

CANADA / JUDGMENT

L'Heureux v. Eustache

2003 BCSC 347

COURT

British Columbia Court of Appeal

DECIDED

6 March 2003

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2003BCSC0347

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: L'Heureux et al v Eustache et al v British Columbia (Insurance Corp.),
2003 BCSC 347
Date: 20030306
Docket: 30553
Registry: Kamloops

Between: Chantelle L'Heureux, an Infant by her Guardian Ad Litem, Roger L'Heureux and the
said
Roger L'Heureux
Plaintiffs
And
Calvin Eustache and Barbara May Morin
Defendants
And
Insurance Corporation of British Columbia
Third Party
Before: The Honourable Mr. Justice Lamperson

REASONS FOR JUDGMENT

Counsel for the Plaintiffs

D. Dley

Counsel for the Defendant, Barbara May Morin and the Third Party

C. Gotuaco

Date and Place of Trial/Hearing:

February 28, 2003

Kamloops, B.C.

- [1] The defendant Mrs. Barbara May Morin applies under Rule 18A to have the plaintiffs' action against her dismissed with costs.
- [2] This litigation arises from a motor vehicle accident that occurred on April 13, 1996, on Highway No. 5 near Heffley Creek, British Columbia, when the car owned by the defendant Morin and driven by the defendant Calvin Eustache collided with a vehicle in which the plaintiff was a passenger.
- [3] The issues are:
- (a) Whether the defendant Morin gave express or implied consent for the defendant Eustache to drive her car; and if not,
- (b) Whether she was negligent in failing to take steps to have her vehicle returned to her forthwith after she realized that her husband had taken it without her consent.
- [4] Mr. Gerry Morin, the defendant's husband works in Louis Creek which is approximately a 40 minute drive from their residence in Kamloops. When leaving for work early in the morning on April 13, 1996, he discovered that his pickup truck would not start. Consequently, he took his wife's car. She was asleep at the time and had no knowledge of this until she awoke some time around 10:30 or 11:00 a.m. She assumed that her husband had taken the car, but she did nothing despite their understanding that he was not to drive it.
- [5] After Gerry Morin finished work, he started drinking with friends and relatives in the Louis Creek area. Realizing that he was very drunk, he decided to have his friend, the defendant, Eustache, drive him home. Unfortunately, it turned out that Eustache was also drunk at the time of the accident.
- [6] Gerry Morin has an alcohol problem and a criminal record for impaired driving. It is for that reason that the defendant Morin does not allow her husband to drive her car. Both understood this. The only time that he is permitted to drive her car is when they are on holidays together and she is a passenger. Both have stated under oath that she would have neither granted him permission to drive the car on the day in question nor would she have allowed a third person to drive it. The evidence in this regard comes from excerpts of the defendant's examination for discovery and from an affidavit of Gerry Morin who was cross-examined thereon. Their evidence is clear, namely that he was not allowed to drive her car. The plaintiff has adduced no evidence to contradict them.
- [7] Section 86(1) of the Motor Vehicle Act, R.S.B.C. 1996, c. 318, reads as follows:
- 86 (1) In an action to recover loss or damage sustained by a person by reason of a motor vehicle on a highway, every person driving or operating the motor vehicle who is living with and as a member of the family of the owner of the motor vehicle, and every person driving or operating the motor vehicle who acquired possession of it with the consent, express or implied, of the owner of the motor vehicle, is deemed to be the agent or servant of that owner and employed as

such, and is deemed to be driving and operating the motor vehicle in the course of his or her employment.

[8] Because Mr. and Mrs. Morin constitute a family, it can be argued that s. 86 deems Mr. Morin to be an agent or servant of Mrs. Morin insofar as the car is concerned. However, it does not necessarily follow that such a finding extends the owner's liability for torts committed by a third person who is driving the car. The test in this regard was discussed by Braidwood J.A. in *Godsman v. Peck*, [1997] B.C.J. No. 377 (C.A.) as follows:

[26] The appropriate test that must be applied whenever the issue of implied consent is to be considered pursuant to s. 79(1) [now s. 86(1)] of the Motor Vehicle Act is that approved by the Supreme Court of Canada in *Palsky v. Humphrey*, *supra*, at 662:

It seems to me that consent can be implied because it is clear that had it been sought it would have been granted as a matter of course.

[27] In concluding whether or not the test is met in the circumstances of a case of that sort (where the vehicle was driven by a third party), an important and relevant consideration is whether or not the evidence supports the conclusion that, at the time the motor vehicle was loaned to the original driver, the owner granted possession of it under circumstances that clearly show that it was acquired with both the willingness and the expectation on the owner's part that it would be driven by a third person. I agree with Verchere J. in *Hartley v. Saunders*, *supra*, at 469, where he says:

On the question of implied consent to some person other than the actual borrower operating a motor vehicle, the owner's expectation and willingness to operation by another are material factors to be considered.

[28] There should be evidence to show, or support the inference, that the owner turned his mind to the likelihood of that further transfer of possession. If there is no such evidence, a court finding liability on the owner's part is not implying consent so much as deeming it. One of the commendable goals of s. 79(1) may be to induce owners of motor vehicles to exercise discretion when transferring control of them to others, but to impose liability in a case where such a transfer was not within the contemplation of the owner would do nothing to further that goal, and simply goes too far.

[29] The concept of consent, even though it be implied, is not satisfied by general evidence of willingness that another may drive. Willingness is an attitude that must be crystallized by an expectation that another will drive. For general willingness to amount to consent, certain specific circumstances must be within the owner's contemplation. These are the circumstances expected to arise in which possession may be transferred to a third person, and in which the owner would be willing for such a transfer to occur. This willingness and expectation must be in the owner's mind at the time when the vehicle is transferred to the original borrower.

- [9] It was well understood by Mr. and Mrs. Morin that he was not permitted to drive her car. Under those circumstances, it cannot be said that there was both a willingness and expectation on her part that a third person would drive the car. To satisfy the test, the plaintiff must prove both willingness and an expectation. One without the other is not sufficient to meet the test. The plaintiff has not met the burden of proof imposed upon him with respect to either of the two elements of the test.
- [10] In the alternative, the plaintiff asserts that the defendant Morin was negligent in not taking steps to retrieve her vehicle from Louis Creek after she realized that her husband had taken it. The basis of the argument is that she ought to have known that he would likely drive while impaired by alcohol.
- [11] It seems to me that to find the defendant liable in the circumstances of this case would be extending the law of negligence too far. The following comments by Professor Klar referred to by Seaton J.A. in *Schulz v. Leaside Developments Ltd. et al* (1978), 90 D.L.R. (3d) 98 at 100 (B.C.C.A.) leave to appeal to S.C.C. refused is apropos to the circumstances of this case:

The basis of negligence law is that there should be compensation owing to plaintiff by defendant only when the conduct of the defendant can be categorized as substandard, objectively speaking. This is not to say that people who are victimized by non-negligent conduct should not be compensated by society. It is not an argument for social injustice. Rather, the point is that, if a choice has been made that compensation will be awarded to a person victimized by another's unreasonable conduct and that this compensation will be effected by the law of negligence, then there must be reasonable adherence to the law of negligence and its requirements for a successful action. Trying to overload the law of negligence by attempting to achieve, through it, a system of economic and efficient loss distribution, without regard to causation or fault, discredits the law of negligence and also fails to achieve the goal of effective loss distribution. If society wishes to choose the goal of efficient and economical loss distribution as its primary goal in the area of compensation for personal injury claims, then the tort law system of fault is the wrong mechanism.

- [12] It follows from my comments that the application of the defendant is allowed with costs.

"G.W. Lamperson, J."

The Honourable Mr. Justice G.W. Lamperson

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Prepared on 29 October 2026 · Esheria