

CANADA / JUDGMENT

R. v. Waite

[1989] 1 SCR 1436

COURT

Supreme Court of Canada

DECIDED

8 June 1989

Source: decisions.scc-csc.ca · Research copy typeset by Esheria. Not court-issued or certified.

R. v. Waite

Collection

Supreme Court Judgments

Date

1989-06-08

Report

[1989] 1 SCR 1436

Case number

19988

Judges

Dickson, Robert George Brian; Beetz, Jean; McIntyre, William Rogers; Lamer, Antonio; Wilson, Bertha; Le Dain, Gerald Eric; La Forest, Gérard V.; L'Heureux-Dubé, Claire

On appeal from

Ontario

Subjects

Criminal law

Notes

SCC Case Information: 19988

Decision Content

R. v. Waite, [1989] 1 S.C.R. 1436

Michael Bradley Waite Appellant

v.

Her Majesty The Queen Respondent

indexed as: r. v. waite

File No.: 19988.

1987: November 10; 1989: June 8.

Present: Dickson C.J. and Beetz*, Estey*, McIntyre, Lamer, Wilson, Le Dain*, La Forest and L'Heureux-Dubé JJ.

on appeal from the court of appeal for ontario

Criminal law -- Criminal negligence -- Mens rea -- Impaired driver playing chicken with hayride -- Persons killed and injured -- Whether subjective test as to accused's state of mind, in addition to objective test as to state of accused's driving, to be considered in determining mens rea -- Criminal Code, R.S.C. 1970, c. C-34, ss. 202(1), 203.

Appellant, who had been drinking, struck and killed four young people taking part in a hayride, and injured a fifth. The hayride involved three tractors each towing a wagon with bales of hay along a public road. Four or five of the young people had been running alongside the wagons or had been running from one wagon to another when appellant came upon the hayride. Appellant drove behind the hayride, passed it, turned around and deliberately approached the hayride at high speed on the wrong side of the road.

At trial before judge and jury, the appellant was found not guilty of four counts of causing death by criminal negligence and one count of causing bodily harm by criminal negligence, but guilty of five counts of the included offence of dangerous driving. The charge to the jury did not specifically mention the objective test for criminal negligence but did convey that the mens rea required for proof of the commission of the offence could be found in the accused's conduct. In clarifying the test for mens rea, the trial judge directed the jury to look at the objective driving and also to the accused's state of mind as to whether he had deliberately assumed the risk. The Crown appealed the acquittals on the charges of criminal negligence. The Ontario Court of Appeal allowed the appeal and ordered a new trial.

At issue here is whether the requisite mens rea for criminal negligence is to be determined only by an objective test based on the activity giving rise to the charge or whether a subjective test as to the voluntary assumption of risk on the part of the accused is also required.

Held: The appeal should be dismissed.

Per Dickson C.J. and Wilson and La Forest JJ.: Criminal negligence requires both the conduct addressed by the objective test and a subjective mental element which is the minimal intent of awareness of the prohibited risk or wilful blindness to the risk. The jury properly instructed as to the minimal intent requirements of awareness or wilful blindness to the prohibited risk would not necessarily have returned a verdict of acquittal.

Per McIntyre and L'Heureux-Dubé JJ.: The mens rea which the Crown must prove in criminal negligence cases, as in other offences, is to be found in the conduct of the accused. Criminal negligence is shown where the Crown proves conduct on the part of the accused which shows a marked and substantial departure from the standard of behaviour expected of a reasonably prudent person in the circumstances. The objective test is to be applied whether the acts are ones of commission or omission; criminal negligence does not involve a subjective element requiring the deliberate assumption of risk by the accused.

Per Lamer J.: The appeal should be dismissed for the reasons set out by McIntyre J. subject to the observations made in R. v. Tutton.

Cases Cited

By Wilson J.

R. v. Tutton, [1989] 1 S.C.R. 000; Vézeau v. The Queen, [1977] 2 S.C.R. 277.

By McIntyre J.

R. v. Tutton and Tutton (1985), 18 C.C.C. (3d) 328.

By Lamer J.

R. v. Tutton, [1989] 1 S.C.R. 000.

Statutes and Regulations Cited

Criminal Code, R.S.C. 1970, c. C-34, ss. 202(1), 203, 618(2)(a).

APPEAL from a judgment of the Ontario Court of Appeal (1986), 28 C.C.C. (3d) 327, 15 O.A.C. 215, allowing an appeal from acquittal by Evans C.J.H.C. sitting with jury. Appeal dismissed.

Brian H. Greenspan, for the appellant.

W. J. Blacklock and Kenneth L. Campbell, for the respondent.

//Wilson J.//

The judgment of Dickson C.J. and Wilson and La Forest JJ. was delivered by

WILSON J. -- Although I find myself in respectful disagreement for the reasons I gave in R. v. Tutton, [1989] 1 S.C.R. 000, with my colleague Justice McIntyre in so far as he adopts an objective test for criminal negligence, I agree with him that this appeal should be dismissed and the Court of Appeal's order for a new trial affirmed.

In my view the trial judge's final instruction to the jury was in error as to the degree of mens rea required under s. 202 of the Criminal Code, R.S.C. 1970, c. C-34. When the jury asked the trial judge to explain the moral difference between dangerous driving and causing death by criminal negligence, the trial judge instructed the jury that the subjective element in criminal negligence was "a deliberate and wilful assumption of the risk involved in driving in the manner in which he was driving". Later in his reply to the jury he repeated that the subjective element in criminal negligence was "assumption and deliberate assumption of the risk". Although I believe there is a subjective element to criminal negligence, the judge in this case placed much too high an onus on the Crown to prove elements of deliberation and wilfulness. For the reasons I gave in *R. v. Tutton* I am of the view that the mental element in criminal negligence is the minimal intent of awareness of the prohibited risk or wilful blindness to the risk.

The trial judge's erroneous instructions to the jury were given near the close of the trial and they were crucial because they were in response to a question from the jury. The facts of the case also suggest that, had the jury been instructed as to the minimal intent requirements of awareness or wilful blindness to the prohibited risk, they would not necessarily have returned the verdict of acquittal on the charges of causing death by criminal negligence: see *Vézeau v. The Queen*, [1977] 2 S.C.R. 277.

//McIntyre J.//

The reasons of McIntyre and L'Heureux-Dubé JJ. were delivered by

MCINTYRE J. -- This appeal comes before this Court as of right pursuant to s. 618(2)(a) of the Criminal Code, R.S.C. 1970, c. C-34, At trial before judge and jury the appellant was found not guilty of four counts of causing death by criminal negligence and one count of causing bodily harm by criminal negligence, but guilty of five counts of the included offence of dangerous driving. The Crown appealed the acquittals on the charges of criminal negligence. The Ontario Court of Appeal allowed the appeal and ordered a new trial. It is from this Order that the present appeal is taken.

The events giving rise to this appeal occurred on September 8, 1984. Between approximately 3:15 p.m. and 6:00 p.m. on that day the appellant consumed about five bottles or tins of beer at a fall fair in the arena at Drayton, Ontario. At about 7:00 p.m. he consumed two more bottles of beer. At about 8:20 p.m. on the same day the Bethel Mennonite Church hayride commenced. The hayride was made up of three tractors each of which towed one wagon containing bales of hay. The wagons proceeded along the public road, one after the other, and some forty or fifty people, mostly young, rode in the wagons. The accused accompanied by two friends followed the wagons in his car. He had a bottle or tin of beer in his hand while driving. Evidence was given by certain witnesses that some of the hayride participants, four or five in number, were walking or running along the road beside the wagons and moving from the second wagon to the first wagon. The appellant drove past the wagons and he and his passengers testified that in passing the vehicles they did not observe anyone on the roadway. Having passed the hayride, the appellant proceeded some distance down the highway and there turned his car around and drove back along the road

towards the now oncoming hayride. The appellant gave evidence that at this time he said to his companions: "Let's see how close we can get." One of the passengers testified that the accused had said: "Let's play chicken." The accused drove toward the hayride on the left side of the road. He was thus heading directly for the hayride vehicles and travelling on their side of the road. The posted speed on the road was 50 m.p.h. The accused testified that he was travelling at approximately 70 m.p.h. Other estimates of the speed, drawn from the evidence given at trial, vary from 50 to 90 m.p.h. The appellant at this time was driving without his headlights. He was using only fog lights though the state of light was such that headlights would ordinarily have been required. He continued in the left lane approaching the hayride until he was, according to the evidence, some 150 feet from the leading tractor, at which time he swerved into the right lane to pass the hayride. As he passed the wagons he struck five members of the hayride party who were on the roadway running along beside the wagons. Four were struck by the car and killed; one was injured, suffering a fractured leg. After the impact the appellant brought his vehicle to a halt and removed a cooler of beer from the trunk and threw it into the adjacent field.

Evidence was given at trial of blood alcohol readings taken after the accident. They showed that the appellant's blood alcohol level was something in excess of 80 milligrams of alcohol per 100 millilitres of blood, and expert evidence was to the effect that the appellant's blood alcohol would have been approximately 110 to 112 milligrams of alcohol per 100 millilitres of blood at the time of the accident. The appellant and his passengers testified that they had not expected to find any of the hayride party on the road, and the appellant testified to the effect that he was not aware of the presence of anyone on the road until the accident occurred.

The offence of causing death by criminal negligence with which the appellant was charged is created by s. 203 of the Criminal Code , which is in these terms:

203. Every one who by criminal negligence causes death to another person is guilty of an indictable offence and is liable to imprisonment for life.

Criminal negligence is defined in s. 202(1) of the Code in these terms:

202. (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.

The key words in any consideration of this section are: "shows wanton or reckless disregard for the lives or safety of other persons". The Code has defined the concept of criminal negligence and the issue raised in this appeal is how the Code definition should be applied. More particularly, how should a jury be instructed when it must consider a case involving a charge of criminal negligence?

The crime of criminal negligence is a crime which, like other criminal offences, requires proof by the Crown of a mens rea. In instructing the jury on this question, the trial judge set out the following test. He said:

On all the evidence, after considering all the circumstances, are you satisfied that the accused's conduct was such as to amount to a wanton or reckless disregard for the safety of other persons?

The driver of a motor vehicle on a public highway is under a duty to take care in its operation so as to avoid injury to persons or property of others, and if he fails in that duty and his acts or omissions are of such a character as to show this wanton or reckless disregard for the lives and safety of others then, according to the law, that conduct amounts to criminal negligence.

The lack of intention to cause harm is not an answer to a charge of criminal negligence. What you are concerned with is the conduct of the accused at the time of the accident or immediately prior thereto, and if that conduct, when you view it objectively, shows a wanton and reckless disregard for the lives and safety of others, then that is criminal negligence as defined in the Criminal Code .

And he added later:

If the evidence satisfies you beyond a reasonable doubt that the driving behaviour of the accused was a flagrant departure from normal driving standards, in the absence of some explanation, some rational explanation, then the driving conduct is properly characterized as criminal negligence. Dangerous driving, to give you a distinction between them, is conduct of a lesser nature and it lacks that high degree of moral fault required for criminal negligence.

In this, it is my opinion that the trial judge correctly dealt with the question. He was telling the jury that the mens rea required for proof of the commission of the offence could be found in the conduct of the accused. He did not mention specifically the test which has become accepted in this and most appellate courts in Canada, to the effect that criminal negligence is shown where the Crown proves conduct on the part of the accused which shows a marked and substantial departure from the standard of behaviour expected of a reasonably prudent person in the circumstances, but in my view he conveyed in the quoted words an adequate instruction.

After about two hours of deliberation the jury returned for further instructions and put the following question to the trial judge:

What is the moral difference between dangerous driving and criminal negligence. We want a clearer definition.

The trial judge heard submissions from counsel on the question of the test for determining the mens rea of criminal negligence and then gave the jury a further direction in these terms:

The position is that in dangerous driving the intention or the state of mind, if you wish, of the driver is not important. You look objectively at the manner of driving. You just look at the manner of driving.

Now, when you go over to criminal negligence, you have to look at two things, the objective driving, as you do for dangerous driving, and you also have to look at the subjective element, that is the attitude, or what is in the mind of the accused. That is whether there is a deliberate and wilful assumption of the risk involved in driving in the manner in which he was driving. So that you have in one, the dangerous driving, there is simply an objective standard, as compared to what the prudent driver would do. In the criminal negligence you have that, plus the subjective element of assumption and deliberate assumption of the risk.

The jury then returned a verdict of not guilty on all the criminal negligence charges but guilty of dangerous driving on all charges.

In the Court of Appeal (Martin, Thorsen and Cory JJ.A.) the Crown's appeal was allowed and a new trial was ordered. The judgment of the Court was written by Cory J.A. (as he then was) and is now reported at (1986), 28 C.C.C. (3d) 327. Cory J.A. considered that the requisite mens rea for criminal negligence may be objectively determined from the action or conduct of an accused. He considered that the trial judge in responding to the question from the jury was in error in telling the jury that criminal negligence involves a subjective element and requires the deliberate assumption of risk by an accused. He was also of the view that the trial judge's final instructions placed too high an onus on the Crown, in requiring the application by the jury of a subjective test for the determination of the required mens rea. He said, at p. 344:

This placed too high an onus on the Crown. As indicated by Morden J.A. in *R. v. Sharp*, supra, it would have been sufficient had the trial judge simply read s. 202 of the Code to the jury together with the instruction that the driving had to amount to a marked and substantial departure from the standard of a reasonable driver.

The appellant argued in this Court that the Court of Appeal erred in adopting an objective test in determining the mens rea of criminal negligence. It was argued that such a test was not in accord with the authorities, and that a subjective test inquiring into the mind and mental state of the accused was required. It was also argued that the Court of Appeal had erred in arriving at the conclusion that the Crown had satisfied the onus that the verdict would not necessarily have been the same in the absence of the error found in the charge to the jury. In my view, neither of these arguments can succeed.

The judgment of the Court of Appeal was based upon a detailed and careful review of the history of the concept of criminal negligence as an element in the criminal law and a full discussion of the differing views on the question. I do not feel that any useful purpose would be served by covering again the ground already covered in the Court of Appeal. It is my view that the subject has been fully and adequately dealt with in the reported reasons and, with one exception, I would adopt the reasons of the court which in my view otherwise correctly state the law.

In limiting the application of the objective test to cases involving acts of commission and in holding that an objective test will not suffice for cases involving acts of omission, it is my view that Cory J.A. was in error. It would appear that in so doing he was following the judgment of the Ontario Court of Appeal in *R. v. Tutton and Tutton* (1985), 18 C.C.C. (3d) 328, where Dubin J.A.

drew a distinction between acts of commission and omission, and held, at p. 345, that a subjective test should be used in cases which were based on acts of omission. I would, however, reject that view for reasons which are expressed in the R. v. Tutton case in this Court, [1989] 1 S.C.R. 000, and hold that an objective test must be applied in cases based on an allegation of criminal negligence, whether by acts of commission or omission. In all other respects I would, as I have said, adopt as my own the reasons for judgment of Cory J.A., dismiss the appeal, and confirm the order for a new trial.

//Lamer J.//

The following are the reasons delivered by

LAMER J. -- I have read the reasons of my brother McIntyre J. and I agree with him, for the reasons he sets out, that the appeal should be dismissed, and that the order for a new trial be confirmed. I should however make in this case the same observations I have made in the case of R. v. Tutton, [1989] 1 S.C.R. 000.

Appeal dismissed.

Solicitors for the appellant: Greenspan, Arnup, Toronto.

Solicitor for the respondent: The Attorney General for Ontario, Toronto.

* Beetz, Estey and Le Dain JJ. took no part in the judgment.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/466/index.do>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-waite-1989>

Prepared on 29 October 2026 · Esheria