

CANADA / JUDGMENT

Nasser v. Haugland

2021 BCCA 212

COURT

British Columbia Court of Appeal

DECIDED

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2021 BCCA 212 Nasser v. Haugland COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Nasser v. Haugland, 2021 BCCA 212 Date: 20210601 Dockets: CA46091; CA46094; CA46102; CA46105 Docket: CA46091 Between: Kodi Esame Nasser Appellant (Plaintiff) And Ross Alexander Haugland and Norquip Services Ltd. Respondents (Defendants)

- and - Docket: CA46094 Between: Nayif Esame Nasser Appellant (Plaintiff) And Ross Alexander Haugland and Norquip Services Ltd. Respondents (Defendants)
- and - Docket: CA46102 Between: Peter Craig Torrie Appellant (Plaintiff) And Ross A. Haugland and Norquip Services Ltd. Respondents (Defendants)
- and - Docket: CA46105 Between: Suzanne Angela Roffey Appellant (Plaintiff) And Ross Haugland and Norquip Services Ltd. Respondents (Defendants) Before: The Honourable Chief Justice Bauman The Honourable Madam Justice Fenlon The Honourable Mr. Justice Butler On appeal from: An order of the Supreme Court of British Columbia, dated April 17, 2019 (Nasser v. Roffey, 2019 BCSC 1263, Vancouver Dockets M156403, M156404, M186191, M189258). Counsel for the Appellants, appearing via videoconference: R. Dalziel, Q.C. T. Bant Counsel for the Respondents, appearing via videoconference: K. Armstrong, Q.C. K. Naish Place and Date of Hearing: Vancouver, British Columbia March 3, 2021 Place and Date of Judgment: Vancouver, British Columbia June 1, 2021 Written Reasons by: The Honourable Madam Justice Fenlon Concurred in by: The Honourable Chief Justice Bauman The Honourable Mr. Justice Butler Summary: The respondent had been ill with bronchitis. While driving to work, the respondent suffered a coughing fit and lost consciousness. The vehicle then collided with two other vehicles. The appellants were injured in the collisions and sought damages in negligence. The trial judge found the respondent had lost consciousness almost immediately after starting to cough and could not have avoided the collision, deeming it an inevitable accident. The appellants challenge the judge's finding that the respondent had not breached the standard of care by choosing to drive despite still feeling unwell, and his finding that the respondent had no time to react before losing consciousness. Held: Appeal allowed; new trial ordered. The trial judge misapprehended the evidence in concluding that a critical witness's testimony varied significantly between chief and cross. Reasons for Judgment of the Honourable Madam Justice Fenlon:

Background

- [1] For more than ten years before the car accident underlying this appeal, the appellant Peter Torrie and the respondent Ross Haugland commuted to work together. They shared the driving; Mr. Haugland drove the company pickup truck to work, and Mr. Torrie drove home.
- [2] In December 2013, Mr. Haugland was off work for a few days with a bout of bronchitis. He was still feeling unwell the following week when he started back to work, so asked Mr. Torrie to drive both ways. On Monday the next week, Mr. Haugland resumed their usual pattern and drove to work. He did so again on the morning of Tuesday, December 17. Five minutes into their commute, Mr. Haugland started to cough and lost consciousness. The truck continued accelerating into the next intersection, forcefully rear-ending the car driven by the appellant Suzanne Roffey before striking the pickup truck driven by the appellant Nayif Nasser, in which the appellant Kodi Nasser was a passenger. All of the appellants were injured--some seriously. They sued in negligence, seeking damages. Mr. Haugland acknowledged that he had caused the accidents but denied liability on the basis that what had occurred was an "inevitable accident."
- [3] Following a three-day trial to determine liability, the judge accepted the inevitable accident defence. The judge found Mr. Haugland had become unconscious after coughing once and that there was nothing he could have done to prevent or avoid the accident. The judge concluded Mr. Haugland was not liable for the injuries caused and dismissed the appellants' claims.

Issues

- [4] The appellants contend that order should be set aside because the judge:
1. Erred in finding that Mr. Haugland did not breach the standard of care when he decided to drive on the day of the accident, knowing he was still unwell; and
 2. Misapprehended the evidence of Mr. Torrie and, as a result, rejected his testimony that Mr. Haugland coughed repeatedly for 10 to 15 seconds before becoming unconscious and had time to brake or pull over before the accident.

Analysis

1. Did Mr. Haugland breach the standard of care by deciding to drive when he was still unwell?
- [5] The appellants submit the accident was not inevitable because Mr. Haugland knew he was too unwell to drive safely and was negligent in getting behind the wheel that day. They point to Mr. Haugland's evidence that he was "definitely not 100%" and that "every cough still hurt" because he had been coughing so much that his ribs and stomach were sore. The appellants contend the judge erred because he did not ask whether it was reasonably foreseeable that Mr. Haugland's illness and coughing could interfere with his ability to safely operate a motor vehicle, focusing instead on whether Mr. Haugland's condition had improved.

- [6] I would not accede to this ground of appeal. I see no error in either the judge's articulation of the standard of care or its application to the facts of this case. The judge instructed himself on the high bar a defendant must clear to establish the defence of inevitable accident, citing, among other cases, *Calvert v. Gauthier*, 1991 CanLII 1010 (B.C.S.C), in which a defendant with diabetes suffered a hypoglycemic reaction that caused a head-on collision. The judge noted that the defendant in *Calvert* did not discharge the burden upon her to show that she took the necessary precautions to avoid the possibility of the events unfolding as they did. He recognized that there is a high standard of care imposed on a driver relying on inevitable accident, saying:
- [56] there is an understandable policy rationale for imposing a high burden of proof on a defendant who asserts inevitable accident as a defence. This is because the care and operation of a motor vehicle is entirely under the driver's exclusive control. Mr. Haugland must prove that the Accidents could not have been prevented by reasonable care on his part.
- [7] The judge then reviewed a number of cases in which drivers were found to be negligent despite a loss of consciousness: *Perry v. Banno* (1993), 80 B.C.L.R. (2d) 351 (S.C.); *Whitmore v. Arens*, 1999 CanLII 7028 (B.C.S.C); *Holt v. Rother*, 2013 BCSC 1065; and *Leahy v. Beaumont*, (1981) 27 SASR 290. Those cases involved pre-existing health conditions and/or probable causes of the accident other than a sudden loss of consciousness. The judge then said:
- [61] Turning to the facts of this case, Mr. Haugland had no history of losing consciousness. On the day of the Accidents, he had a cold and bronchitis, but during the three days prior to the Accidents, he was feeling better than he had been in the previous weeks. Mr. Haugland recalls that he felt better. His wife testified that he was better over the weekend of December 14 and 15, 2013. Mr. and Mrs. Haugland both recall that he drove to a company Christmas party over that weekend. Mr. Haugland also drove his children to hockey games and practices over that weekend. Mr. Torrie confirmed that on the day of the accident Mr. Haugland looked better than he had appeared the previous week.
- [62] Mr. Haugland recalls, and checked his records to confirm, that he worked on the day before the Accidents. I accept Mr. Haugland's evidence that he worked on December 16, 2013, the day before the accidents, and that on that day he drove at least one way to work and possibly both ways given that Torrie does not recall carpooling with him on this day.
- [63] Taken together, the evidence establishes that on December 17, 2013, Mr. Haugland was feeling better, albeit not 100% healthy, and that he had driven for at least three days before the day of the Accidents without any problems or incidents. There is, therefore, no reasonable basis to suggest that Mr. Haugland should not have been driving on December 17, 2013. I reject the argument that Mr. Haugland was negligent by driving to work on the day of the Accidents. [Emphasis added.]

- [8] The judge's conclusion--that there was nothing about Mr. Haugland's health to put him on notice that his ability to drive safely could have been affected--is supported by his findings of fact.
2. Did the judge misapprehend Mr. Torrie's evidence?
- [9] As I have noted, the cause of the accidents is not controversial. The main issue for the judge was determining when Mr. Haugland lost consciousness. Was it, as Mr. Haugland claimed, immediately following his first cough? Or was it, as Mr. Torrie testified, after coughing for 10 to 15 seconds? This was a critical finding of fact because, as the judge observed:
- [57] There is no doubt that until the moment of unconsciousness a conscious coughing driver is held to the same standard as any other driver. This conscious coughing driver is expected to take reasonable steps, such as slowing down or pulling over, if their coughing is affecting their ability to drive safely. This is consistent with the oft-cited case of *Roberts v. Ramsbottom*, [1980] 1 W.L.R. 823 (Eng. Q.B.) at 832, in which the court said: The driver will be able to escape liability if his actions at the relevant time were wholly beyond his control. The most obvious case is sudden unconsciousness. But if he retained some control, albeit imperfect control, and his driving, judged objectively, was below the required standard, he remains liable.
- [10] The judge assessed the conflicting evidence of Mr. Haugland and Mr. Torrie in the following passages, concluding that Mr. Torrie's description of events varied during his testimony:
- [64] Turning now to the events of December 17, 2013, Mr. Haugland says that after the light turned green at the intersection of King George Highway and 26th Avenue, he drove through the intersection, and then shortly thereafter he coughed once, was about to cough again, then lost consciousness. His evidence is that he had no opportunity to take steps to prevent the Accidents because he remained unconscious until a moment before the collision with the Nasser Vehicle at the intersection of King George Highway and 152nd Street.
- [65] Mr. Torrie does not specifically recall stopping at a red light at the intersection of King George Highway and 26th Avenue, but agrees that Mr. Haugland began coughing shortly after they drove through that intersection. As discussed earlier, Mr. Torrie's evidence on the timing of what happened in the 10 to 15 second period he described varied from his direct examination to his cross-examination. [Emphasis added.]
- [11] The judge had earlier summarized Mr. Torrie's evidence, saying:
- [31] On direct examination, Mr. Torrie says that Mr. Haugland lost consciousness a few hundred yards and 10 to 15 seconds after he started coughing. Mr. Haugland drove normally when he started coughing and was driving close to the speed limit. He also recalls that Mr. Haugland raised his arm and coughed into it. Mr. Torrie says that he could have stopped or pulled over while coughing during this period.

- [32] On cross-examination, Mr. Torrie provided a markedly different description of what happened in the 10 to 15 second period. He agreed that during this period: · Mr. Haugland started to cough, covering his mouth and face with his right arm while holding the steering wheel with his left arm; · Mr. Torrie being concerned that Mr. Haugland was coughing on him; · Mr. Torrie calling his name and asking him something like, "Are you all right?"; · Mr. Haugland] being non-responsive verbally and nonverbally; · Mr. Torrie suspecting Mr. Haugland to be incoherent; · Mr. Haugland's] vehicle veering to the left; · Mr. Torrie grabbing the steering wheel; and · Mr. Haugland's vehicle rear-ended the Roffey Vehicle. [Underline emphasis added; italic emphasis in original.]
- [12] Ultimately, the judge concluded that both men gave credible accounts of the events preceding the accident but found Mr. Torrie's evidence to be less reliable than Mr. Haugland's because of Mr. Torrie's "shifting recollection of what happened during the relevant 10 to 15 second period": at para. 68.
- [13] The appellants face a significant hurdle in convincing this Court that the appeal should be allowed on the basis of a palpable and overriding error in the assessment of evidence. An appellate court is not entitled to re-weigh evidence and make its own findings of fact. If findings of fact were open to the trial judge on the evidence, they should not be disturbed: *Agar v. Weber*, 2014 BCCA 297:
- [36] It is trite law that factual determinations, whether from findings of fact or from reasonable inferences drawn from proven facts, are entitled to a high degree of deference, absent a palpable and overriding error. Such findings are only palpably wrong if they cannot be "reasonably supported by the evidence": *H.L. v. Canada (Attorney General)*, 2005 SCC 25 at para. 74.
- [14] The reluctance of appellate courts to interfere with a trial judge's findings is heightened where credibility and reliability are being assessed. As the Supreme Court of Canada said in *Beadouin-Daigneault v. Richard*, [1984] 1 S.C.R. 2 at 8-9: [T]he rule is clear with regard to findings based on the credibility of witnesses: an appellate court should not intervene unless it is certain that its difference of opinion with the trial judge is the result of an error by the latter. As he had the benefit of seeing and hearing the witnesses, such certainty will only be possible if the appellate court can identify the reason for this difference of opinion, in order to be certain that it results from an error and not from his privileged position as the trier of fact. If the appellate court cannot thus identify the critical error it must refrain from intervening, unless of course the finding of fact cannot be attributed to this advantage enjoyed by the trial judge. [Emphasis added.]
- [15] I begin by noting that this is not a case in which there is no evidence to support the judge's finding that Mr. Haugland coughed once and then fell unconscious. Although there was no medical evidence supporting the likelihood of such an event occurring (which is generally expected in cases of this kind), there was nonetheless Mr. Haugland's evidence and the evidence of his wife, who testified that her husband had experienced three similar incidents

in the days following the accident. Rather, it is contended that the judge erroneously understood Mr. Torrie to have markedly changed his evidence from one part of his testimony to another.

- [16] With great respect to the judge, I conclude that he did misapprehend the evidence. Six of the eight examples of variations identified by the judge in Mr. Torrie's cross-examination were, in fact, consistent with what Mr. Torrie had earlier stated in his examination in chief. To the extent the judge considered that the timing of events described by Mr. Torrie had changed, in my view, a careful reading of Mr. Torrie's testimony does not support that conclusion.
- [17] First, the judge identified Mr. Torrie's evidence in cross-examination that "Mr. Haugland started to cough, covering his mouth and face with his right arm while holding the steering wheel with his left arm" as one difference; however, in his evidence in chief, Mr. Torrie said Mr. Haugland had started coughing at the light at 26th and King George Highway, a "pretty nasty cough". He then continued: A And he coughed on for 10, 15 seconds, I believe, at least, and started coughing it was kind of a violent chesty cough, leaning towards me in the passenger seat, coughing into his arm as well, [Emphasis added.] Because Mr. Torrie was consistent that the whole episode from start to loss of consciousness was 10-15 seconds of coughing, the statement: "and started coughing leaning towards me" referred to that period; he was, in effect, saying, "when he started coughing"--and could not be understood to be describing a second sequence of coughing at the end of the first 15 seconds.
- [18] Second, the judge referred to Mr. Torrie "being concerned that Mr. Haugland was coughing on him" as something raised for the first time in cross-examination. But Mr. Torrie, in his evidence in chief, said: Q Were you watching Mr. [Haugland] the whole time during his coughing fit? A Yes. Q And why were you watching him? A When he was coughing, he actually turned towards me as well while coughing and I -- into his -- side to his arms. I was sort of shying off a bit, there's someone coughing at you
- [19] Third, the judge identified Mr. Torrie as having given two markedly different descriptions of what had occurred after Mr. Haugland appeared to lose consciousness. In cross-examination, Mr. Torrie said he had grabbed the steering wheel after Mr. Haugland's vehicle had veered to the left. However, in his evidence-in-chief, Mr. Torrie gave the same evidence, saying: Q Okay. What happened after Mr. [Haugland] appeared to lose consciousness? A When he was coughing quite badly, he stopped coughing, right then as I'm watching him and looking ahead to the traffic, the vehicle was moving a little out of our lane, a foot going into the oncoming traffic, I leaned over and held the wheel. And we bumped the car, rear-ended the car
- [20] Fourth, the judge noted Mr. Torrie's evidence on cross-examination that Mr. Haugland's vehicle had "rear-ended the Roffey vehicle," which was a car (the Nasser vehicle was a truck). But again, in-chief, Mr. Torrie described striking the car, saying: A And we bumped the car, rear-ended the car, first impact, ahead of us. My hand kind of came off the wheel and I kind of looked at the car, and then the truck.

- [21] In fairness to the judge, he did not have the transcript of Mr. Torrie's evidence that is now before the Court. Mr. Torrie's manner of speaking could be described as choppy and disjointed, in particular when contrasted with Mr. Haugland's manner of speaking in clear and crisp sentences. But it cannot be said that Mr. Torrie's evidence about what happened varied markedly from chief to cross.
- [22] That this misapprehension was material is apparent from a review of the reasons for judgment. The rejection of Mr. Torrie's evidence underpins the central finding that Mr. Haugland became unconscious after one cough and therefore had no time to brake or pull over to avoid an accident.
- [23] In addition, the judge assumed that Mr. Haugland could have continued to cough after he lost consciousness, saying:
- [66] Crucially, when Mr. Torrie was asked if Mr. Haugland was conscious while coughing, he said that he does not know if Mr. Haugland was conscious, but he assumed he was because he was coughing. He says that the more Mr. Haugland coughed, the more his eyes closed and he could not determine when he lost consciousness. Mr. Torrie could be correct that Mr. Haugland coughed for 10 to 15 seconds, some of which could have been after he had lost consciousness. Mr. Torrie agrees that Mr. Haugland lost consciousness but does not know when this happened. There is no medical evidence to suggest that only a conscious person coughs. It is possible that Mr. Haugland lost consciousness but continued to cough such that Mr. Torrie misinterpreted the coughing as an indication that Mr. Haugland was still conscious. [Emphasis added.] The difficulty with this assumption is that, as the judge noted, there was no medical evidence to support it. That absence of evidence should not have weighed in favour of Mr. Haugland's version of events, as it was he who bore the onus of proving that he was unconscious after one cough. In other words, it was not up to the plaintiffs to establish whether an unconscious person can cough.
- [24] Finally, the judge did not accept Mr. Torrie's evidence that Mr. Haugland had lifted his arm and coughed into it shortly before losing consciousness "given Mr. Torrie's varying recollection"--a misapprehension which I have already addressed--and because "it may have been Mr. Haugland tensing before coughing, or it may have been an involuntary movement after he lost consciousness.": at para. 67. Again, with respect, the supposition that an unconscious person can lift their arm is entirely speculative. There was no medical evidence to support the judge's attempt to reconcile the conflicting descriptions of events in this way.
- [25] I note that courts have routinely cautioned against accepting a defendant's claim that a collision occurred because they suddenly lost consciousness in the absence of "adequate medical evidence": *Sportun and Sportun v. Murphy and Smith*, [1955] 2 D.L.R. 248 (Ont. C.A.); *Moses v. Winder*, [1981] R.T.R. 37 (Eng. Q.B.). Mr. Haugland attempted to lead evidence from his family doctor about "cough syncope" to explain his sudden loss of consciousness, but the judge quite rightly excluded that evidence--as the family doctor readily acknowledged, he was not an expert in respirology or other areas of medicine that might

explain the mechanism of cough syncope or the likelihood of such an event occurring after one cough.

- [26] The appellants submit that if the judge's rejection of Mr. Torrie's evidence is unsound, this Court should substitute its own finding that Mr. Haugland has not proved that he lost consciousness after one cough. I would decline to do so. In my view, this Court is not in a position to weigh the competing versions of events and to substitute our own finding on this critical question. We have not had the advantage of seeing Mr. Haugland and Mr. Torrie testify and are left with the judge's finding that both witnesses were credible. In these circumstances, I agree with the respondents that the proper remedy is to order a new trial.

Disposition

- [27] I would allow the appeal, set aside the order, and remit the matter to the trial court for rehearing. "The Honourable Madam Justice Fenlon" I AGREE: The Honourable Chief Justice Bauman I AGREE: "The Honourable Mr. Justice Butler"

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