
CANADA / JUDGMENT

R. v. McCormack

2021 BCSC 2688

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Supreme Court of British Columbia

DECIDED

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2021 BCSC 2688 R. v. McCormack

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. McCormack,

2021 BCSC 2688

Date: 20210503

Docket: CW 66631

Registry: Chilliwack

Regina

v.

Roy Donald McCormack

Before: The Honourable Justice Edelmann

Oral Reasons for Judgment

Counsel for the Crown:

G. Lindsey

Counsel for the Accused:

P. R. Derksen

Place and Date of Trial/Hearing:

Chilliwack, B.C.

February 22-26, 2021

Place and Date of Judgment:

Chilliwack, B.C.

May 3, 2021

THE COURT:

Overview

- [1] On August 5, 2016, the Defendant drove a tractor-trailer which was involved in a collision with several other vehicles. The collisions occurred on Highway 5 between Merritt and Hope in the southbound lanes, a short distance from the steepest portion of the roadway known as Snowshed Hill. Several people were injured in the collisions.
- [2] The Defendant is charged with eight counts of criminal negligence causing bodily harm and one count of dangerous driving.

Legal Framework

- [3] Criminal negligence is defined in s. 219 of the Criminal Code, R.S.C. 1985, c. C-46 [Criminal Code]:

219 (1) Every one is criminally negligent who

- (a) in doing anything, or
- (b) in omitting to do anything that it is his duty to do,

shows wanton or reckless disregard for the lives or safety of other persons.

- [4] Bodily harm is defined in s. 2 of the Criminal Code:

bodily harm means any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature;

- [5] The elements of dangerous driving are set out in s. 249(1)(a) of the Criminal Code.

249 (1) Every one commits an offence who operates

- (a) a motor vehicle in a manner that is dangerous to the public, having regard to all the circumstances, including the nature, condition and use of the place at which the motor vehicle is being operated and the amount of traffic that at the time is or might reasonably be expected to be at that place;
- [6] In this case, the conduct underlying the offence of dangerous driving and that for criminal negligence is the same, as there is little question the truck the Accused was driving caused bodily harm to one or more of the individuals whose vehicles were struck.

- [7] In *R. v. Beatty*, 2008 SCC 5, the Supreme Court of Canada described the mens rea or state of mind required for criminal negligence in the following terms:
- [7] The modified objective test established by this Court's jurisprudence remains the appropriate test to determine the requisite mens rea for negligence-based criminal offences. As the label suggests, this test for penal negligence "modifies" the purely objective norm for determining civil negligence. It does so in two important respects. First, there must be a "marked departure" from the civil norm in the circumstances of the case. A mere departure from the standard expected of a reasonably prudent person will meet the threshold for civil negligence, but will not suffice to ground liability for penal negligence. The distinction between a mere departure and a marked departure from the norm is a question of degree. It is only when the conduct meets the higher threshold that the court may find, on the basis of that conduct alone, a blameworthy state of mind.
- [8] It is clear that the brakes on the Accused's trailer were not functioning properly, and that this failure led to the collisions on August 5, 2016. The central issue in this case is whether the Accused failed to check the brakes properly, and if so whether that failure was a marked departure from the standard expected from a reasonably prudent person in the circumstances.

The Collision Scene

- [9] Several witnesses described the scene of the collisions on August 5, 2016. The collisions happened on a sloped area of highway 5 just south of Box Canyon. There were a number of vehicles slowed or stopped on the highway due to construction. On the hill leading to the scene of the collisions, the Accused's truck was emitting substantial smoke from the brakes on the tractor but did not appear to be slowing. The truck sideswiped a large number of vehicles as well as the median before coming to stop, having pinned a vehicle against the median. Several people were seriously injured in the collisions.

Collin Nemeth

- [10] Collin Nemeth is a Senior Area Vehicle Inspector who attended the scene within hours of the collisions. Upon looking at the tractor he could see that the brakes had gotten very hot as there was visible marbling from overheating. Mr. Nemeth concluded that the brakes on the tractor were clearly functional.
- [11] Mr. Nemeth could see immediately that there were serious problems with the brakes on the trailer. His first observation was that some of the brakes were over stroked, which indicates that the push rod was too long, making it ineffective as not enough pressure will be placed on the brake. He could see the over stroke markers by looking through the wheels. It was not clear from his testimony how many of the brakes were over stroked, but there is an indication in Mr. Nemeth's report that at least one of the brakes was over stroked.

- [12] Upon later inspection and testing, only one of the six brakes on the trailer was functional. The other five had significant problems rendering them non-functional. The problems included being improperly adjusted, worn out brake linings, loose rivets and a brake drum being completely rusted and not moving at all. Mr. Nemeth was of the view that several of the brakes had been inoperative for many months. He was unable to say whether the brakes would have been operational when the trailer was last inspected in October 2015.
- [13] Mr. Nemeth was asked about the ability to see the problems with the brakes. The brake mechanism on the Accused's truck was covered with dust shields to keep dust out. Mr. Nemeth described the dust shield as like a pie plate with a hole the size of toonie through which the brake lining can be seen. He noted there is also usually a gap around outside edges of the dust cover through which one can see some of the brake mechanism.

Brake Checks

- [14] It is common ground that under the Motor Vehicle Act Regulations, B.C. Reg. 26/58, [the Regulations], both the driver and the carrier are responsible for ensuring a vehicle was safe to operate. The Regulations set out the requirement for pre-trip and post-trip inspections at s. 37.22:
- (1) No carrier shall permit a driver to drive, and no driver shall drive, a commercial motor vehicle unless the requirements of this section are met.
 - (2) The driver or a person specified by the carrier shall satisfy himself or herself that the commercial motor vehicle is in a safe operating condition including, but not limited to, the operating condition of the following items:
 - (a) service brakes, including trailer brake connections and brake adjustments; []
 - (3) The inspection referred to in subsection (2) shall be performed daily before the first trip of the day.
- []
- [15] Commercial vehicles such as the one the Accused was driving must also inspect their brakes at designated Brake Checks.
- [16] Several witnesses, including the Accused, testified about the proper approach to checking the brakes on a tractor trailer. There was general agreement that a brake check should be done prior to starting a trip and at each Brake Check area.
- [17] Collin Nemeth described the steps required for a proper brake check. A driver should check to see if the wheels or tires are hot. If there is one that is hotter than the others, it is either dragging or is doing most of the work because other brakes are not working effectively. The driver should check that the push rods are within specifications. The push rods can be seen from the other side of the truck by bending down. The driver should do a tug test by applying only the trailer brakes and pulling the tractor forward to see if the trailer brakes

are functioning. The driver should also check air pressure gauges and listen for audible air leaks. Mr. Nemeth estimated that it would take an experienced person five to 15 minutes to do a proper brake check.

- [18] There is a sign posted at Brake Checks in British Columbia, including at Zopkios Brake Check, entitled "Brake Check Advisory". It provides the following checklist:

AIR BRAKE SYSTEM

1. Compressor Maintains Full Reservoir Pressure
2. Push Rod Travel Within Limitations On All Chambers
3. No Audible Air Leaks
4. Glad Hands And Lines Are Secure
5. Drums, Bearings And Tires Are Not Overheating
6. Trailer Supply Valve Operates Properly

- [19] Two other Crown witnesses were truck drivers who also described their process of checking brakes.

- [20] Christopher Knight has been driving a truck for 13 years and was on the highway the day of the incident. He described his process as hammering the tires to make sure there were no flats and checking the wheel hubs to ensure there was not heat coming from the brakes. He estimated the whole process to take about three to four minutes. In cross examination Mr. Knight was asked about checking the slack adjusters which are attached to the push rods. He said that the trucks he pulls generally have automatic slack adjusters. He agreed that he relied on the company to keep the trailers in reasonable condition, and that he is not expected to adjust the slack adjusters. He was familiar with the "Brake Check Advisory" checklist. In his view, push rod travel was hard to check unless you crawl right under the trailer and this was something that was more relevant on trucks with manual slack adjusters. Checking push rod travel did not appear to be part of Mr. Knight's regular process of checking the brakes on his vehicle.

- [21] Another driver, Paolo McKee, was asked about the process of checking the brakes. He said that "technically" you are supposed to crawl under your vehicle to check every brake, so that you could view the "goalie posts" on the slack adjusters which would show if they were properly adjusted. Although Mr. McKee appears to have had a regular practice of checking the push rods and slack adjusters, I was not left with the impression that he would consider it a marked departure for a driver not to consistently check them as part of regular brake checks, in particular on trucks with automatic slack adjusters.

Zopkios Brake Check

- [22] The Zopkios Brake Check is located 6.5 kilometres before the scene of the collisions. Tractor trailers like the one the Accused was driving are required to stop to check their brakes. The central issue in this case is whether the Accused stopped at the Zopkios Brake Check. There is little question that if the Accused passed through the Zopkios Brake Check without stopping and checking his brakes, in particular if his brakes were already overheating and smoking, then he would be guilty of criminal negligence and dangerous driving.
- [23] PC Ostrem described the Zopkios Brake Check area as being about 400 to 500 metres long. He estimated about 200 metres consists of a lane in which to slow down, and then five or six lanes including some parking for commercial vehicles. There is a bathroom area with a paved parking lot and a lane 50 to 100 metres long to get back onto the highway.
- [24] There are three witnesses whose evidence is relevant to whether the Accused stopped at the Zopkios Brake Check. I will address each in turn.

Mr. McCormack

- [25] The Accused testified on his own behalf. The approach to be taken when the Accused gives testimony is well established and was succinctly set out by the Supreme Court of Canada in *R. v. W.(D.)*, 1991 CanLII 93 (SCC), [1991] 1 SCR 742 [W.D.]:

First, if you believe the evidence of the accused, obviously you must acquit.

Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

- [26] Although W.D. dealt with a charge to a jury, the direction applies with equal force to the case before me.
- [27] The Accused testified that he completed his training to drive tractor trailers in 2014 and had been working as a driver since that time. He had worked for other companies but had only started working for Farid Trucking a couple of weeks before the collisions.
- [28] The Accused says that he had just returned to Hope from a previous trip when his dispatch called him to pick up a trailer at Rogers pass. He says he pulled into a truck stop and slept for a couple of hours. He then drove his truck to Rogers pass without a trailer. In his initial testimony, he said he believed it was around 3 a.m. when he arrived at Rogers pass. In cross examination when he was confronted with his log book entries he revised his estimate to 9 a.m. When he arrived at the location, he says the trailer was at the side of the road, already fully loaded with a seal on the doors. It was common for him to drive trailers that had sealed doors which ensured the safety of the cargo and ensured nothing was removed.

- [29] The Accused described going through a pre-trip routine, which included connecting the truck to the trailer, hooking up the lines, making sure air gauges were reading correctly, and doing a "tug test". He said he looked at the brakes and that the push rods all seemed normal to him. He was asked in cross examination whether he would look at the brake drums and shoes. He responded that you could not see them at all, and that he was not aware about the dust covers and holes until he heard about them from Mr. Nemeth in the course of this trial. It was not something he was taught to check.
- [30] From Rogers Pass, the Accused says he drove to Knutsford, a rest stop in Kamloops just off Highway 5A because he was tired and wanted to sleep. In his initial testimony he estimated it took him four to five hours to get to Knutsford, although on cross examination he estimated it took four to five hours to get from Rogers Pass to the Zopkios Brake Check. He estimated he slept for four or five hours at Knutsford, although this estimate changed to between three and five hours on cross examination.
- [31] After waking up, he says he walked around the truck, banging the tires to ensure they were inflated, checked the primary and secondary air gauges and did a "tug test" before continuing. He says he then drove on Highway 5A towards the Zopkios Brake Check.
- [32] About a mile and half before arriving at the Zopkios Brake Check, the Accused says he noticed that there was smoke on the left side tires on his truck. He says he believed it was because he was over braking on a grade and that, once he let up on braking and found a gear where he didn't need to brake so much, it dissipated. In cross examination he agreed that the 10 kilometres before Zopkios was fairly flat and there was no reason for the brakes to start smoking on a flat area, but repeated several times that his brakes started smoking when he was on a hill and he was over braking. The Accused was asked in cross examination whether he was concerned that the tractor brakes were working harder than the trailer and he said he wasn't thinking about it at the time.
- [33] Upon arriving at the Zopkios Brake Check, the Accused says he stopped in front of the washrooms. When he came out of the washrooms he realized he had not updated his log book. Rather than entering his actual trip, however, he says he simply copied from a previous trip which would have indicated he had taken Highway 5. He conceded that the log entries were false, and said he went through Kamloops and the Clapperton Brake Check, but he actually went down Highway 5A where you do not have to go through Kamloops or Clapperton. At the time of the collisions, there were already entries in the log book for times after the collisions.
- [34] There was further confirmation that entries in the log book were false, as based on the entries in his log book the Accused stopped at an inspection station on Highway 5 near Kamloops around noon. According to another Crown witness, in a review of the video for the inspection station two hours before and two hours after noon, the Accused's truck was not visible on any of the four cameras at the inspection station.

- [35] Before leaving the Zopkios Brake Check, the Accused says he banged each tire, listened for air leaks, felt for heat on the tires and did a "tug test". He checked if the hub of his wheel was hot, but it had cooled by the time he had gotten there. He says there was no heat, no smoke and he could not smell anything burning. He did not hear any air leaks and all his tires were inflated. He passed one or two trucks on his way out of the Brake Check.
- [36] He left Zopkios and got back onto the highway using fifth gear, which in his experience would carry him up or down the mountain. After the Zopkios Brake Check, there are two grades. It was when he came to the steeper part of the grade that the Accused says he knew he was having problems. The brakes really started smoking up and he began to panic. By the time he got to the Snowshed he estimates he was going 80 or 85 kilometres an hour and was passing cars.
- [37] The Accused says that he was not aware that the brakes of the trailer were in poor condition, and he would have called dispatch to get maintenance if he had known. In cross examination he disagreed with the suggestion that a quick look at the brakes would have shown the defects ultimately found by Mr. Nemeth. The Accused said he did not go under the trailer, and if he ever thought there was a reason to go under a trailer he would call his dispatch. His verification of the brakes involved listening for leaks and checking the gauges. When asked if he looked at the brakes, he said you could see the markers that come down. The evidence before me on what would have been visible prior to the dust covers being removed was limited. All the photos in evidence were taken after the dust covers had been removed.
- [38] Three or four times before August 2016, the Accused says he had had the experience of brakes smoking when he was driving a truck similar to the one he was operating on August 5, 2016. He stated it happens for different reasons and not just as a result of brake failure. On those occasions he would figure out what was causing the brakes to smoke and evaluate what needed to be done. On each of those occasions he was able to carry on driving.
- [39] I do not propose to go into detail on the decisions that the Accused made after he left the Zopkios Brake Check once his brakes started to fail. It is clear that once the brakes had started to fail, he made attempts to slow the truck. He testified that he was unable to use the last runoff that was available to him because there was a truck between him and the runoff. I did not understand the Crown to be making submissions that the Accused's conduct once the brakes had failed constituted a marked departure. They were decisions that were made under a significant amount of pressure.

Corinne Rossi

- [40] Ms. Rossi was driving her car along Highway 5 on August 5, 2016. She remembers seeing a truck that was smoking in front of her on the highway. She passed the truck because she was trying to get away from the smell of smoke. She was not able to be specific about where she passed the truck, but remembers it being on a flat area after the Britton Creek Rest Area. The Britton Creek Rest Area is approximately 13 kilometres before the Zopkios Brake Check.
- [41] Ms. Rossi describes seeing the same truck go past her near the Snowshed which is about 3 kilometres after the Zopkios Brake Check. She passed the truck again and then slowed down when she got to the construction after Box Canyon. She saw the truck come up behind her and pass her before colliding with several vehicles on its way down the hill.
- [42] In her narrative emailed to the police shortly after August 5, Ms. Rossi indicated that she saw the truck near or before the Zopkios Brake Check. She accepted in cross examination that she would not have been aware of the name of the Brake Check, but likely learned this from a truck driver or one of the other people who were discussing the collisions during the many hours they were stuck on the highway. It was clear from her email that she had also viewed photos of the scene of the collisions. When asked about which photos, she initially indicated that they were photos from the news, although her answers were not straightforward on this issue. When she was asked specifics about the times and places referred to in her evidence, she emphasized more than once that these events were over four years ago and she did not realize she would be called upon to testify about them. She says that had she known she would be testifying she would have kept better records.
- [43] The Crown suggests that if Ms. Rossi is believed, there was simply not enough time for the Accused to stop and check his brakes at Zopkios. Although I have no doubt that Ms. Rossi was seeking to be helpful, I am not satisfied that her testimony, in terms of crucial details such as where and when she passed the truck and the speeds at which she was driving, is sufficiently reliable on its own to support the inference the Crown seeks to have me draw. However, I do give some weight to her observations to the extent that they are confirmed by other evidence.

Statement of Mr. Enns

- [44] The Crown tendered an audio-recorded statement which I allowed to be entered for the truth of its contents earlier in these proceedings. According to the agreed Statement of Fact:

Gerry Enns, was a commercial truck driver who provided a statement to police in this case on March 27, 2017. He suffer [sic] from Alzheimer's Disease. He no longer has any memory of the events that he discussed in his statement.

- [45] Although the typo in the agreed Statement of Fact makes it unclear, I presume the intention was to say that he currently suffers from Alzheimer's. However, there is no evidence before me about the onset or progression of the disease and its effect over time on Mr. Enns' memory. Mr. Enns did not testify and was not cross examined in relation to his statement.
- [46] In his statement, Mr. Enns says that on August 5, 2016, he had parked his truck across from the washrooms at the Zopkios Brake Check. The other person who was riding in his cab was in the washrooms and Mr. Enns was checking the tires and other things. All of a sudden, he pulled himself out from where he was reaching underneath the trailer and a truck came flying by, almost hitting him. Mr. Enns states the truck must have missed him by maybe a foot. He estimated the truck was going 40 or 50 kilometres an hour when there is a 20 kilometres an hour speed limit in the Brake Check, and he was going double, if not triple, that.
- [47] According to Mr. Enns' statement, the truck was smoking so badly that you could not see the back of the trailer. The truck carried on straight through the Brake Check, not stopping at all. The other person who was in Mr. Enns' truck came out of the washrooms and apparently also observed the smoking truck. The other person did not testify before me for reasons that are not in evidence. The Crown has not sought to rely on the observations of the second person. Mr. Enns finished inspecting his truck and got back into his truck with the other person. When they left the Brake Check Mr. Enns could no longer see the truck that had passed him, he could only see blue smoke. Mr. Enns said this was surprising as it would have taken him fifteen or twenty minutes to go down that hill with his heavy "Super B", which is the type of truck that he was driving at the time.
- [48] After the collisions, traffic was backed up on the highway for several hours. Mr. Enns states that there were "many, many, many drivers on the radio talking about this".
- [49] At an unspecified time later that day, Mr. Enns says he spoke to a Corporal Rosenberg and explained to him what he had seen. He then accompanied the officer to the scene of the collisions where he was able to confirm that it was the same colour of truck that he had seen at Zopkios. Corporal Rosenberg did not testify in this matter and there is no other evidence of the statement given by Mr. Enns on August 5, 2016, before me.
- [50] Although I found the statement of Mr. Enns met the criteria for threshold reliability, I expressed my concerns about the substantive weight to be given to some of the details in the statement of Mr. Enns.
- [51] As I noted, I do not have any information before me about the onset or progress of Mr. Enns' Alzheimer's, notably with respect to the reliability of his memory on March 27, 2017 when he gave his statement. Although there is not evidence before me on this point, I accept the submissions of Defence Counsel that Alzheimer's is a disease which may involve a gradual deterioration of memory functioning. It is simply not clear on the evidence before me the state of Mr. Enns' memory at the time he gave his statement.

- [52] More importantly, the statement was given almost eight months after the events described by Mr. Enns. Even on the face of his statement, Mr. Enns had heard substantial discussion about the incident among "many, many, many" other truckers as well as the person who was in the truck with him. There is no evidence before me about how many other sources of information might have informed Mr. Enns' recollection of the events on August 5, 2016, by the time he gave his statement the following year.
- [53] Certain portions of the statement are consistent with other evidence that is before me and I find them to be reliable. I am satisfied on the evidence before me that the Accused's truck passed through the Zopkios Brake Check when Mr. Enns was there. I am also satisfied that it was the Accused's truck which passed closely by Mr. Enns on its way out of the Brake Check area. In my view, it is more difficult to rely on some of the other details in Mr. Enns' statement given the overall circumstances. There are three aspects I will address in particular.
- [54] The first is the speed of the truck as it went past Mr. Enns. According to Mr. Enns, he came out from under his truck just as the other truck was passing by him. Another part of the statement indicates the truck was "right on top of" him when he came out from under his truck and Mr. Enns had to press himself against the side of his truck to get out of the way. Given the circumstances in which the truck passed by him, I give limited weight to his estimate of the truck's speed, in particular to an estimate given eight months later. I note also that Mr. Enns' perception that the speed limit was 20 kilometres an hour in the Brake Check is not consistent with the testimony of Inspector Nemeth who, when he was asked about the speed limit in the Zopkios Brake Check, said that they had taken the signs down but it used to be 50 kilometres an hour. Having heard direct testimony from Inspector Nemeth and given his role as a vehicle inspector, I prefer his evidence about the speed limit in the Brake Check.
- [55] The speed of the truck was presumably relevant to Mr. Enns' perception that the truck came through the Brake Check without stopping, although it is not set out in the statement how Mr. Enns came to the conclusion that the truck had not stopped. There is no indication Mr. Enns saw the truck enter the Brake Check, and it is not clear from the statement where exactly Mr. Enns' truck was located in the Brake Check area, although based on the descriptions of the other witnesses it is plausible that he was parked closer to the exit ramp. It is not evident on the face of the statement why the Accused's truck could not have stopped in the Brake Check and then sped up past Mr. Enns' truck as it was leaving the Brake Check area.
- [56] The final observation in Mr. Enns' statement is the amount of smoke that was visible when the Accused's truck left the Brake Check. Based on the testimony of the Accused, his brakes had been overheating and smoking prior to his arrival at the Brake Check. Although the Accused testified that he did not smell his brakes burning at the Brake Check, it was unclear whether there would have been a lingering smell from the brakes that were previously smoking. Mr. Enns was an experienced truck driver, and he was not impressed with having a

truck pass so close to him. Mr. Enns would presumably be quite familiar with the smell of overheating brakes and would have recognized that the Accused's brakes had been overheating.

- [57] In his testimony, Mr. Nemeth was asked how long it would take brakes to cool once they had started smoking. He said it would depend on how hot the brakes had gotten, and he was unable to provide a specific timeframe.

Conclusion

- [58] In conclusion, while I have some serious concerns about the reliability of the testimony given by the Accused, I am not satisfied that the Crown has proven beyond a reasonable doubt that he did not stop at the Zopkios Brake Check.
- [59] Even in combination with the testimony of Ms. Rossi, I do not find the reliability of Mr. Enns' description of the speed of the vehicle and the amount of smoke coming off the Accused's truck to be sufficiently reliable to satisfy me on a criminal standard that the Accused did not stop and perform a brake check at Zopkios. In my view, given the frailties surrounding the statement of Mr. Enns, I am simply not satisfied that I could base on a conviction on this observation.
- [60] Given the evidence from the various sources about the nature of brake checks, it was possible for the Accused to have completed a brake check, including a successful "tug test" given the one functioning brake on the trailer. Although the brakes had cooled, there may have been a residual smell when he drove close to Mr. Enns' truck on the way out of Zopkios. I do not find these possibilities to be merely speculative.
- [61] I accept that a more diligent inspection of the brakes would likely have alerted the Accused to the serious problems he was facing. In retrospect the heating of the tractor brakes and not the trailer brakes was also indicative of the problems with the brakes on the trailer. The question before me is not, however, whether the Accused was negligent. The question is whether the Crown has proven beyond a reasonable doubt that there was a marked departure from the standard of a reasonable driver. I am not satisfied on the evidence before me that standard has been met.
- [62] I find the Accused not guilty.

"Edelmann J."

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