title to such land rests in the Provincial Government (s.534(1)), and the right of possession rests in the local municipality (s.533(1)). There is no evidence that pedestrians

are in any way forbidden to walk on such boulevard areas. I must conclude, therefore, that members of the public are entitled to walk on the boulevards along-side Knight Avenue toward Shelborne.

[18] I turn to the definition of "sidewalk" in the ***Motor Vehicle Act***. Can the definition reasonably include lawn? Sidewalk as defined in the ***Act*** is the area between the property line and the roadway that is "improved for the use of pedestrians." In this case, the boulevards leading to the intersection, including the area walked across by the plaintiff, are between the property lines and the roadway.

[19] Does the fact that the boulevards are covered by lawn mean that they are "improved"? If so, are they improved for the use of pedestrians?

[20] The word "improve" has several meanings. One that is suitable to this case is set out in The Shorter Oxford Dictionary (3rd ed.) at p.1037, definition No.5 as follows:

> 5. To advance or raise to a better quality or condition; to make better; to ameliorate.

[21] In my opinion, lawn is an improvement. I say so because lawn is generally considered as a betterment of the quality or condition of bare land.

[22] Is lawn an improvement "for the use of pedestrians"? The word "pedestrian" is defined in the ***Motor Vehicle Act*** as including "a person afoot." While lawns are, of course, useful for their aesthetic beauty, they are also used to walk upon. I take judicial notice that one of the reasons that lawn is so widespread in urban areas in Canada is that it is pleasant and useful to walk upon.

[23] I conclude, therefore, that the lawn-covered boulevards alongside Knight Avenue leading to Shelborne reasonably fit within the ***Motor Vehicle Act*** definition of sidewalk.

[24] I return, then, to the definition of crosswalk. As crosswalk is defined as including the portion of a highway within the connection of the lateral lines of the sidewalks on opposite sides of the highway, and as the boulevards leading up to each side of Shelborne are sidewalks under the ***Act***, it follows that there are unmarked crosswalks across Shelborne, one on each side of the intersection.

[25] I have found only one case which directly deals with a similar unmarked crosswalk issue. In ***Colburn v. Schilling***, 107 P. 2d 279 (1941), (4th Dist. Ct. of App., California), it was argued that there was no unmarked crosswalk at an intersection because the concrete sidewalk leading to the intersection ended a few feet short of the curb. Under the Vehicle Code of California, St. 1935, "sidewalk" was defined as "that portion

of a highway, other than the roadway, set apart for pedestrian travel." Barnard, J. for 3 of the 4 judges, held, at p.281:

> Section 85, defines an unmarked crosswalk as that portion of a roadway ordinarily included within the prolongation of the boundary lines of sidewalks at intersections of streets which meet at approximately right angles. We think the latter section, in referring to sidewalks, was intended to refer to the space between the property line and the curb and not merely that portion thereof which happens to be covered with the cement or other material making an improved walk.

The reasons of the dissenting judge are not reported.

[26] For all the foregoing reasons, I find that the plaintiff was in an unmarked crosswalk when she was struck by the defendant's vehicle.

[27] I turn now to the defendant's contention that she did not have sufficient time to see the plaintiff, react to her presence and brake enough to avoid colliding with her.

[28] According to s.179(1) a motorist must yield the right-of-way to a pedestrian crossing the street in a crosswalk. However, s.179(2) places a limit on this duty. It says that a pedestrian must not walk into the path of a vehicle that is so close that it is impracticable for the driver to yield the right-of-way.

[29] The defendant's contention centres upon the amount of time she would have had to react to the sight of the plaintiff

starting to cross Shelborne had the defendant actually seen her. The time the defendant would have had is the time that was actually taken by the plaintiff walking from the curb to the point where she was hit. The distance from the curb to the point of impact, just over one and one-half lanes on Shelborne, was approximately 5 metres. A traffic accident reconstruction expert called by the plaintiff, Mr. Derek Wild, assumed the plaintiff's walking speed was 1.26 metres per second. Based upon this assumption he calculated the lapsed time from start to point of impact to be 4 seconds (5 metres divided by 1.26 metres per second equals approximately 4 seconds) plus an increment for acceleration by the plaintiff from her initial position up to walking speed. Mr. Wild adopted the 1.26 metres per second figure from a study and from an expert's report commissioned by the defendant but not put in evidence.

[30] On cross-examination, defendant's counsel put to Mr. Wild another study which used 1.80 metres per second for an adolescent's walking speed. Mr. Wild did not accept the 1.80 figure as being applicable to the plaintiff. He pointed out that the 1.80 figure made no differentiation between male and female adolescents. I adopt the 1.26 metres per second figure used by Mr. Wild.

[31] As noted earlier, the defendant's vehicle was travelling at approximately 45 kph. There was no braking before the collision. At 45 kph the defendant's vehicle would have

travelled approximately 50 metres in 4 seconds. I find, therefore, that the defendant's vehicle was about 50 metres away from the point of impact as the plaintiff started to cross Shelborne.

[32] Mr. Wild explained that a driver needs time for detection, identification, decision and response. He testified that the usual time from detection to response by braking is from 1½ and 2½ seconds. He chose 2½ seconds in the circumstances of this case, but conceded on cross-examination that it could be as long as 3 seconds, taking into account the age of the defendant.

[33] On either of those figures (2½ or 3 seconds), I find that the defendant, had she seen the plaintiff starting to cross the road, had sufficient time to apply her brakes and slow her vehicle enough to let the plaintiff cross safely in front of her. Thus, when the plaintiff left the curb, the defendant's vehicle was not so close as to make it impracticable for the defendant to yield the right-of-way.

[34] It follows that the plaintiff had the right-of-way as she was crossing Shelborne in the unmarked crosswalk.

[35] The defendant ought to have given the right-of-way to the plaintiff and I find she (the defendant) was negligent in

failing to do so. I also find that the defendant was negligent by reason of inadequate lookout. Each item of negligence contributed to the accident.

[36] I asked defendant's counsel for his position on the defence of contributory negligence by the plaintiff should I find that the plaintiff had the right-of-way. Defence counsel responded that if I found that the plaintiff was in an unmarked crosswalk and had the right-of-way, he could not succeed on the defence of contributory negligence. In taking this position he no doubt had in mind cases cited by the plaintiff, including ***Sheng v. Davis*** [1998] B.C.J. No. 2932 (Q.L.), (4 December, 1998), Vancouver CA023423 (C.A.); ***Cerra v. Bragg*** (20 April, 1980), Vancouver B790322 (B.C.S.C.); and ***Stock v. Halak***, [1986] B.C.J. No. 1048 (Q.L.), (7 November, 1986), Vancouver B840311 (S.C.). In view of defence counsel's position and the foregoing case law, I find that no case for contributory negligence has been made out.

[37] It follows that the defendant is 100% liable for the plaintiff's damages arising from the motor vehicle accident.

[38] Damages remain to be assessed. By agreement of counsel I am not seized of the issue of damages. The assessment thereof may come on before any judge of the court.

[39] The plaintiff will have her costs up to and including this trial and judgment.

"D.W. Shaw, J."

Mr. Justice Shaw