

CANADA / JUDGMENT

# Armes v. Millard

2016 BCCA 464

## COURT

British Columbia Court of Appeal

## DECIDED

23 November 2016

Source: bccourts.ca - Research copy typeset by Esheria. Not court-issued or certified.

2016 BCCA 464 Armes v. Millard COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Armes v. Millard, 2016 BCCA 464 Date: 20161123 Dockets: CA42864; CA42865; CA42897 Docket: CA42864 Between: Celin Armes, by her Litigation Guardian, Peter Armes Appellant Respondent on Cross Appeal (Plaintiff) And Karen Joy Millard Respondent (Defendant) And Clare Heather Singleton Respondent Appellant on Cross Appeal (Defendant)

- and - Docket: CA42865 Between: Rheann Armes, by her Litigation Guardian, Peter Armes Appellant Respondent on Cross Appeal (Plaintiff) And Karen Joy Millard Respondent (Defendant) And Clare Heather Singleton Respondent Appellant on Cross Appeal (Defendant)
- and - Docket: CA42897 Between: Karen Joy Millard Respondent (Plaintiff) And Clare Heather Singleton Appellant (Defendant) Before: The Honourable Madam Justice Newbury The Honourable Mr. Justice Harris The Honourable Mr. Justice Savage On appeal from: An order of the Supreme Court of British Columbia, dated June 9, 2015 (Millard v. Singleton, 2015 BCSC 1015, Vancouver Registry Nos. M111796, M111797, M113130). Counsel for Celin Armes, by her Litigation Guardian, Peter Armes and Rheann Armes, by her Litigation Guardian, Peter Armes: J.S. Stanley Counsel for Clare Heather Singleton: S.B. Stewart Counsel for Karen Joy Millard: D.H. Doig S.M. Katalinic Place and Date of Hearing: Vancouver, British Columbia November 7, 2016 Place and Date of Judgment: Vancouver, British Columbia November 23, 2016 Written Reasons by: The Honourable Mr. Justice Harris Concurred in by: The Honourable Madam Justice Newbury The Honourable Mr. Justice Savage Summary: The appellants, passengers and one of two drivers in a two vehicle collision, appeal the trial judge's finding that the other driver was not contributorily negligent for failing to take precautionary action after seeing the movement in the oncoming vehicle's headlights. HELD: Appeals dismissed. The trial judge's conclusions on whether the oncoming vehicle's moving headlights gave rise to a duty of care to take special precautions, and whether that duty was breached, were open to the judge on the evidence before her. Reasons for Judgment of the Honourable Mr. Justice Harris:

## Introduction

- [1] The issue in these appeals is whether one driver in a two vehicle motor accident, Ms. Millard, ought to have been apportioned some fault for the accident on the basis that she was negligent in failing to take special precautions in response to a reasonably foreseeable risk of danger created by the other vehicle in the accident. The trial judge concluded that Ms. Millard had not been negligent and that the other driver, Ms. Singleton, should bear the sole responsibility for causing the accident.
- [2] The appellants, who were the passengers in Ms. Millard's car and Ms. Singleton, allege multiple errors which coalesce around three principal arguments. First, the judge erred in her conclusion that Ms. Singleton's vehicle was not an "imminent hazard" in the sense that it did not give rise to a duty requiring Ms. Millard to take special precautions in the face of a reasonably foreseeable risk. Second, the judge erred in her analysis of the standard of care when she concluded that there were no reasonable steps Ms. Millard could have taken to avoid the accident. Third, the judge erred in failing to take a sufficiently robust and common sense approach to causation when she concluded that, in any event, it had not been demonstrated that the accident could have been avoided or the injuries occasioned by the accident would have been lessened if Ms. Millard had met the standard of care, assuming that she had breached it.
- ### Background and Reasons for Judgment
- [3] The accident happened at about 7:00 p.m. on Highway 16 between Prince George and Vanderhoof on November 15, 2010. Ms. Millard was driving eastbound in her 2009 Cobalt. It was equipped with studded snow tires. In the car with her were her two daughters. All of the occupants were wearing seatbelts. Ms. Singleton was driving westbound in a Dodge Grand Caravan. It had snow tires only on the front wheels. In the vicinity of the accident, the Highway has one lane of travel in each direction. The accident happened when Ms. Singleton lost control of her Grand Caravan and it slid sideways into the path of Ms. Millard's Cobalt driving in the opposite lane of travel.
- [4] It was dark and snowing when the accident happened. Snow was accumulating on the ground, although the evidence about the condition of the surface of the highway itself is far from clear. Mr. Sdoutz, an accident reconstruction expert, described the tracked portion of the roadway as wet and predominantly bare with some slush. This description was based on photographs taken shortly after the accident.
- [5] Ms. Millard had been driving in snow for about 2½ to 3 hours before the accident, although this tells us nothing about how long it had been snowing in the vicinity of the accident. Conditions were, however, deteriorating. Ms. Singleton, driving in the opposite direction, had been driving in the snow for about 10 minutes before the accident.
- [6] As conditions worsened, Ms. Millard reduced her speed. The posted speed limit is 100 km/h. Ms. Millard was driving in third gear. She doubted her speed to be more than 60 km/h. Her estimate was that she was "doing quite a bit less than that". Mr. Sdoutz estimated her speed at 50 km/h just before the accident based on data from a "black box" in her vehicle. Ms.

Millard was driving at a speed about half the posted speed limit. It is common ground that Ms. Millard was travelling in a reasonable and safe manner given the conditions. The point of contention is whether she should have adjusted her driving further in light of a potential risk alleged to be posed by Ms. Singleton's vehicle.

- [7] Mr. Sdoutz estimated Ms. Singleton's speed at about 90 km/h as her vehicle slid sideways into Ms. Millard's car, which was travelling in its lane of travel. It is quite likely that she was travelling in excess of that speed before sliding sideways.
- [8] As Ms. Millard approached the scene of the accident, she saw Ms. Singleton's headlights approaching her. As the trial judge said, at a minimum, Ms. Millard saw movement in the headlights of the oncoming vehicle on two occasions, just seconds apart. It was dark. She could see headlights. She could see the headlights move. As I read her evidence, she did not admit that the headlights crossed into her lane of travel. She also said that after the first movement the vehicle seemed to be fine. On occasion, she described the vehicle as "fishtailing" and "losing and regaining control", but these descriptions must be inferences because she could not see the car. She could only see the headlights.
- [9] Ms. Millard was able to say very little, if anything, about the extent or duration of the movement of the headlights, how many times they moved side to side or, with any precision, the time that elapsed between the occasions on which they moved. She said it was fast. It felt like hours. But all of the events were over in seconds. Ms. Millard gave some estimates about time and distance, but she also qualified them heavily, said she really did not know and that some estimates were just possibilities.
- [10] On seeing the first movement in the headlights, Ms. Millard did not adjust her driving by slowing down further or pulling over or stopping in her lane of travel. She continued driving in her lane as she approached Ms. Singleton's vehicle. The gist of her evidence is that she had already adjusted her speed to the conditions and, even though she saw the movement of the oncoming headlights, she maintained her speed.
- [11] The accident occurred within seconds of the second time Ms. Millard noticed the headlight movement of the oncoming vehicle. Ms. Singleton's vehicle slid sideways into Ms. Millard's lane of travel, colliding with the front end of the Cobalt. It is common ground that Ms. Millard had no opportunity to avoid the collision once Ms. Singleton's vehicle began to slide across the road. The principal point of contention, however, based in part on Mr. Sdoutz's estimates of the distances between the two vehicles at various times, was whether Ms. Millard could have avoided the collision if she had either stopped or slowed down and pulled over to the right after seeing the oncoming vehicle's headlights move.
- [12] The accident injured the occupants of the Cobalt. Most unfortunately, one of Ms. Millard's daughters was severely injured in the accident.

- [13] The trial occurred in three actions, although only liability was in issue. Ms. Millard is a defendant in two actions in which her daughters are the plaintiffs. She is also the plaintiff in a third action claiming damages against Ms. Singleton.
- [14] The trial judge summarized the issues that she had to decide:
- [29] The plaintiffs' and Ms. Singleton's position depend upon on three propositions being accepted:
- a. The second headlight movement indicated there was a hazard on the highway;
  - b. Having perceived that hazard, Ms. Millard had a duty to take action in response to it. The plaintiffs say she should have stopped, pulled over and stopped or slowed her vehicle;
  - c. Had she slowed her vehicle, the severity of the injuries caused by the impact would have been reduced.
- [15] The judge began her analysis by commenting that the applicable legal principles were not in dispute. Accordingly, she focused her analysis on points in contention. She also prefaced her decision by noting that, although the parties referred to three events (two movements of the headlights followed by the Caravan sliding into the oncoming lane), the accident occurred over mere seconds in the dark with low visibility and heavy snow. In those circumstances she concluded that estimates of timing and distance were inherently uncertain.
- [16] The trial judge first concluded that the movement of headlights Ms. Millard witnessed as Ms. Singleton's vehicle approached her was not something a reasonable person would view as a hazard requiring a driver to take steps to avoid it. The judge noted the variation in descriptions of what it was in terms of headlight movement that Ms. Millard saw. She found Ms. Millard to be a credible and honest witness. She recognized that the estimates of distance between the vehicles both when the headlights moved for the first and the second time were inherently uncertain. She was unable to make firm conclusions about distance between the vehicles at critical times. The basis of her conclusion follows:
- [40] Ms. Millard is the only one who gave direct evidence about the distance of the vehicles before impact. Whatever movement there was, Ms. Millard testified the oncoming vehicle recovered and "seemed fine" in the seconds before the accident. An important factor in my mind is that she had already altered her behaviour in reaction to the road conditions and was driving well below the speed limit. Clearly, she was paying close attention to the road conditions and her driving. Whatever she saw in the seconds before the impact, when she was asked if she slowed down because of it, she testified that she was "already going slow enough". I infer from her statement and behaviour just prior to the accident, that she did not perceive the headlight movement to be indicative of any oncoming danger to her vehicle. Given she was driving prudently and was alert, I have no reason to conclude her judgment was unreasonable.

- [17] On the standard of care, as I read the judgment, the trial judge accepted that as a general proposition Ms. Millard was driving in a reasonably prudent and safe manner given the road conditions. She distinguished *Gill Estate v. Greyhound Lines of Canada Ltd.* (1987), 21 B.C.L.R. (2d) 324, the case principally relied on at trial and again on appeal, on its facts. Dealing specifically with the allegation of a breach of the standard of care, the judge reached the following conclusions:
- [56] The plaintiffs argued she could have stopped, pulled over or slowed down. The first two options were not viable, nor wise options. Coming to a full stop on a rural highway at night when it is snowing heavily and there is low visibility, would have created a dangerous situation. The facts of this case actually illustrate that danger. Mr. Chamberlain had to take evasive action to avoid colliding with the van as he came upon the stopped vehicles. It is irrelevant whether Ms. Millard knew or checked for traffic behind her; stopping in those conditions does not become safer just because you cannot see a vehicle behind you.
- [57] Similarly, pulling off to the shoulder was not a safe option in those conditions. How could she be sure she could see where the shoulder ended and the incline of the ditch started? In the pictures, the shoulder appears to me to be somewhat narrow although it is difficult to tell. But the important point is those photographs were taken with a flash and, in the case of those included in Mr. Sdoutz's report, digitally lightened. Ms. Millard was driving at night in heavy snow. Taking her eyes off the road to assess the width of a shoulder that is covered in snow, would have been imprudent. I find pulling over was not a safe option in those road conditions. Moreover, being stopped on the shoulder or highway is not necessarily safer than continuing to drive. You cannot take evasive action in a split second when you are stopped.
- [58] As to slowing down, as noted above at paragraphs 38 and 52, she concluded she was already going slowly enough in response to seeing the headlight movement. I find her decision reasonable in the circumstances . Discussion
- [18] The appellants argue the trial judge asked the wrong question. They say the correct question is not whether a reasonable person would view the headlight movement as a hazard. The question is whether a reasonable person would conclude that in all of the circumstances that evening there was a duty to take special precautions to avoid danger. Had the right question been asked, they contend, the answer would have been that a reasonable person would have recognized the duty to take those precautions. Moreover, the judge erred in relying on the precautions that had already been taken by Ms. Millard in responding to the weather conditions thereby conflating the test for whether a duty to take special precautions had arisen with the test for whether the precautions taken were reasonable.
- [19] I am, with respect to the able argument advanced by the appellants, unable to accede to these grounds of appeal. On a fair reading of the reasons, the judge clearly understood the test she had to apply. The trial judge did not err in her understanding of the relevant law. She focused her reasons on the points in contention. While the judge used short-hand to

describe the issue, such as whether Ms. Singleton's vehicle was a hazard or a potential hazard, she did so to frame the material question she had to decide. In several places in the judgment, it is evident that the judge understood the undisputed test. Furthermore, the judge did not, in my view, conflate the test for whether a duty to take special precautions had arisen with the test for whether the precautions taken were reasonable.

- [20] As I read the reasons, the judge analyzed what was required of a driver in the conditions as they existed generally, as well as a consideration of whether there was anything in the particular circumstances of the approaching vehicle that would lead a reasonable person to conclude that the approaching vehicle constituted a hazard creating a duty to take special precautions to avoid danger. To address this question, the judge examined the totality of the circumstances. The judge's focus on the movement of the headlights is unsurprising since beyond adjusting her driving to the prevailing conditions, the movement of the headlights of the oncoming vehicle and their distance from her own were the additional pieces of information that a reasonable driver in Ms. Millard's position would have to process in deciding whether the possibility of danger was reasonably foreseeable. The judge was not asking the wrong question; rather she was focusing on what was most pertinent to resolve the question she had to decide.
- [21] The judge concluded, at para. 40, that Ms. Millard was not negligent in part because she had already adjusted her driving to the prevailing conditions and was therefore driving safely. I do not think the judge lost sight of the question whether a reasonable driver would have perceived the oncoming vehicle as creating an imminent hazard that required some kind of avoidance action. I think the judge was drawing an inference from the fact that Ms. Millard had adjusted her driving to the conditions and was paying close attention as the other vehicle approached. In substance, the judge accepted that subjectively Ms. Millard did not perceive the oncoming vehicle to be an imminent hazard in circumstances where she was paying particular attention to the risks inherent in driving under those conditions. Given those facts, not only did the judge accept that, subjectively, Ms. Millard did not perceive the headlight movement to indicate reasonably foreseeable danger to her vehicle, but she also accepted that that was a reasonable judgment in the circumstances. In my view this is a finding of fact which is supportable on the evidence and I see no principled basis for interfering with it.
- [22] It was for the judge to decide on the evidence whether, in the particular circumstances of this case, the movement of the headlights would be seen by a reasonable driver as a hazard calling for further special precautions to be taken. It is not for us to reweigh the evidence. The trial judge considered the evidence and what could be said about distances, speeds, and what could be inferred from the movement of the headlights of the oncoming vehicle. Much of that evidence was inherently vague and unspecific. I do not think the trial judge misapprehended the evidence. The conclusion she reached was available to her on the evidence. I would not disturb it.

- [23] I have reached this conclusion even though I accept that the judge approached the question by asking whether Ms. Millard should have recognized the second movement of the headlights as a potential hazard, when it appears that the argument was that she should have been alerted to the risk of danger by the first movement. In my view, this error is inconsequential. The evidence about how much time elapsed between the first and second movement of the headlights and the extent and degree of the first headlight movement was vague and unspecific, even accepting that Ms. Millard acknowledged the possibility that 2 or 3 seconds elapsed between them. Ms. Millard's evidence on timing was most uncertain. I do not think that any satisfactory basis exists in the evidence to conclude that the difference between the first and second movement of the headlights would have affected the judge's analysis, which amounts to a finding that the movement of headlights that night did not amount to an imminent hazard.
- [24] I turn now to the second ground of appeal which focuses on the standard of care.
- [25] The appellants suggest that the trial judge misapprehended the evidence because Ms. Millard did not testify that she took the further precaution of slowing down in response to the movement of the headlights or that she turned her mind to whether she should slow down in response to it. The appellants also criticized the trial judge for what they say was speculation about the possibility of stopping or pulling over. They suggest that the trial judge erred in essentially denying the existence of a duty of care to take special precautions to address an emerging possibility of danger.
- [26] With respect, I do not think the judge misapprehended the evidence. The argument does not rise above an attempt to reargue the case at trial in the face of the trial judge's adverse findings. I see no merit in the suggestion that the trial judge effectively denied the existence of a duty of care to take special precautions to address an emerging possibility of danger. In this part of the judgment, the focus of the inquiry is into what options were reasonably available to Ms. Millard in the circumstances. The trial judge assessed the evidence and ruled out attempting to pull over onto the shoulder. The judge analysed the photographs showing the shoulder. But these were not in any event representative of what Ms. Millard would have been able to see that night. The photographs were taken with a flash and were digitally enhanced. She turned her mind to what Ms. Millard could probably see regarding the width of the shoulder and what lay beyond it. It appears to fall away sharply. Assessing that evidence she found, as she was entitled to do, that steering right and pulling over would not have been a safe and reasonable option. The trial judge also assessed the risks of stopping in the circumstances confronting Ms. Millard. She concluded that doing so was not a safe option and that continuing to drive at her already slow speed was reasonable. The judge's findings are supported by the evidence. I would not accede to this ground of appeal.
- [27] I think it important to emphasize that the judge had to do her best to find the facts necessary to decide the case on a very thin evidentiary basis. She had effectively only Ms. Millard as an eye witness. Ms. Millard provided very little by way of definitive evidence about the facts because of the difficulty in estimating time and distance. Her estimates were often just

guesses. The trial judge found her to be credible and honest, but the bottom line was that Ms. Millard was unable to provide evidence establishing a reliable substratum of fact about what happened so as to lay a foundation to prove that she had been negligent in failing to react to the movement of the headlights she saw coming toward her. Having reviewed the entire record, I can only concur in that assessment of the evidence.

- [28] The judge found that, given what Ms. Millard could see that night, it was reasonable for Ms. Millard to continue to drive in her lane at the same speed. She was already driving cautiously. The temporary movement of the headlights did not establish that Ms. Singleton's vehicle had crossed into Ms. Millard's lane. After the first movement, the oncoming vehicle seemed to be under control. The judge's conclusion that Ms. Singleton's vehicle would not have been seen by a reasonable driver to pose a potential hazard was supported by the evidence.
- [29] Nothing in Mr. Sdoutz's calculations of time and distance provide any basis to disturb the judge's conclusions. They were no more than arithmetic calculations of relative distances based on many assumptions that were not clearly established in the evidence. These calculations were made, I note, on the stand. His report addressed other issues.
- [30] Finally, it is noteworthy how little evidence the judge had about the prevailing road conditions or the characteristics of the Highway and the shoulder near the accident scene. The judge did the best she could with the little she had.
- [31] In my view, it is not necessary to go further to examine the alleged errors in relation to the causation analysis in order to conclude that these appeals should be dismissed. Accordingly, I would dismiss the appeals. "The Honourable Mr. Justice Harris" I agree: "The Honourable Madam Justice Newbury" I agree: "The Honourable Mr. Justice Savage"

---

## Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE      <https://www.bccourts.ca/jdb-txt/ca/16/04/2016BCCA0464.htm>

CASE PAGE              <https://chat.esheria.ai/case-law/canada/armes-v-millard-2016>

Prepared on 29 October 2026 · Esheria