
CANADA / JUDGMENT

Passerin v. Webb

2018 BCSC 289

COURT

Supreme Court of British Columbia

DECIDED

28 February 2018

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2018 BCSC 289 Passerin v. Webb

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Passerin v. Webb,

2018 BCSC 289

Date: 20180228

Docket: 49386

Registry: Kamloops

Between:

Angelo Steven Passerin

Plaintiff

And

Devon Webb

Defendant

Corrected Judgment: The text of the judgment was corrected to rectify erroneous paragraph numbering as well as at paragraphs 81(a) and 81(b) where changes were made on March 13, 2018;

Before: The Honourable Mr. Justice Dley

Reasons for Judgment

Counsel for the Plaintiff:

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R.N. Beckmann

Place and Date of Trial:

Kamloops, B.C.

February 13-15, 2018

Place and Date of Judgment:

Kamloops, B.C.

February 28, 2018

Introduction

- [1] Angelo Passerin ("Mr. Passerin") suffered serious injuries when he was struck by a runaway snowmobile. The snowmobile had been operated by Devon Webb ("Mr. Webb") who had been thrown off the machine. The snowmobile travelled at least one kilometre across open terrain before it struck Mr. Passerin.
- [2] The issue is whether the collision was caused by Mr. Webb's negligence.
- [3] I conclude, that Mr. Webb is liable for the collision.

Background Facts

- [4] On March 21, 2013, Mr. Passerin, Mr. Webb and about eight others travelled to McBride, British Columbia in contemplation of snowmobiling the following day. Included in the group was Mr. Webb's sister, Sarah Webb, his father, Dave Webb and co-worker, Matt Masur. The group had snowmobiled together on previous occasions. They were of varying levels of experience and expertise. Mr. Webb was an experienced snowmobiler.
- [5] They spent the evening socializing and drinking. The next morning, they headed out to the Mount Renshaw area just north of McBride. After paying for their trail passes, they proceeded up a groomed logging road. They stopped at about the halfway point (18 km) and, several in the group, including Mr. Passerin had a beer. Mr. Webb was not interested in drinking - he had come to snowmobile.

- [6] There was a warming cabin at the top of the logging road, from which point onward, none of the terrain was groomed. The area was a popular alpine snowmobiling site with wide open mountainous terrain and access to bowls and saddles (a saddle is the terrain between two mountain peaks).
- [7] After their morning snowmobiling, the entire group gathered together and had lunch. Several of the group drank some beer. Mr. Passerin drank some vodka and cranberry juice from a miniature water bottle. Mr. Webb did not consume any alcohol.
- [8] After lunch, the group headed out with the intention of traversing into some lower bowls. Mr. Webb was looking for a route into some lower bowls that would be more accommodating for the lesser experienced riders. Mr. Passerin was some distance away.
- [9] Within 15 minutes after lunch, Mr. Passerin saw Sarah Webb standing on her snowmobile and waving at him. He saw that her machine was stuck in some deep snow on a side hill. Mr. Passerin stopped his unit, looked around and began to walk toward Ms. Webb so as to render assistance. He had gone about 10 feet, when he was struck by Mr. Webb's snowmobile. He did not hear it coming - nor did Sarah Webb.
- [10] Mr. Webb had been going uphill at half throttle when he unexpectedly encountered a snowdrift. He applied the brakes; his snowmobile pitched forward and down - tossing him off of the machine. The rider-less snowmobile travelled over a 100-foot cliff, climbed out of a 20-foot powdered ravine and raced at full throttle for 1 to 1.5 km until it struck Mr. Passerin. The snowmobile stopped as a result of colliding with Sarah Webb's nearby machine.
- [11] Mr. Masur had watched Mr. Passerin walking toward Sarah Webb. Mr. Masur was parked higher up and saw the unmanned snowmobile coming "wide open" and in a path toward Mr. Passerin and Sarah Webb. He tried to get their attention, but his shouts were not heard.
- [12] The group tended to Mr. Passerin until he was helicoptered away about three to four hours later.

Mr. Webb's Snowmobile

- [13] Mr. Webb's snowmobile was a 2012 Ski Doo 800. He had ridden at least 1300 km on the unit before the collision. Mr. Webb did all of the routine maintenance. On the day of collision, he had experienced no problems with its operation.
- [14] The machine was a pull start. In order to start the unit, a "key" specifically programmed for the particular machine was required. The key was a cap attached to a coiled tether cord. The cap fitted onto a post that was affixed to the engine. If the cap was not fitted onto the post properly, a message would alert the operator that there was an improper fit and the machine would not start. Detaching the cap from the post stopped the engine. The tether cord was to be attached to the operator's clothing so that if the rider fell off the machine, the cap would pull off the post and the snowmobile would stop. This was a safety function.

- [15] On the handle bar next to the throttle was a "kill switch" which when depressed, also stopped the engine. Mr. Webb used the kill switch to turn off the engine when he was stopped. Occasionally, while riding, Mr. Webb had accidentally hit the kill switch causing the machine to stop.
- [16] The snowmobile was powered by a throttle on the right handle bar. The throttle was a lever that was pressed by the operator's thumb in order to accelerate. The throttle was designed to spring back when pressure was reduced. If the throttle was released completely, the machine would come to a stop within 10 feet.

[17] When Mr. Webb bought the machine, there were warning labels attached which stated:

BEFORE STARTING:

1. Attach tether cord to your clothing.
2. Check proper operation of the throttle and brake levers each time before starting. They must return to their initial position when released.
3. Apply parking brake.
4. Turn handlebars all the way in both directions to check for interference and insure free operation.

AFTER STARTING:

1. Pull-out tether cord to check if engine shuts off.
2. Re-start and push in the emergency engine stop switch to check if engine shuts off.
3. Disengage parking brake before riding to avoid brake fading.

[18] Mr. Webb was aware of the warnings even though he had removed them when he installed new plastic on the machine. In spite of the warnings, it was not his practice to check the throttle or the tether cord.

[19] After the collision, Mr. Masur took photographs of the snowmobile. They show the tether cord and cap attached to the post, but the clip used to affix the cord to the operator's clothing was missing.

Negligence

[20] In order to succeed in a negligence action, the plaintiff must prove that:

- a) the defendant owed the plaintiff a duty of care;
- b) the defendant's behaviour breached the standard of care;
- c) the plaintiff suffered damage; and
- d) the damage was caused by the defendant's breach (the remoteness question).

Mustapha v. Culligan of Canada Ltd., 2008 SCC 27 at para. 3.

Did the Defendant Owe the Plaintiff a Duty of Care?

[21] The question as to whether Mr. Webb owed a duty of care to Mr. Passerin focuses on the relationship between the parties. If the relationship was such that it would be reasonable to say that the defendant owed a duty to take care not to injure the plaintiff, then the duty of care arises. The existence of such a relationship depends on foreseeability and considerations of public policy: Mustapha at para. 4.

[22] There was consensus from all witnesses that snowmobiling is a sport where riders fall from the machine or get stuck in the snow from time to time. According to various witnesses, falling off a snowmobile is part of the extreme nature of back-country snowmobiling as riders challenge their abilities by pushing to the next level.

[23] The comments of the Manitoba Court of Appeal in Assiniboine School Division No. 3 v. Hoffer et.al., [1971] M.J. No. 39 (C.A.) at para. 6 are apropos:

We come then to the preliminary question whether a duty of care was owed by the Hoffers to the plaintiff. The answer to this question must be in the affirmative. They had a machine of substantial size and weight, capable of high speed. They knew or should have known, that if the machine were released to careen riderless around the countryside, damage to the person or property of others would result. The case falls squarely within the "neighbour" principle enunciated by Lord Atkin in *Donoghue v. Stevenson* (1932) A.C., 562 at 580. The defendants Hoffer owed a duty to anyone whom they might reasonably anticipate would suffer loss if the machine were carelessly allowed to escape out of control.

[24] In addition to those in Mr. Webb's group, there were others snowmobiling in the same area. The Renshaw mountain area was open to the public. Common sense would dictate the need for the snowmobilers to watch out for others. That would require all operators to exercise proper care in maintaining control of their machines. I, therefore, conclude, that Mr. Webb owed a duty of care to Mr. Passerin.

Did the Defendant Breach the Standard of Care?

[25] Mr. Passerin alleges the following breaches of standard of care:

- a) Mr. Webb was travelling too fast when he fell and lost control of his snowmobile;
- b) Mr. Webb failed to follow his usual practice of accelerating when he encountered a snowdrift;
- c) Mr. Webb failed to engage the kill switch; or
- d) Mr. Webb failed to wear his tether cord.

- [26] Mr. Webb testified that he was travelling at about half speed up hill when he encountered the unexpected snowdrift. Although his evidence is not reliable in some material respects, there is insufficient proof to establish that his fall off the machine was caused by speed. Mr. Webb was nearing the top of the mountain, and he chose to apply the brakes rather than accelerate. He did not know what was beyond the crest of the mountain top and, rather than accelerate to the unknown, he chose what he thought was the safer option. Hindsight does not make his decision to brake any less reasonable than it was at the time. In any event, I am not satisfied that there is sufficient evidence to prove that the difficulties caused by the snowdrift were as a result of Mr. Webb travelling too fast.
- [27] I am satisfied that Mr. Webb's decision to brake rather than accelerate was reasonable under the circumstances.
- [28] Mr. Webb stated that he did not have time to hit the kill switch as he toppled over the snowmobile. I accept his explanation and particularly so given his belief that the primary safety mechanism for the snowmobile was the attachment of the tether cord. In those circumstances, where the operator was unable to hit the kill switch to turn off the motor, a fall from the machine would result in the engine stopping as the tether cord became disengaged from the post (assuming it was properly affixed to the rider). Therefore, I conclude that Mr. Passerin has not shown that Mr. Webb's inability to hit the kill switch was a breach of the standard of care owed to the plaintiff.
- [29] I do, however, conclude that Mr. Webb did not have the tether cord affixed to his clothing and that was a breach of the standard of care owed to Mr. Passerin.
- [30] Overall, Mr. Webb was an unreliable witness. His testimony was fraught with contradictions on material points. His testimony was so unreliable that I cannot accept his assertion that he had attached the tether cord to his clothing.
- [31] In his Notice of Civil Claim, Mr. Passerin outlined his allegations respecting Mr. Webb's negligence including that Mr. Webb had failed to connect the tether cord. In the Response to Civil Claim, under the Defendant's Version of Facts, the following was stated:
- b. while operating the snowmobile, the snowmobile suffered a sudden and unforeseeable mechanical failure, in that the snowmobile's throttle locked into full position, causing the Defendant to lose control of the snowmobile, and causing the Defendant to be thrown from the snowmobile.
- [32] Mr. Webb now concedes under oath that the throttle locking into the default position was not the cause of losing control of the snowmobile. The loss of control was caused as a result of encountering the snowdrift.
- [33] Mr. Webb explains that his memory is now better as to what occurred, and that his memory has gotten better over time. He attributes the improvement in his memory to having more time to consider what occurred and from speaking to others.

- [34] It is argued on his behalf, that the version of facts in the Response is not a sworn statement and that his testimony under oath is what should be considered. However, Mr. Webb has acknowledged that he provided his version of what occurred to counsel, and that he had reviewed the Response before it was filed.
- [35] Rule 3-3(2) of the Supreme Court Civil Rules, B.C. Reg. 168/2009 provide guidelines for the contents of a Response. The defendant must admit, deny or state that the plaintiff's alleged facts are outside his knowledge. Where a fact is denied, the defendant is to set out his version of that fact and set out any additional material facts that the defendant believes relates to the matters raised in the claim.
- [36] The contents of pleadings are not to be taken lightly. Pleadings provide the framework of the dispute between the parties. The alleged facts are an essential element of pleadings. Care must be taken to ensure that the facts, as pleaded, are accurate. If the facts as enunciated by a party are not to be taken seriously then the pleadings become rather meaningless.
- [37] Although the words as articulated in the Response may not be specifically those of Mr. Webb, they are nonetheless attributable to him. He provided the information as to what he says occurred. Even though counsel may have taken poetic license with respect to articulating the facts, the gist of what Mr. Webb described remains clear. Mr. Webb attributed his loss of control of the snowmobile to be caused by the sudden and unforeseeable locking of the throttle.
- [38] Mr. Webb's version of the events as described in the Response is akin to an out-of-court statement. It may not have the traditional trappings of a written and signed statement, or a video recording, but nonetheless it is Mr. Webb's description of the relevant events. An out-of-court statement is a factor to weigh along with all of the other evidence in determining an issue.
- [39] In the Response, Mr. Webb stated that the tether cord was properly connected to his jacket. At trial, Mr. Webb testified that the cord was attached to his pants. He explained that the difference as to where the cord was attached to his clothing was because he recollected that it was warm enough that he was putting his jacket on and off - it was thus easier to attach the cord to his pants.
- [40] At the Examination for Discovery, Mr. Webb testified that he had forgotten to re-attach the tether cord while having lunch. At trial, he said that he had not forgotten - he had simply not attached it. Mr. Webb explained that the reason for the different answers was because he did not understand the question at the Discovery. I do not accept that explanation. The question was easy to understand at the Discovery. I conclude that Mr. Webb understood the question and was responsive in his answer.

- [41] I have had the benefit of watching and listening to Mr. Webb while he gave evidence. He struck me as an intelligent and articulate man. If he did not understand the question, I infer that he would have told counsel that he did not understand. Counsel had invited him to advise if he did not understand questions.
- [42] At the Discovery, Mr. Webb said that he had no memory of re-attaching the tether cord to his pant loop. At trial, Mr. Webb said that he now had no doubt and was certain that he had hooked the tether cord because the pant loop had ripped.
- [43] At the Discovery, Mr. Webb said that after the collision, he saw the cap still attached to the post, but the cord was not attached. At trial, Mr. Webb said that the tether cord was attached to the cap and was stretched across the gas tank. Mr. Webb explained that his description at the Discovery was simply his recollection at the time.
- [44] Dave Webb confirmed the workings of the tether cord and the fact that when the operator falls off the snowmobile, the cord pulls the cap off the post. He agreed that the tether cord was a safety measure. Dave Webb said that his son wore the tether cord affixed to his clothing.
- [45] Dave Webb was adamant that the tether cord was wrapped around the handlebar when he saw it after the collision. It is not clear whether his observation of the cord being wrapped around the handlebar was made before or after Mr. Masur took the photographs.
- [46] I do not find Dave Webb's evidence to be helpful. He was not an objective witness. He was an eager advocate for his son. During cross-examination, he was argumentative and defensive. On the question as to whether he saw his son with the tether cord affixed to his clothing, I do not consider Dave Webb's evidence to have any reliable weight.
- [47] Mr. Webb also called his sister to testify. At her Discovery, Sarah Webb testified that she saw the tether cord "broken halfway". At trial, she said that she could not recall if she had looked at the cord. When confronted with the contradiction, she indicated that she did not remember much from that day.
- [48] Mr. Webb has conceded that he did not do the safety checks with respect to the throttle or the tether cord as set out by the manufacturer's warning. He saw no need to take those precautions even though his machine had been shut off for about 30 minutes. It is, therefore, unknown as to whether the safety checks would have revealed any issues with the throttle or the cap.
- [49] The failure to conduct the safety checks is not by and of itself a breach of the standard of care. However, the failure is a factor to consider as part of the overall evidence in deciding whether Mr. Webb did or did not have the tether cord properly affixed to his clothing in the minutes leading up to the fall from the snowmobile.

- [50] There may be a host of explanations relevant to why the tether cord clip was missing after the collision. Those explanations may include that the clip was broken prior to the fall, broken during the fall, broken while the machine careened about the mountain unmanned or broken when the machine collided with either Mr. Passerin or Sarah Webb's snowmobile. Those explanations are not exhaustive and amount to nothing more than speculation.
- [51] In coming to my conclusion that Mr. Webb did not have the tether cord properly affixed to his clothing at the time of the fall, I have rejected Mr. Webb's assertions that he was wearing the cord properly. I accept the evidence, that if the tether cord had been affixed to Mr. Webb's clothing, his fall from the machine would have likely caused the cap to pull off the post, thereby shutting off the engine. I have also drawn an inference from Mr. Webb's failure to do the safety checks after lunch, as an indication that he did not have much regard for safety measures.
- [52] I, therefore, conclude that Mr. Webb breached the standard of care.

Did the Plaintiff Sustain Damage?

- [53] It is not in dispute that Mr. Passerin sustained injuries. Accordingly, I conclude that Mr. Passerin sustained damage.

Was the Plaintiff's Damage Caused by the Defendant's Breach?

- [54] Mr. Webb argues that this was a freak accident and that the damage is too remote to be reasonably foreseeable. The question of remoteness is answered by an objective analysis. In *Mustapha*, the Court stated the test as follows:
- [12] The remoteness inquiry asks whether "the harm [is] too unrelated to the wrongful conduct to hold the defendant fairly liable" (*Linden and Feldthusen*, at p. 360). Since *The Wagon Mound* (No. 1), the principle has been that "it is the foresight of the reasonable man which alone can determine responsibility" (*Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co.*, [1961] A.C. 388 (P.C.), at p. 424).
- [13] Much has been written on how probable or likely a harm needs to be in order to be considered reasonably foreseeable. The parties raise the question of whether a reasonably foreseeable harm is one whose occurrence is probable or merely possible. In my view, these terms are misleading. Any harm which has actually occurred is "possible"; it is therefore clear that possibility alone does not provide a meaningful standard for the application of reasonable foreseeability. The degree of probability that would satisfy the reasonable foreseeability requirement was described in *The Wagon Mound* (No. 2) as a "real risk", i.e. "one which would occur to the mind of a reasonable man in the position of the defendan[t] ... and which he would not brush aside as far-fetched" (*Overseas Tankship (U.K.) [page121] Ltd. v. Miller Steamship Co. Pty.*, [1967] A.C. 617 (P.C.), at p. 643).

[55] It is not necessary that foreseeability precisely link together the individual aspects of an event. Foreseeability is established if one can generally foresee the class or character of the damage: *Millette v. Cote*, [1976] 1 S.C.R. 595 at p. 4.

[56] It would be apparent to a reasonable person standing in the shoes of Mr. Webb that if the tether cord was not fastened to his clothing and he fell from the machine, that the engine would continue running. If the tether cord had been properly affixed and the engine turned off when the cap became dislodged from its post, the throttle being stuck would have been immaterial. Proper use of the tether cord would have likely prevented damage to Mr. Passerin. It would not be far-fetched for a reasonable person to foresee that an unmanned and moving snowmobile was a real risk in an area frequented by other snowmobilers.

[57] I adopt the words of the Court in *Assiniboine* at para. 13:

The extent of the damage and its manner of incidence need not be foreseeable if physical damage of the kind which in fact ensues is foreseeable. In the case at bar I would hold that the damage was of the type or kind which any reasonable person might foresee.

[Emphasis added].

[58] I, therefore, conclude that Mr. Passerin's damage was caused by the defendant's breach of the standard of care as the damage was foreseeable and not too remote.

Contributory Negligence

[59] Mr. Webb argues that if he is found to be negligent, then fault should be apportioned at least 50% against Mr. Passerin. Mr. Webb argues that Mr. Passerin:

- a) failed to keep any, or, in the alternative, an adequate lookout; or
- b) was impaired by alcohol and/or drugs, and as a result, could not react or move in time to avoid the collision or avoid being injured by the collision.

[60] Mr. Webb argues that because Mr. Passerin was walking in an area where snowmobiles could be travelling, where it was not unusual for riders to fall from their machines, and that it was foreseeable that he might be struck by another snowmobile in such circumstances, he should have taken greater precautions.

[61] Mr. Webb also argues, that because Mr. Passerin consumed alcohol the night before the incident, had a beer in the morning, and an alcoholic drink during lunch, that his ability to react was impaired.

[62] The onus to prove contributory negligence lies with the defendant: *Ackley v. Audette*, 2017 BCCA 283 at para. 24.

[63] I conclude, that Mr. Webb has failed to discharge the onus of proof.

- [64] Mr. Passerin looked around before he started to walk toward Sarah Webb. Mr. Passerin was careful to watch where he was walking. Mr. Passerin had gone about 10 feet before he was struck.
- [65] Mr. Masur was parked higher up and had a bird's eye view of the event. He was shouting warnings that he knew were futile - not a "hope in hell" that his warning would be heard. He also knew that Mr. Passerin could not see the snowmobile because of a rise in the surrounding terrain. Mr. Masur saw Mr. Passerin turning just as the snowmobile struck him.
- [66] Neither Mr. Passerin nor Sarah Webb heard the approaching snowmobile. Sarah Webb did not see the snowmobile coming, nor did she see the collision.
- [67] The apportionment of fault is an assessment of the relative blameworthiness of the respective parties: *Aberdeen v. Langley (Township)*, 2007 BCSC 993 at paras. 58-63.
- [68] The standard of care required Mr. Passerin to be aware of his surroundings. He did that by looking around before he started to walk away from his snowmobile towards Sarah Webb. Mr. Passerin was being careful to watch where he was walking. He had only taken a few paces before being struck. Although Mr. Passerin does not recall doing so, Mr. Masur saw him turning just before the collision. That is an indication that Mr. Passerin was staying aware of his surroundings.
- [69] There was some drinking the night before. However, there is no evidence to establish that such drinking affected Mr. Passerin's decision-making on the day following.
- [70] Mr. Passerin also consumed a beer in the morning when the group stopped at the 18 km point of the access trail and a drink of vodka during lunch.
- [71] Without evidence to support the proposition, the mere fact that a person has been drinking does not automatically result in the assumption that impairment is the natural result. There is no evidence to establish that Mr. Passerin was impaired in any way. I cannot conclude that the limited consumption of alcohol affected Mr. Passerin's ability to react, observe or avoid the collision.
- [72] Mr. Passerin did not place himself into a position of danger or contribute to any creation of risk. He was acting reasonably and took the necessary precautions in all of the circumstances. I, therefore, conclude that Mr. Passerin's conduct was not a contributory cause of the collision.

The Rescuer Doctrine

- [73] If Mr. Passerin was a rescuer of Sarah Webb, the question arises as to whether she should bear some liability for his damage. I conclude that Sarah Webb is not liable under the rescuer doctrine.

- [74] A rescuer may be entitled to be compensated for his damage resulting from attempting to render assistance to another person: *Ray v. Bates*, 2015 BCCA 216 at paras. 14-17.
- [75] The first inquiry is whether Sarah Webb was negligent in the operation of her snowmobile when she became stuck and signaled for Mr. Passerin's assistance. If she was not negligent, then she was not a wrongdoer that put Mr. Passerin in peril.
- [76] Sarah Webb had been snowmobiling for a number of years. Although Mr. Passerin viewed her as a beginner, she described herself as an intermediate rider. Based on her experience, I agree with her assessment that she was more than a beginner.
- [77] There is no controversy that falls are a common experience for snowmobilers and becoming stuck in the snow is also not uncommon.
- [78] Dave Webb was an experienced rider. He was behind Sarah Webb when his sled rolled down the hill. There was no evidence to indicate that he was negligent or assuming a risk riding in the same area where Sarah had become stuck. I, therefore, infer that Sarah Webb had safely traversed into that area and was not venturing into an area that was beyond her capacity.
- [79] Sarah Webb became stuck in snow - as is common in snowmobiling of this type. There was no evidence to establish that she was in an area that was beyond her skill level or that she was negligent in her riding - it was just part of a snow mobile outing; it was not anything out of the ordinary.
- [80] Sarah Webb was not a wrongdoer and, accordingly, is not liable for any part of Mr. Passerin's damage.

Summary

- [81] For the reasons set out above, I conclude that:
- a) Devon Webb is liable for Mr. Passerin's damage;
 - b) Mr. Passerin is not contributorily negligent; and
 - c) Sarah Webb is not liable under the rescuer doctrine.
- [82] Mr. Passerin is entitled to costs. If there are any issues arising with respect to costs, any party may apply within 30 days.

"S.D. Dley J."

DLEY J.

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Prepared on 28 October 2026 · Esheria