
CANADA / JUDGMENT

Haynes v. Haynes

2017 BCCA 131

COURT

British Columbia Court of Appeal

DECIDED

24 March 2017

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2017 BCCA 131 Haynes v. Haynes

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Haynes v. Haynes,

2017 BCCA 131

Date: 20170324

Docket: CA43562

Between:

Buddy Haynes

Respondent

(Plaintiff)

And

Arthur Brian Haynes

Appellant

(Defendant)

Before:

The Honourable Madam Justice Newbury

The Honourable Madam Justice MacKenzie

The Honourable Mr. Justice Harris

On appeal from: An order of the Supreme Court of British Columbia, dated

March 10, 2016 (Haynes v. Haynes, 2016 BCSC 416,
Kamloops Registry File M49507).

Counsel for the Appellant:

G. Ritchey

Counsel for the Respondent:

J.A. Zak

Place and Date of Hearing:

Kamloops, British Columbia

March 13, 2017

Place and Date of Judgment:

Vancouver, British Columbia

March 24, 2017

Written Reasons by:

The Honourable Madam Justice Newbury

Concurred in by:

The Honourable Madam Justice MacKenzie

The Honourable Mr. Justice Harris

Summary:

Motor vehicle accident case in which trial judge found the defendant liable by reason of speed of his vehicle (a truck towing a flat deck trailer) and his violation of s.7.07(3) of Regulations to the Motor Vehicle Act. Held: Appeal allowed. Trial court had erred in finding that a breach of the regulation constituted negligence; in failing to carry out an analysis of causation; and was clearly wrong in rejecting the defendant's "explanation" that the mishap may have been caused by a flat tire on the trailer. If a prima facie case of negligence had been made out, this explanation would have discharged the onus that shifted to the defendant to offer an explanation consistent with no negligence on his part.

Reasons for Judgment of the Honourable Madam Justice Newbury:

Factual Background

- [1] On a sunny afternoon in September 2012, the defendant and plaintiff (who are father and son respectively) set off in a truck towing a flat-deck trailer from Rayleigh (near Kamloops) south along the Yellowhead Highway towards a scrapyard on the Tk'emlups Indian Reserve. On the trailer they had loaded an old Bronco (from which the wheels and tires had been removed) that was strapped into place, and an old engine block placed in the cargo box of the Bronco.
- [2] The defendant drove. He is a retired city worker who had driven trucks and other equipment in the course of his employment. He holds a Class 1 driver's license and was age 71 at the time of trial. The plaintiff, a passenger in the truck, is a professional truck driver who drives tractor-trailers as part of his employment. Both had driven the Yellowhead Highway many times. On this day, the highway surface was dry and smooth. The posted speed limit was 100 km/h.
- [3] After entering the highway, the men travelled about six to eight kilometres, in the curb lane, without incident. They reached a gentle curve to the right. The defendant testified that he felt a "wobble" and then the trailer began to "whip from side to side". The trial judge recounted his testimony:

The truck and trailer left the travelled portion of the highway striking an asphalt barrier along the far right boundary of the highway which was the limit of the shoulder of the highway. The defendant testified that prior to the trailer whipping from side to side, he felt a gentle wobble. The defendant stated that it was the trailer that started to sway and that the whipping motion transmitted this motion to the truck. The defendant testified that the whipping motion moved both the truck and trailer at the same time. This whipping motion caused the truck and trailer to:

[nose] off into the other lane, and I didn't want that to happen, so I pulled it -- turned it back into the -- my lane, I guess you'd call it, the curb lane and then the next thing I know "phewt" over we go.

The defendant testified that when he first felt the motion of the trailer on the highway, the truck and trailer were in the right-hand curve on the highway. In describing the action of the truck and trailer, the defendant testified that there was oncoming traffic travelling in the opposite direction, but the truck did not go into the oncoming lane. The defendant did concede that the nose of the truck could have travelled into the fast lane as it was pointed in that direction. However, he steered the truck back into his lane.

The defendant testified that he moved back into the slow lane by turning the steering wheel, managing to straighten out the truck and trailer, but that he still felt the wobble. He testified that either the truck or trailer hit the curb and then it went over the embankment.

The defendant testified that at some point in time, he slowly applied his brakes. He was not sure if it slowed things down, but the trailer was still whipping. He was of the view that their application had no effect. The defendant did not know how fast he was travelling when he went off the road as he testified that he was not looking at the speedometer.

The defendant estimated that he had travelled a maximum of 200 yards from the time he first experienced the swaying until the truck and trailer left the road. [At paras. 20-4; emphasis added.]

The defendant testified that he had been travelling 'in the neighbourhood' of 85 to 90 km/h before the accident.

[4] For his part, the plaintiff had not been paying attention to his father's driving prior to the accident, but was occupied with a cell phone. He said he did not notice anything unusual in the defendant's operation of the truck and had "no complaints" as to how his father was driving. He estimated their speed at about 80 km/h when the accident occurred.

[5] The plaintiff also "felt a wobble" that got his attention and looked up to see what was happening. He testified that:

they were headed at an angle toward the centre of the highway and toward oncoming lanes. His next recollection is that he was pulled forward towards the defendant or the steering wheel. He had the sensation that they were slowing down and heading to the right. He acknowledged that the sequence of events [was] hard to recall, but he testified that [the] impact was hard and the collision violent.

The plaintiff's evidence as to what happened to him upon impact [with] the curb is summarized in the plaintiff's written closing argument:

12. Later, on viewing the photographs that had been taken by the RCMP, he believed that it was the asphalt curb that bordered the paved shoulder that they hit. On impact with the curb, his right arm went through the closed passenger window. His immediate fear [was] that his arm was going to be ripped off under the truck. He recalled the momentum and forces involved made it feel as though "an invisible hand" was pulling his right arm out the window.
13. The plaintiff then recalled hearing "a real loud noise", something then hit him hard on the head "and then blackness".

[At paras. 26-7.]

[6] At paras. 31-35 of her reasons, the trial judge described the defendant's evidence as to the "history" of the truck and trailer. It is fair to say that his testimony on this point was remarkably uninformative. He said he did not know the maximum weight that the trailer could haul, the type of hitch or its towing capacity, how the braking system on the hitch of the trailer worked, or even whether it was working. Having bought the truck and trailer second-hand, he said he not know whether the suspension system had been modified after manufacture, whether the truck was equipped with a towing package, or the weight capacity for the ball on the hitch. Further, the trial judge said:

He was not certain about how long he had owned the truck and trailer, but he did know the name of the person from whom he had purchased the trailer. After some consideration, the defendant said he had owned the truck for quite some time and had owned the trailer for about ten years. The defendant acknowledged that the tires on the trailer had not been changed. The defendant did not know whether the tires on the trailer had been balanced, nor whether the bearings had been checked and packed. The defendant did not know the weight of the Bronco and the additional weight of the block engine which he estimated weighed several hundred pounds.

In cross-examination, however, the defendant was aware that a trailer's instability can be caused by tires or the weight on the trailer shifting. He knew the Bronco had to be at the front of the trailer and that a certain amount of weight had to be on the tongue of the trailer. [At paras. 33-4; emphasis added.]

- [7] No expert opinion evidence was adduced at trial by either side. However, the police officer who was dispatched to the scene of the accident, Cst. Dunn, testified. He had taken a number of courses in the investigation of motor vehicle accidents, but was not qualified as an expert. He spoke briefly at the scene with the defendant (who was in an ambulance by then), and took various photos of the truck and trailer. He found no evidence of alcohol or drugs and the seatbelts appeared to be in proper order. He saw three straps, two of which were broken, and one of which was still attached to the Bronco, which was still partially on the trailer. He noticed that one of the trailer tires had lost its bead and was flat. He saw a fresh skid mark which the Court noted appeared to be "consistent with" the version of the accident the defendant had given to him at the scene.
- [8] The trial judge found that the defendant's version of the accident, and "to some extent" the plaintiff's version, were in agreement with Cst. Dunn's findings. Those findings were based on the defendant's statement to the constable, the officer's inspection of the highway and observation of the skid and scuff marks, and debris located nearby. (At para. 44.)

Legal Argument

- [9] At the end of the trial, the plaintiff asserted that he had established more than a prima facie case of negligence and that in addition, the defendant had breached s. 7.07(3) of the Motor Vehicle Act Regulations, B.C. Reg. 26/58.[1] S. 7.07(3) provides:

No person shall drive or operate on a highway any combination of vehicles if any vehicle being towed whips or swerves unreasonably or otherwise fails substantially to follow the path of the towing vehicle.

In the plaintiff's submission, this breach also constituted negligence - although he had not pleaded the point.

- [10] The defendant argued that the plaintiff had not proven negligence. Even if a prima facie case had been established, moreover, the defendant argued that he had rebutted it by providing an explanation (that the wobbling was caused by a flat tire) consistent with no negligence on

his part; the accident had been inevitable; and once the wobble occurred, he had been "in the agony of the collision and he had done everything to control the vehicle." The trial judge declined to consider the latter argument because it had not been pleaded, and no challenge is made on appeal to that ruling.

- [11] The trial judge turned at para. 52 of her reasons to the applicable law. She acknowledged that no presumption of negligence arises in law merely because a vehicle drives off the road. On this point, she noted *Fontaine v. British Columbia (Official Administrator)* [1998] 1 S.C.R. 424, in which the Court jettisoned the doctrine of *res ipsa loquitur* (historically applied in circumstantial cases) and rejected the argument that an inference of negligence should be drawn "whenever a vehicle leaves a roadway in a single-vehicle accident." Major J. for the Court continued:

This bald proposition ignores the fact that whether an inference of negligence can be drawn is highly dependent upon the circumstances of each case: see [*Gauthier & Co. v. The King* [1945] S.C.R. 143 at 150]. The position advanced by the appellant would virtually subject the defendant to strict liability in cases such as the present one. [At para. 35.]

- [12] In *Fontaine* itself, the trial judge, Madam Justice Boyd, had declined to find negligence on the part of a driver of a vehicle that went missing in stormy weather in a rural area in November 1990. The vehicle and its occupants were found two months later, both dead, in a creek adjacent to a highway. There was little or no direct evidence, but the plaintiff, the passenger's widow, argued that because the vehicle had left the highway, the onus was on the defendant to prove an explanation "consistent with no negligence on his part." Boyd J. ruled, however, that the defendant had succeeded in "producing several different explanations of the accident which [were] equally consistent with no negligence on the defendant's part", including the possibility that the vehicle had swerved to avoid an animal or debris, hit a pool of water and hydroplaned, hit a rock or other object, etc. The onus thus shifted back to the plaintiff to prove negligence, but the plaintiff did not succeed in discharging it. Her claim was dismissed.

- [13] Both this court and the Supreme Court of Canada affirmed the trial judgment. Speaking for the Supreme Court, Major J. reasoned:

there was evidence before the trial judge that a severe wind and rainstorm was raging at the presumed time of the accident. While it is true that such weather conditions impose a higher standard of care on drivers to take increased precautions, human experience confirms that severe weather conditions are more likely to produce situations where accidents occur and vehicles leave the roadway regardless of the degree of care taken. In these circumstances, it should not be concluded that the accident would ordinarily not have occurred in the absence of negligence.

If an inference of negligence might be drawn in these circumstances, it would be modest. The trial judge found that the defence had succeeded in producing alternative explanations of how the accident may have occurred without negligence on [the driver's] part. Most of the

explanations offered by the defendants were grounded in the evidence and were adequate to neutralize whatever inference the circumstantial evidence could permit to be drawn. The trial judge's finding was not unreasonable and should not be interfered with on appeal. [At paras. 32-3; emphasis added.]

[14] The trial judge in the case at bar also noted *Singleton v. Morris* 2010 BCCA 48, in which Chief Justice Finch stated for the Court:

Thus, in cases such as this, the trial judge may - but is not required to - draw an inference of negligence from the fact there was a rear-end collision. The defence, however, may attempt to rebut such inferences through the defence of explanation. A defence of explanation, as stated in *Hackman v. Vecchio* (1969), 4 D.L.R. (3d) 444 at 446 (B.C.C.A.) is an explanation of how an accident may have occurred without the defendant's negligence. The defendant does not bear the onus of proving how the accident did happen. The trial judge drew an inference of negligence in this case. She said, "In this case, given that this was a rear-end collision in which the truck was properly stopped and was there to be seen, there is a prima facie case of negligence." Further, the trial judge correctly noted that Mrs. Morris "has to advance an explanation as to how the collision may have occurred without negligence on her part." [At para. 38; emphasis added.]

As well, the judge mentioned *Nason v. Nunes* 2008 BCCA 203, in which this court reviewed various pre-Fontaine decisions, including *Redlack v. Vekved* (1996) 82 B.C.A.C. 313, lve. to app. dism'd. [1996] S.C.C.A. No. 608; *Savinkoff v. Seggewiss* (1996) 25 B.C.L.R. (3d) 1 (C.A.) and *Gauthier & Co.*, supra. At para. 14 of *Nason*, we stated:

If and to the extent that the Court in *Savinkoff* intended to establish or confirm a legal rule that negligence must be inferred as a matter of law whenever a vehicle goes off the road and that the defendant must always meet it in the manner suggested, I believe the decision has been superseded by *Fontaine*. Wherever the court finds on all the evidence that negligence has not been proven, or that the defendant has shown he drove with reasonable care, the defendant must succeed, whether or not he is able to "explain" how the accident occurred. This is not to suggest that an inference may not be drawn as a matter of fact in a particular case, where a vehicle leaves the road or a driver loses control; but such an inference will be "highly dependant on the facts" of the case and the explanation required to rebut it will "vary in accordance with the strength of the inference sought to be drawn by the plaintiff."

The Trial Judge's Conclusions

[15] At the outset of her analysis, the trial judge in the case at bar found that the defendant was not a credible witness. In particular, his purported inability to remember various features about the truck and trailer was not believable. (At para. 56.) She found that the plaintiff had established a prima facie case of negligence against the defendant - "firstly" because the defendant was obliged by s. 7.07(3) of the Motor Vehicle Act Regulations not to drive a combination of vehicles when any vehicle being towed "whips" or swerves unreasonably. That, she said, was exactly what the trailer had done. She continued:

The defendant's evidence is that the swaying of the trailer transmitted the swaying to the truck. This caused the truck to go out of control. Despite the defendant's evidence, the truck and trailer never got back into the slow lane and under control. The truck went out of control, onto the shoulder, hitting the curb, and then went over the embankment. [At para. 59.]

[16] Presumably as a second pillar of the plaintiff's prima facie proof of negligence, the judge observed that the defendant had not looked in his side mirrors to see "what was occurring" when the wobble began (although she did not indicate how this fact contributed to the accident), and that he had not said he had slowed his speed when he first felt the wobble. (As will be emphasized below, this was incorrect.) The judge then stated her critical conclusions in two paragraphs:

I also conclude that the defendant's negligent driving started before the [curve] and I infer it was the speed of the truck that caused the start of the wobble in the [curve], thus resulting in what was described by the defendant and what was found by Constable Dunn when he looked at the scene of the accident.

The defendant speculated that a tire could have blown, but there was no evidence of this other than the trailer, when it finally landed, it had a deflated tire. This is speculation on the part of the defendant. The defendant has not provided an explanation of how the accident may have occurred without his negligence. [At paras. 62-3; emphasis added.]

In the result, she ruled that the defendant had been negligent and that his negligence had caused the truck and trailer to go over the embankment.

[17] The judge did not deal with the plaintiff's injuries; presumably, the quantum of damages was left for another day.

On Appeal

[18] In this court, the defendant submits the following two grounds of appeal:

A. The trial judge erred in concluding the respondent had established a prima facie case of negligence.

B. Alternatively, the trial judge erred in rejecting the explanation of how the accident may have happened without negligence on the part of the appellant.

[19] I begin with some observations concerning what exactly the trial judge found and did not find. She reviewed the evidence relating to how the trailer was loaded and made various adverse comments about the defendant's testimony on this subject. She did not make any finding, however, of lack of care or negligence on the defendant's part in connection with his decision to load the Bronco and engine block on the trailer or in connection with how the loading had been carried out. In particular, she asked certain questions at para. 57 but did not purport to answer them:

The defendant stated that he inspected the trailer when it was attached to the truck. That may be so, but what was he looking at and what was his measurement and standard when he was looking at the truck and trailer to determine that everything was fine?

[20] I cannot agree with the plaintiff's assertion, then, that the Court found that the defendant "failed to properly inspect the trailer before departing for the salvage yard." The fact the trial judge disbelieved the defendant did not create positive evidence that the defendant had failed to inspect the trailer or had loaded it improperly. As Gibbs J. (as he then was) pointed out in *Steinberg v. Commissioner of Taxation (Commonwealth)* (1975) 134 C.L.R. 640 (Aust. H.C.), "The fact that a witness is disbelieved does not prove the opposite of what he asserted". (At 695). Similarly, Scrutton L.J. had observed in *Hobbs v. Tinling & Co.; Hobbs v. Nottingham Journal Ltd.* [1929] 2 K.B. 1 (C.A.):

The defendants would be entitled to cross-examine on such facts to prove that the witness was not a credible person, and to employ that proof of unreliability to the evidence he had given in chief. But by destroying that evidence you do not prove its opposite. If by cross-examination to credit you prove that a man's oath cannot be relied on, and he has sworn that he did not go to Rome on May 1, you do not, therefore, prove that he did go to Rome on May 1; there is simply no evidence on the subject. [At p. 21.]

Both *Steinberg* and *Hobbs* were cited with approval by this court in *R. v. Tessier* (1997) 113 C.C.C. (3d) 538 at 553; see also *Walton v. Alberta (Securities Commission)* 2014 ABCA 273, I've to app. dism'd. [2014] S.C.C.A. No. 476, where the Court stated that "[i]t is an error for a tribunal to turn disbelief of a particular witness into positive proof of the opposite proposition." (At para. 36.) Citing *R. v. O'Connor* (2002) 62 O.R. (3d) 263 (C.A.), the Court in *Walton* added that while a witness's evidence on a particular point may be disbelieved, some positive evidence is needed to prove the contrary.

[21] The trial judge in the case at bar did make a positive finding, however, that the defendant had been travelling too fast when the "wobble" began. There was no direct evidence of this: the plaintiff testified the defendant had been going about 80 km/h and when asked whether the defendant was going "too fast or too slow", he said, "No, not at all." He said the speed had seemed "reasonable under the circumstances" and later in his testimony, said the defendant "seemed to drive absolutely correct." The defendant estimated his speed at between 85 and 90 km/h.

[22] On one reading of her reasons, the trial judge seems to have concluded that the defendant was travelling too fast because he had gone off the road - reasoning that comes perilously close to an application of *res ipsa loquitur*. On the other hand, it may be that she inferred as a matter of fact that the truck and trailer had been proceeding too quickly in all the circumstances. This inference was open to her, although again, given the sunny and dry conditions, the lack of any finding of improper loading and the absence of any expert evidence, any such inference would necessarily be a very weak one. Further, it would be undermined by the fact that the trial judge was incorrect in saying the defendant had not

testified he reduced his speed: see para. 23 of the reasons, quoted above at para. 3.

- [23] If one assumes a prima facie case of negligence was made out, the onus would have shifted to the defendant to provide an explanation of how the accident "may have occurred" without his negligence, as the trial judge acknowledged at para. 63. However, she characterized the explanation offered by the defence - that the trailer had suffered a flat tire and it had caused the 'wobble' and loss of control - as 'speculative' because there was no evidence other than that "the trailer, when it finally landed had a deflated tire." (At para. 63.)
- [24] It is true, of course, that an "explanation" offered to overcome a prima facie inference of negligence must not be merely "speculative" and in this sense should be "reasonable": see Fontaine at para. 24. But as Mr. Ritchey argued, the possibility that a flat tire on the trailer caused the "wobble" that then led to the defendant's loss of control in this case is no less reasonable than the possibilities that were raised by the trial judge in Fontaine and found by the Supreme Court to be "adequate to neutralize whatever inference the circumstantial evidence could permit to be drawn." Here, the inference is grounded in specific and uncontroverted evidence and may provide an explanation for why the trailer suddenly began 'snaking'. As such it would be sufficient to negate any prima facie evidence of negligence that may have arisen in this case. As observed in Fontaine at para. 24, the strength of the explanation required "will vary in accordance with the strength of the inference [of negligence] sought to be drawn by the plaintiff."
- [25] Difficulties also arise with respect to the finding that a prima facie case of negligence was made out by virtue of a contravention of s. 7.07(3) of the Motor Vehicle Act Regulations. Quite apart from the fact that the regulation was not pleaded, the imposition of liability in negligence by virtue of a breach of the regulation would effectively amount to an application of strict liability. As stated in *Ryan v. Victoria (City)* [1999] 1 S.C.R. 201 at para. 29, a statutory breach does not automatically give rise to civil liability.
- [26] We were not referred to any particular policy or legislative framework that would suggest that a breach of the regulation was intended to create a presumption of negligence. Common sense would suggest that the intention of s. 7.07(3) was simply to ensure that if a vehicle being towed "swerves unreasonably", the driver should immediately get off the road or stop. The defendant's evidence was that his truck began snaking "more or less suddenly", that he pulled it back into his own lane, applied his brakes gently (so that he would not lose control) and "the next thing you know, we are over the bank." He agreed the entire event took place over 200 yards at most. Again, there was no expert evidence to the effect that the defendant should instead have applied his brakes suddenly and strongly in the circumstances.

Disposition

[27] In the result, I conclude with respect that the trial judge erred in fact in proceeding on the basis that the defendant did not testify that he had slowed his vehicle when it began to wobble; and in failing to engage in a proper analysis of causation. Nor did she explain how the speed of the defendant's vehicle or how his failing to check his side mirrors caused or contributed to the mishap. Further, if an inference arose on the facts of this case that the defendant was driving too fast in all the circumstances, the judge was clearly wrong in rejecting the possibility that the mishap may have been the result of the flat tire on the trailer. She also erred in law in proceeding on the basis that the defendant violated s. 7.07(3) of the regulation and was therefore negligent as a matter of law.

[28] I would allow the appeal and set aside the trial judge's order.

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Madam Justice MacKenzie"

I AGREE:

"The Honourable Mr. Justice Harris"

[1] The judge cited Reg. 116/2015 but the correct citation appears to be Reg. 26/58.

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Prepared on 29 October 2026 · Esheria