

CANADA / JUDGMENT

Plante v. Mackenzie

2021 BCSC 2468

COURT

Supreme Court of British Columbia

DECIDED

20 December 2021

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2021 BCSC 2468 Plante v. Mackenzie

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Plante v. Mackenzie,

2021 BCSC 2468

Date: 20211220

Docket: M167686

Registry: Vancouver

Between:

Amira Nagi Plante aka Amira Nagem

Plaintiff

And

Corey Leigh McKenzie, Karey Clyne also known as Karey Plante and Minister of Public Safety and Solicitor General of British Columbia

Defendants

Before: The Honourable Madam Justice Iyer

Reasons for Judgment

Counsel for the Plaintiff:

S.E. Gibson

Counsel for the Defendant, Minister of Public Safety and Solicitor General of British Columbia:

R.M. Grist

M. McEachern

Place and Date of Trial:

Vancouver, B.C.

June 28-30, July 2, 5-8, and

November 22, 2021

Place and Date of Judgment:

Vancouver, B.C.

December 20, 2021

OVERVIEW

- [1] In the early morning of May 18, 2015, the plaintiff, Amira Nagem, was a passenger in a car driven by her husband, the defendant Karey Clyne, and owned by the defendant Corey-Leigh McKenzie. Ms. Nagem and Mr. Clyne were driving back to Burnaby after having driven to Kelowna the previous evening.
- [2] Mr. Clyne had borrowed the car from Mr. McKenzie, but another friend, Derrick Sutton, drove the car to Kelowna with Ms. Nagem and Mr. Clyne as passengers. They arrived in downtown Kelowna around 1 a.m. on May 18, and parked. Two RCMP officers encountered the group and, after investigating, found drugs in the car. They arrested all three for possession for the purposes of trafficking and took them to the RCMP detachment located nearby.
- [3] Ms. Nagem and Mr. Clyne were released shortly after 4 a.m. with the keys to the car. They drove towards Burnaby. Somewhere between Merritt and Abbotsford, Ms. Nagem fell asleep in the front passenger seat. Mr. Clyne was driving at about 180 km/h just outside Abbotsford when the car left the road, went down into the grass meridian, flipped and crashed ("Accident"). Ms. Nagem was badly injured.
- [4] There is no question that Mr. Clyne, as the driver, and Mr. McKenzie, as the car's owner, are liable for the Accident. The issue before me is whether the RCMP are also liable in negligence. Ms. Nagem claims that they are. She says that the RCMP owed her a duty of care when releasing her from custody, that they breached the standard of care, and that the breach caused or contributed to the injury she suffered in the Accident. The defendant Minister of Public Safety and Solicitor-General of British Columbia, representing the RCMP in this case ("Minister"), disputes her claims. The defendants Mr. McKenzie and Mr. Clyne did not respond to the notice of civil claim and did not appear. I was advised that a settlement had been reached with the third party.

- [5] Although the Minister initially claimed that Ms. Nagem was contributorily negligent, during closing submissions the Minister clarified that it was only raising this issue if I found the RCMP contributorily negligent.

ELEMENTS OF NEGLIGENCE

- [6] A negligence claim has four elements. First, the plaintiff must prove that the defendant owed them a duty of care. Second, the plaintiff must show that the defendant breached the standard of care. Third, the plaintiff must prove that they suffered damage. Fourth, the plaintiff must prove that the defendant's conduct caused, in fact, and in law, the plaintiff's injury: *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at para. 3.
- [7] The parties made extensive submissions on all of these issues. For the reasons that follow, I find that the RCMP did not owe Ms. Nagem a duty of care. It is therefore unnecessary to address the other elements of negligence.

DUTY OF CARE

Legal Principles

- [8] The legal principles that guide the identification of a duty of care are well established. The applicable analytical framework consists of three steps, often referred to as the Anns/Cooper test:
- a) Is there a precedent case establishing the existence or non-existence of a duty of care in circumstances sufficiently similar to this case?

If so, a duty of care exists. If not:

- b) Was the harm suffered by the plaintiff reasonably foreseeable and was the relationship between the plaintiff and defendant sufficiently proximate (i.e., close and direct) that it is just to impose a duty of care in such circumstances?

If not, there is no duty of care. If so, a prima facie duty of care arises:

- c) Are there any residual policy reasons for negating the prima facie duty of care?

If so, there is no duty of care. If not, a novel duty of care exists.

- [9] The plaintiff bears the burden of establishing the absence of a precedent and the existence of a prima facie duty. The defendant bears the burden of establishing any policy reasons for negating it: *Carhoun & Sons Enterprises Ltd. v. Canada (Attorney General)*, 2015 BCCA 163 at paras. 50-51; *Rankin (Rankin's Garage & Sales) v. J.J.*, 2018 SCC 19 at paras. 18-20 [Rankin].

Is there a Duty of Care in this Case?

The conduct in issue

- [10] Ms. Nagem claims that the RCMP were negligent in releasing her and Mr. Clyne from custody. While I heard a great deal of evidence about what occurred at the detachment, including video footage of the booking process, the following relatively uncontroversial facts are sufficient for the duty of care analysis.
- [11] Constable Celli was the arresting officer and was accompanied by Corporal Myhre at the time of the arrests.[1] During their search of the vehicle, they ran a check on its Saskatchewan license plate. They learned it was registered to Mr. McKenzie, and that it had not been reported stolen or taken without consent. They also ran a check on Mr. Sutton's driver's licence, as he was in the driver's seat of the car, and confirmed it was valid.
- [12] The officers found a number of illegal drugs in the car, along with a small scale, a collapsible baton and plastic bags, which they seized. They also seized a flip cell phone from Mr. Clyne's pocket. Cst. Celli and Cpl. Myhre found clothing, bags and blankets in the car as well as a plastic bag containing a large quantity of change. They left these items in the car. The officers took the keys and locked the car, leaving it legally parked on Leon Ave. They escorted Mr. Sutton, Ms. Nagem and Mr. Clyne individually to the detachment, which was located about three blocks away.
- [13] During the booking process, officers seized \$1,350 in cash from Ms. Nagem. Her other personal possessions, including jewelry, lighters, a wallet and \$34.40 in cash, were put in a locker and returned to her when she was released.
- [14] Ms. Nagem spoke to S/Sergeant Froehlich, a female officer who assisted with booking Ms. Nagem, and Sgt. Swecera, who was in charge of the cell block that night. She informed one or both of them that she was pregnant, that she had withdrawn the \$1,350 for the trip and the money was unrelated to the drug trafficking charges. She said that Mr. Clyne was her husband, that she did not have a driver's licence that the car was not hers, and that Mr. Sutton had been driving it.
- [15] Ms. Nagem asked Sgt. Swecera if she could have access to the phone that Cst. Celli had seized, saying that she had to get a phone number or numbers out of it. In response, Sgt. Swecera radioed Cst. Celli, who was processing the exhibits. Sgt. Swecera asked, "[she] wants to know if she can look at her cell phone for a number and she needs someone to drive the car." Cst. Celli did not permit Ms. Nagem to have access to the phone. Ms. Nagem was provided with an opportunity to speak to duty counsel and did so.
- [16] The officers ran the standard Canadian Police Information Centre ("CPIC") checks on Ms. Nagem and Mr. Clyne. Such a check includes information about the person's criminal record, outstanding warrants or charges, and court conditions. It does not include a person's driver's licence status, for which a separate computer check would be required.

- [17] Sergeant Swecera informed Ms. Nagem that she and Mr. Clyne were being released on a promise to appear with conditions. He explained what the conditions were. They included a prohibition on any contact with Mr. Sutton and a prohibition on entering the "Red Zone," an area of downtown Kelowna in which the car was parked.
- [18] At about 4:15 a.m., Ms. Nagem and Mr. Clyne were brought into the same room to be released together. Sgt. Swecera explained to them that they would not be "breached" for entering the Red Zone to get to the car, but would be apprehended if they remained in it or returned later. He gave them directions to the vehicle. He gave the car keys to Ms. Nagem as Cst. Celli had authorized this. Throughout their period of detention, Ms. Nagem and Mr. Clyne spoke with various officers. They were polite and appeared sober, alert and competent.
- [19] Prior to releasing Ms. Nagem and Mr. Clyne with the car keys, the police did not run a check on their driver's licence statuses. Had they done so, they would have learned that Mr. Clyne was under an indefinite driving prohibition. The police did not try to contact Mr. McKenzie, the car's owner, to verify that he had lent it to Mr. Clyne and Ms. Nagem.
- [20] Chapter 19.3 of the RCMP Operations Manual addresses guarding prisoners and personal effects. Section 1.3 provides as follows with respect to release of prisoners:
- 1.3 The RCMP is responsible for the well-being and protection of persons in its custody. Where appropriate, prisoners will be released to a responsible individual and not into an adverse environment.
- [21] At trial, Ms. Nagem testified that the phone she wanted to access contained the phone number of Mr. Clyne's uncle, Leroy Brown, the person they were going to stay with in Kelowna, and that they had no other way of contacting him. She testified that they did not have enough money to stay at a hotel and that there would not be any availability as it was the May long weekend. There is conflicting evidence about whether Ms. Nagem told the police why she wanted access to the cell phone.
- [22] Ms. Nagem and Mr. Clyne returned to the car and drove it to the Lower Mainland. They stopped in Merritt for gas and had sufficient money to pay for it and a couple of energy drinks that Mr. Clyne consumed. Ms. Nagem reclined the passenger seat and fell asleep sometime after they left Merritt. She was asleep, with her seatbelt on when the Accident occurred.
- [23] At his examination for discovery, Mr. Clyne said that he fell asleep just before the Accident occurred. He was not called as a witness at trial. It is not necessary for me to address the dispute over the admissibility of this evidence, as I do not rely on it.

[24] The black box recovered from the car showed that it was travelling at least 180 km/h (this may have been the maximum speed the black box could record) before it left the road. There were no skid marks or signs of yawing on the road. There is no dispute that Mr. Clyne was driving well over the speed limit of 110 km/h and was operating the vehicle unsafely.

[25] Ms. Nagem impugns the following aspects of the RCMP's conduct:

- a) refusing to give her access to the cell phone to get Mr. Brown's number,
- b) returning the car keys to her when they knew she did not have a driver's licence,
- c) failing to check Mr. Clyne's driving status,
- d) effectively inviting them to drive the vehicle by giving them directions to it and warning that they could only be in the Red Zone briefly, and
- e) releasing them in the middle of the night knowing they were not Kelowna residents and having seized most of their money without providing information about accommodation.

She says these circumstances amount to negligence making the RCMP contributorily liable for the injuries she suffered in the Accident.

[26] Against this factual matrix, I must consider whether Ms. Nagem has established that the RCMP owed her a duty of care.

Is there an analogous precedent?

[27] In answering the question of whether there is an applicable precedent, it is important to be clear about how broadly or narrowly to define what constitutes an "analogous" case. For example, in the present situation, is it sufficient to ask whether prior cases establish that the police owe a duty of care to those in their custody or is it necessary to specify whether the police owe a duty of care to persons whom they are releasing from custody?

[28] The authorities demonstrate that precision is required. In *Rankin*, the Supreme Court of Canada considered a claim that an auto repair business owes a duty of care to a person who is injured by a vehicle stolen from its garage. Writing for the majority, Justice Karakatsansis at para. 27 framed the question as, "whether a business owes a duty of care to someone who is injured following the theft of a vehicle from its premises", rejecting the dissenting judges' much broader question of whether the plaintiff's physical injury was reasonably foreseeable.

[29] In *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63 at para. 28, Justices Brown and Justice Gascon, writing for the majority, cautioned that consideration of an applicable precedent requires the court to assess whether the particular factors in the earlier case that justified recognition of the duty are the same as in the case at bar.

[30] No case to date has established whether police owe a duty of care to a person that they are releasing from custody. In her written submissions, the plaintiff describes the duty of care she claims as follows:

To be precise: the duty of care alleged by the plaintiff is a duty owed by the police to detainees, to take reasonable care for their safety when releasing them from custody.

[Emphasis omitted.]

- [31] The plaintiff submits that this duty of care is analogous to the duty of care owed by an investigating police officer to a particular suspect under investigation recognized in *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41. She also submits that it is analogous to cases establishing the duty of care owed by corrections officials to inmates: *Carr v. Canada*, 2008 FC 1416; *Chilton v. Canada*, 2008 FC 1047; *Carlson v. Canada*, 1998 CanLII 8109 (FC), [1998] F.C.J. No. 733 (T.D.); *Pete v. British Columbia (A.G.)*, 2004 BCSC 1337; *Russell v. HMQ & Matsqui*, 2000 BCSC 650. All of these cases concerned treatment of inmates while in custody, based on the level of control exercised over individuals while in detention.
- [32] In my view, these cases are not analogous. Ms. Nagem's claim does not relate to the conduct of the investigation into the drug trafficking charges or her treatment while she was being held at the detachment. Rather, her claim is about the RCMP's acts or omissions relating to her release, which are claimed to have contributed to an injury that occurred while she was no longer under police control or supervision.
- [33] I conclude that there is no analogous precedent and analysis of foreseeability, proximity and residual policy concerns are required.
- [34] Before turning to that analysis, I must address the plaintiff's submission that s. 1.3 in chapter 19.3 of the RCMP Operations Manual establishes that the RCMP owes a duty of care to the plaintiff. This submission overlooks the important distinction between public (or statutory) and private duties of care. The Operations Manual establishes a policy imposing a public law duty on officers when releasing prisoners. It cannot standing alone, establish a private law duty of care that founds a claim in negligence, though a failure to comply with the standards set out in the Operations Manual may be evidence of negligence: *Wu v. Vancouver (City)*, 2019 BCCA 23 at para. 43, leave to appeal denied [2019] S.C.C.A. No. 90.

Reasonable Foreseeability and Proximity

- [35] Reasonable foreseeability and proximity operate as limiting principles in the law of negligence, ensuring that liability only arises where "the defendant ought reasonably to have contemplated the type of harm the plaintiff suffered" (Rankin, at para. 21). In personal injury cases, the two are often intertwined, and proximity - whether the relationship between the plaintiff and defendant is sufficiently close and direct - may be established based on a finding of reasonable foreseeability of physical harm (Rankin, at para. 23). Reasonable foreseeability is an objective test. It cannot be inferred from the fact that the harm occurred.

- [36] The Supreme Court's application of these principles in Rankin is very helpful here. Citing Allen M. Linden and Bruce Feldthusen, *Canadian Tort Law*, 10th ed. (Toronto: LexisNexis, 2015) at 322, Karakatsanis J. identified the question to ask when assessing reasonable foreseeability as whether the plaintiff has offered facts demonstrating that the risk of the type of damage that occurred was reasonably foreseeable to the class of plaintiff that was injured (at para. 24). Karakatsanis J. then considered the facts of the case before the Court:
- [25] The facts of this case highlight the importance of framing the question of whether harm is foreseeable with sufficient analytical rigour to connect the failure to take care to the type of harm caused to persons in the plaintiff's situation. Here, the claim is brought by an individual who was physically injured following the theft of the car from Rankin's Garage. The foreseeability question must therefore be framed in a way that links the impugned act (leaving the vehicle unsecured) to the harm suffered by the plaintiff (physical injury).
- [26] Thus, in this context, it is not enough to determine simply whether the theft of the vehicle was reasonably foreseeable. The claim is not brought by the owner of the car for the loss of the property interest in the car; if that were the case, a risk of theft in general would suffice. Characterizing the nature of the risk-taking as the risk of theft does not illuminate why the impugned act is wrongful in this case since creating a risk of theft would not necessarily expose the plaintiff to a risk of physical injury. Instead, further evidence is needed to create a connection between the theft and the unsafe operation of the stolen vehicle. The proper question to be asked in this context is whether the type of harm suffered - personal injury - was reasonably foreseeable to someone in the position of the defendant when considering the security of the vehicles stored at the garage.
- [37] In Rankin, the impugned conduct was the defendant's failure to secure the vehicles in the garage, but the question was not whether it was reasonably foreseeable that a vehicle would be stolen, it was whether it was reasonably foreseeable that the plaintiff would be injured by that stolen vehicle (at paras. 1-2). Here, the question is not whether the impugned RCMP conduct made it reasonably foreseeable that Ms. Nagem and Mr. Clyne would drive the car, it is whether it was reasonably foreseeable that either of them would be injured in an accident involving the unsafe operation of the car.
- [38] The plaintiff submits that Ms. Nagem's injury was reasonably foreseeable. She says that what must be foreseeable to establish a prima facie duty of care is the risk of harm, not the "exact type of harm that occurred". She also says that the degree of probability required is low: it must be a "real risk" in the sense that it is not far-fetched, citing Mustapha at para. 13.
- [39] Reasonable foreseeability arises at two points in the negligence analysis. First, it assists in deciding whether a prima facie duty of care is owed. Second, where a duty of care has been established, reasonable foreseeability limits recovery by excluding remote harms from the causation analysis. The comment in Mustapha about the degree of probability being low relates to foreseeability in relation to causation, not to establishing a duty of care.

- [40] Returning to Rankin, which considers reasonable foreseeability as an element of the duty of care, the Court emphasized the need for something in the factual matrix to connect the theft with the subsequent unsafe driving of the stolen car in order to make the personal injury foreseeable:
- [34] I accept that the evidence could establish, as the jury found, that the defendant ought to have known of the risk of theft. However, it does not automatically flow from evidence of the risk of theft in general that a garage owner should have considered the risk of physical injury. I do not accept that anyone that leaves a vehicle unlocked with the keys in it should always reasonably anticipate that someone could be injured if the vehicle were stolen. This would extend tort liability too far. Physical injury is only foreseeable when there is something in the facts to suggest that there is not only a risk of theft, but that the stolen vehicle might be operated in a dangerous manner.
- [41] Here, the question is whether there is something in the facts that suggest not only that Mr. Clyne would drive the car, but that he would do so in a dangerous manner.
- [42] Assessed objectively, the following evidence establishes that it was reasonably foreseeable to the RCMP officers that Mr. Clyne would drive the car: it was about four in the morning; the car was parked nearby and it contained the couple's personal belongings; they lived in the Lower Mainland; Ms. Nagem did not have a driver's licence; the RCMP had seized their phone and most of their money; and, finally, the RCMP had told them that they could enter the Red Zone briefly, but could not remain in it.
- [43] Does the evidence establish it was reasonably foreseeable that the car would be driven unsafely?
- [44] There was considerable evidence at trial about whether it was reasonably foreseeable that Ms. Nagem and Mr. Clyne would drive all the way back to Burnaby immediately after their release. This included what other options for lodging were available to them in the Kelowna area, rest stops on the highway, and the length of the drive. As mentioned, there was contested evidence about whether Mr. Clyne was sleepy or fell asleep.
- [45] With respect, that evidence is not particularly helpful on the question of foreseeability of unsafe driving. There was no evidence that there is a greater likelihood of unsafe driving on long drives than on short drives. There was no evidence that people who are prohibited from driving are more likely to drive unsafely than people who are not prohibited. As stated in Rankin, the fact that a person has control of a motor vehicle does not give rise to a reasonably foreseeable risk of injury to themselves or others:
- [60] Vehicles are ubiquitous in our society. They are not like loaded guns that are inherently dangerous and therefore must be stored carefully in order to protect the public. Commercial garages, unlike an individual who leaves a car unlocked with the keys accessible, have care and control of many vehicles and necessarily have to turn their mind to the security of those vehicles, especially after hours, to prevent theft of the vehicles. Having many vehicles,

however, does not necessarily create a risk of personal injury. While cars can be dangerous in the hands of someone who does not know how to drive, this risk would only realistically exist in certain circumstances.

- [46] Like Rankin, this is a case where common sense alone is insufficient to ground the recognition a novel duty of care (at para. 66). The evidence before me does not establish that it was objectively reasonably foreseeable to the RCMP that the car would be driven unsafely, resulting in injury to Ms. Nagem. In light of this, I find that the plaintiff has not established a duty of care.

CONCLUSION

- [47] I have found that the RCMP did not owe a duty of care to the plaintiff in the circumstances of this case. As noted in Rankin, at para. 67, that does not mean that the police will never owe a duty of care to a person they are releasing from custody. It is certainly possible to imagine circumstances where a risk of harm is reasonably foreseeable and such a duty could arise.
- [48] Similarly, my conclusion on duty of care should not be taken as an endorsement of the conduct of the RCMP in this case. Some of the officers' actions are puzzling. For example, why were the car keys returned to Ms. Nagem and not to Mr. Sutton, who was the driver at the time of the arrests?
- [49] As I have found no negligence on the part of the RCMP, the question of whether Ms. Nagem was contributorily negligent does not arise.
- [50] The action against the Minister is dismissed. If the parties wish to speak to costs, they may do so by way of written submissions.

"Iyer J."

- [1] A fourth person was arrested along with Ms. Nagem, Mr. Clyne and Mr. Sutton. As she has no connection to the issues before me, I have not referred to her.

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