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INFERENCEIAL TREATMENT

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There is nothing like a ride on a warm summer evening. Van Morrison said that the warm air and peaceful feeling produce a feeling of “wonder” and an “everlasting sense of life”. This was probably so for Sean Wayland, a cook employed by The Keg Restaurant, who was riding his bike home after a hard shift on a warm evening in early August.

I look fondly on Mr. Wayland’s case, not for its summer evening facts, but because I often cite it for the proposition that robust reasonable inferences can be drawn from circumstantial evidence, even when the Plaintiff cyclist himself has no idea what happened.

Let us examine the facts.

Mr. Wayland was travelling eastbound to his home in East Vancouver across The Georgia Viaduct. He was in no particular hurry. The weather was good. The Viaduct was well lit and Mr. Wayland was filled with a sense of well-being, though perfectly sober. The eastbound half of The Georgia Viaduct has three lanes, each of which is roughly 11 feet wide. Mr. Wayland was riding in the south (curb) lane as far to the concrete barrier as practicable.

Those familiar with The Viaduct know that it splits into two off-ramps, one for Prior Street traffic and the other leading to Main Street. Mr. Wayland intended to take Prior Street to his East Vancouver neighbourhood. When he was 100 feet west of the split he started to move away from the curb. It was night time but the lighting was good and Mr. Wayland had a fluorescent orange backpack, a halogen generator headlight, and a strip of reflective tape at the rear.

Mr. Wayland’s last memory was seeing the headlights of eastbound traffic in all three lanes approximately two blocks west of his location. He had taken his left hand from his handle bar and looked to his rear over his left shoulder to make this observation. He then faced back in the direction in which he was travelling and replaced his hand on his handle bars.





Mr. Wayland's next memory was sliding along the cement barrier with his body twisted right around. He was quite badly hurt and, in particular, suffered acute dental and jaw injuries.

Counsel for ICBC placed reliance on the general onus of proof in a civil case. His argument was that there was total absence of evidence of negligence on the part of the unknown driver, if there had been a driver, and that accordingly, the Plaintiff failed to satisfy the onus of proof. ICBC's counsel went further and argued that the Plaintiff owed the same duty of care as the driver and failed to exercise that duty by properly signalling his intention to change lanes.

Mr. Justice H.A.D. Oliver, as he then was, rejected ICBC's argument. As to the intention to signal, Oliver J. said the cyclist had not yet begun to change lanes, therefore, no signal was required. Secondly, and more importantly, Oliver J. accepted that when the cyclist turned to look west behind him and saw no headlights for two blocks, it was reasonable to infer that there were no headlights to be seen. Taking that together with the fact that the collision occurred within a second or so of the Plaintiff's slight change of course, Oliver J. inferred that the vehicle that collided with the cyclist must not have been employing headlights. In other words, this vehicle was in fact immediately behind the cyclist when he looked, but all the cyclist could see were headlights in the distance. He stated:

"I find that the automobile was not one of the vehicles whose headlights the Plaintiff had seen but that it was another car which had been travelling eastward, east of the vehicle observed by the Plaintiff, without its headlights on. Had its headlights been on, I am satisfied that the Plaintiff would have seen it and that its driver would have no difficulty in seeing (in the beam of her or his headlights) the reflector tape, the fluorescent orange knapsack, Plaintiff's white shoes moving up and down, the red and white shoulder markings on his shirt and his red cap."

His Honour also found that the driver was at fault for attempting to pass the cyclist at night in the same traffic lane which the cyclist was riding when another lane was open and unobstructed by any other traffic.

Clearly, for Oliver J. to draw the inference that there was another vehicle, about which no evidence was led at all, he must have placed tremendous faith in the ability of the cyclist. Indeed, the judgment contains many references to the cyclist's familiarity with the roadway, his experience, his sobriety, and his credibility.

One of the reasons I love this decision is that it required the presiding Judge to make a leap of faith. The case stands as a shining example of a Judge drawing a judicious and reasonable inference, based on a positive impression of a cyclist, and against the background where there clearly was an absence of evidence as to what happened. It was wide open for Oliver J. to conclude that the cyclist simply misjudged the distance between himself and the approaching headlights. Instead, based on what he knew about the



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cyclist, he found this to be unlikely, and drew an extremely robust inference which established his case against the unidentified driver.

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