

CANADA / JUDGMENT

Roy v. British Columbia (Attorney General)

2005 BCCA 88

COURT

British Columbia Court of Appeal

DECIDED

18 February 2005

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2005 BCCA 88 Roy v. British Columbia (Attorney General)

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Roy v. British Columbia (Attorney General),

2005 BCCA 88

Date: 20050218

Docket: CA030010

Between:

Viviane Roy, Eric Segbefia,

Stephane Segbefia and Tania Segbefia

Plaintiffs

(Respondents)

And

The Attorney General of British Columbia

Defendant

(Appellant)

Before:

The Honourable Madam Justice Southin

The Honourable Mr. Justice Hall

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Oppal

The Honourable Mr. Justice Lowry

H.J. Roberts and R.M. Yamanouchi

Counsel for the Appellant

R.V. Wickett and M.D. Murphy

Counsel for the Respondents

Place and Date of Hearing:

Vancouver, British Columbia

14th December, 2004

Place and Date of Judgment:

Vancouver, British Columbia

18th February, 2005

Written Reasons by:

The Honourable Madam Justice Southin

Concurred in by:

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Lowry

Concurring reasons by:

The Honourable Mr. Justice Hall (P. 21, para. 45)

Dissenting Reasons by:

The Honourable Mr. Justice Oppal (P. 26, para. 55)

Reasons for Judgment of the Honourable Madam Justice Southin:

[1] This is an appeal from the judgment of the Honourable Madam Justice Neilson bearing date the 6th November, 2002, consequent upon a seven day trial in April 2002, ordering the appellant, The Attorney General of British Columbia, to pay:

1. ... to the plaintiff, Eric Segbefia, damages for loss of guidance in the amount of \$3,750.00 and pre-judgment interest in the amount of \$585.62.
2. ... to the plaintiff, Stephane Segbefia, damages for loss of guidance in the amount of \$3,750.00 and pre-judgment interest in the amount of \$585.62.

3. ... to the plaintiff, Tania Segbefia, damages for loss of guidance in the amount of \$3,750.00 and pre-judgment interest in the amount of \$585.62.
4. ... to the plaintiff, Viviane Roy, damages for past loss of financial support in the amount of \$28,129.50.
5. ... to the plaintiff, Viviane Roy, pre-judgment interest on the award of past loss of financial support in the amount of \$4,392.85.
6. ... to the plaintiff, Viviane Roy, damages for future loss of financial support in the amount of \$31,601.18.
7. ... to the plaintiff, Viviane Roy, damages for past loss of household services, in the amount of \$11,514.50.
8. ... to the plaintiff, Viviane Roy, pre-judgment interest on the award of past loss of household services in the amount of \$1,798.13.
9. ... to the plaintiff, Viviane Roy, damages for future loss of household services in the amount of \$26,915.85.

and also ordering that:

10. the plaintiffs recover 100% of their costs against the defendant, The Attorney General of British Columbia, at scale 3.
 11. the plaintiffs and the defendant, The Attorney General of British Columbia, have liberty to apply with respect to the issues of tax gross-up and management fees as necessary.
- [2] The learned judge delivered two sets of reasons for judgment. In the first, 2002 BCSC 1021, delivered the 9th July, 2002, the learned judge found negligence on the part of two police constables which contributed to the death of Germain Joseph Roy, the husband of the respondent, Viviane Roy, and stepfather of the other respondents, and fixed the damages, and, in the second reasons (6 November 2002) Vancouver C993804 (B.C.S.C.) (Oral), determined that the respondents should recover 100% of their costs, although she had found the late Mr. Roy 50% to blame for his own death.
- [3] The appellant appeals, asserting the learned judge erred in:
- a) concluding that Mr. Roy was only 50% at fault for his own death;
 - b) failing to apply the proper standard of care, and in particular, the standard of care of a reasonably competent police officer in the circumstances;
 - c) finding a causal link between MacInnis' alleged omission and Mr. Roy's death, in the absence of any evidence supporting same;
 - d) awarding compensation to the Adult Stepchildren for loss of care and guidance, given their ages, financial independence and lack of dependency upon Mr. Roy;

- e) awarding 100% of their costs to the Plaintiffs, despite the finding that Mr. Roy was 50% at fault for his own death.

The Pleadings

- [4] This action was brought in July 1999 against The Attorney General of Canada, Her Majesty the Queen in right of Canada, Constable Duncan MacInnis, Constable Jeffrey Ausmus, Constable Robert Smith, Constable Steve Strike, and James Andison. In 2002, the respondents added The Attorney General of British Columbia as a defendant.
- [5] The Attorney General's liability is, as the Minister "charged" (see the Interpretation Act, R.S.B.C. 1996, c. 238, s. 29) with the administration of the Police Act, R.S.B.C. 1996, c. 367, he having entered into an agreement with the City of White Rock pursuant to s. 3(1) of that Act, to supply the "provincial police force" to police that municipality. Pursuant to s. 14, the Minister, as he pleaded in his statement of defence, entered into an agreement with the Royal Canadian Mounted Police for it to carry out the powers and duties of the provincial police. Thus, for purposes of this case, the officer was a provincial constable.

- [6] By section 11:

11 (1) The minister, on behalf of the government, is jointly and severally liable for torts committed by

- (a) provincial constables, auxiliary constables, special provincial constables and enforcement officers appointed on behalf of a ministry, if the tort is committed in the performance of their duties, and
- (b) municipal constables and special municipal constables in the performance of their duties when acting in other than the municipality where they normally perform their duties.

- [7] None of this was pleaded by the respondents but it should have been because, at common law, vicarious liability was not fixed on the "employer" of a peace officer. See *McCleave Estate v. Moncton (City)* (1902), 32 S.C.R. 106, and *The King v. Labour Relations Board* (Nova Scotia), [1951] 4 D.L.R. 227 at 235 (N.S.S.C.). The vicarious liability of the appellant is a pure creature of s. 11.

- [8] Two other pleading points arise, flowing from s. 21 of the Police Act:

21 (1) In this section, "police officer" means a person holding an appointment as a constable under this Act.

- (2) No action for damages lies against a police officer or any other person appointed under this Act for anything said or done or omitted to be said or done by him or her in the performance or intended performance of his or her duty or in the exercise of his or her power or for any alleged neglect or default in the performance or intended performance of his or her duty or exercise of his or her power.

- (3) Subsection (2) does not provide a defence if
 - (a) the police officer or other person appointed under this Act has, in relation to the conduct that is the subject matter of action, been guilty of dishonesty, gross negligence or malicious or wilful misconduct, or
 - (b) the cause of action is libel or slander.
- (4) Subsection (2) does not absolve any of the following, if they would have been liable had this section not been in force, from vicarious liability arising out of a tort committed by the police officer or other person referred to in that subsection:
 - (a) a municipality, in the case of a tort committed by any of its municipal constables, special municipal constables, designated constables, enforcement officers, bylaw enforcement officers or an employee of its municipal police board, if any;
 - (b) a regional district, government corporation or prescribed entity, in the case of a tort committed by any of its designated constables or enforcement officers;
 - (c) the minister, in a case to which section 11 applies.
- 1. The Attorney General pleaded s. 21 of the Police Act, presumably on behalf of the two constables. The respondents did not, in a reply, and had not in their amended statement of claim, made any allegations within s. 21(3).
- 2. The basis on which there may be vicarious liability for the actions of an R.C.M.P. constable is not before us. At a minimum, however, there could be no vicarious liability on the part of the federal defendants in these circumstances because s. 21(2) shields a constable from an action for damages, thereby ensuring that the Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50, if it does extend to police officers, by s. 10 precludes the liability of Her Majesty in right of Canada or the Attorney General for Canada. There was no foundation for the impleading of Her Majesty in right of Canada or the Attorney General for Canada.
- [9] Thus, as against all the defendants, save the Attorney General for British Columbia, this action ought to have been struck out and their names ought not to have appeared either in the reasons for judgment or the judgment drawn up consequent upon those reasons.
- [10] The allegations of negligence are put thus in the amended statement of claim:
- 10. On or about December 17, 1998 at or near Vidal Street and Marine Drive, in the City of White Rock, Province of British Columbia, Germain Joseph Roy ("Roy") was found by the defendant, Constable Duncan MacInnes [sic] ("MacInnes") lying on the ground between two motor vehicles. Roy was, at the time, conscious but incoherent and unable to make a reasoned decision. Shortly thereafter, the defendant, Constable Jeffrey Ausmus ("Ausmus") attended on the scene to assist the defendant MacInnes.

11. Roy was incoherent and unable to make a reasoned decision due to extreme intoxication caused by the ingestion of alcohol.
12. The defendants, MacInnes and Ausmus knew or ought to have known that Roy was intoxicated due to the consumption of alcohol.
13. Roy was taken into custody by the defendants MacInnes and Ausmus and placed in the cell known as the "drunk tank" or "cell 3" at the White Rock detachment police lockup.
14. The defendants, MacInnes and Ausmus, placed Roy in cell 3 in a position known as the "recovery position".
15. While in custody, Roy was under the supervision, care and control of the defendant, James Andison ("Andison"), a civilian guard at the White Rock detachment of the Royal Canadian Mounted Police and/or the defendants MacInnes, Ausmus, Robert Smith ("Smith") and Steve Strike ("Strike").
16. Roy remained in custody at the White Rock detachment of the Royal Canadian Mounted Police under the supervision, care and control of the defendants for a number of hours (the "period of custody").
17. During the period of custody Roy received no medical attention and his physical condition deteriorated.
18. On December 17, 1998 at approximately 8:18 p.m. Roy was transported by ambulance to the Peace Arch District Hospital and was pronounced dead shortly after his arrival.
19. The cause of Roy's death was acute alcohol ingestion.
20. During the period of custody, the defendants owed Roy a duty of care for his well being, particulars of which, inter alia, include the following:
 - (a) to ensure that Roy's condition was properly assessed;
 - (b) to ensure that Roy received promptly the medical attention he required;
 - (c) to ensure that Roy was properly observed, monitored and supervised given his intoxication;
 - (d) to ensure that Roy was not at any risk of harm given his intoxication.
21. The death of Roy was caused by the negligence of the defendants and each of them, the particulars of which are, inter alia, as follows:
 - (a) failure to observe or supervise the condition of Roy knowing he was at risk due to intoxication caused by ingestion of alcohol;
 - (b) failure to seek or obtain medical attention for Roy;
 - (c) failure to properly determine the nature and extent of Roy's intoxication;

- (d) taking Roy into custody without first ensuring that he was taken to an appropriate medical facility for diagnosis and/or treatment;
- (e) failure to monitor or observe Roy's condition while he was in custody;
- (f) failure to ensure that Roy received medical attention when they knew or ought to have known that his condition was acute and deteriorating;
- (g) failure to provide the necessary medical care/treatment required in a timely manner.

[11] In his statement of defence the Attorney General pleaded:

- 12. At approximately 7:53 P.M. the Defendant jail guard, James Andison, called for assistance, and Smith attended the Cell and performed cardiopulmonary resuscitation on Roy.
- 13. Members of the White Rock Fire Department took over the care of Roy shortly thereafter, and at approximately 8:04 P.M. paramedics employed by Emergency Health Services assumed that responsibility.
- 14. In response to paragraphs 16 and 17 of the Amended Statement of Claim, this Defendant says that Roy was in the custody of the RCMP Members for approximately 40 minutes, and that there was no indication until the end of that time period that Roy required medical attention, at which time prompt and appropriate medical attention was provided.
- 15. This Defendant specifically denies that Roy's death was caused by the negligence of any of the RCMP Members, as alleged or at all, and says that Roy's death was caused by his voluntary excessive consumption of alcohol.
- 16. In the alternative, if any of the RCMP Members were negligent, as alleged in the Amended Statement of Claim, or at all, which is not admitted but denied, this Defendant says that none of the said acts or omissions was the proximate cause of Roy's death or the injuries, losses, damages or expenses alleged suffered by the Plaintiffs.

[12] The learned judge began her reasons with an account of the evidence of Constables MacInnis and Ausmus. [Constable MacInnis, at the time of trial, was Corporal MacInnis.] I shall come to that account presently but I find it convenient to address, first, the allegation in paragraph 16 that Mr. Roy was "under the supervision, care and control of the defendants for a number of hours". That assertion is wildly off the mark.

[13] The actual times are these:

7:16 p.m. The White Rock R.C.M.P. dispatcher dispatches Constable MacInnis to a location called the "Boathouse". Constable Ausmus also arrives and Constable MacInnis arrests Mr. Roy who is not coherent. They lift Mr. Roy into the police vehicle.

7:30 p.m. They deliver Mr. Roy to the White Rock Detachment where he is placed in cell 3, the "drunk tank".

7:47 p.m. The civilian guard checks Mr. Roy and finds him "sleeping" and "snoring".

7:53 p.m. The civilian guard checks again and finds Mr. Roy not breathing. Attempts at resuscitation follow. Emergency services are summoned.

? Ambulance leaves with Mr. Roy for Peace Arch Hospital.

8:18 p.m. Mr. Roy pronounced dead at Peace Arch Hospital.

The Time and Cause of Death

- [14] In the circumstances of this case, the first two questions are when did Mr. Roy die and what was the cause, using the word "cause" in its medical and not legal sense, of his death? The second question may be called the "why".
- [15] As to when, Dr. Charlesworth, who performed the autopsy and whose evidence is to be found in the appeal book at page 45, remarked, "... he died at approximately 8:45." Neither counsel pursued the point with him. Dr. Baker, called for the defence, in his report, relying upon the examination for discovery of the civilian guard, put the time of death in these words: "... unwitnessed period of time between 19:30 and 19:47 hours on December 17, 1998."
- [16] Whether Dr. Charlesworth misspoke himself and meant 7:45 p.m., I cannot say, but if he did not misspeak himself, he had plainly forgotten that Mr. Roy was pronounced dead at 8:18 p.m.
- [17] As to Dr. Baker's time of death, the evidence of the guard was that Mr. Roy was breathing at 7:47 and not breathing at 7:53. There was no evidence as to how many minutes will elapse between the cessation of breathing and there being no possibility of resuscitation.
- [18] One can, I think, sensibly infer that Mr. Roy died shortly before 8:00 p.m., that is within 40 or 45 minutes of his arrest.
- [19] I come then to "why". The expert witnesses were agreed that Mr. Roy died from having ingested alcohol of such an amount as to cause his central nervous system to fail.
- [20] As Dr. Charlesworth put it:

Q And their breathing is affected, I take it, because the alcohol affects the brain and the central nervous system?

A Alcohol is a depressant. That's its primary, that's its only CNS effect and as such at low levels it affects specific areas in the brain and as it gets into higher levels it has a more general effect including the basal functions which include airway protection, consciousness and eventually respiratory drive. So at high enough levels it will cause you to cease breathing, yes.

Q You use the word "eventually" and it's the same word you used in your report. I take it this is a gradual, not a sudden process?

A Well, it's gradual in the sense that you tend to go through stages. So that it's not that you are standing there at the bar ordering a beer and suddenly you stop breathing. There are stages that you pass through. And so those stages will include somnolence or stupor and then sleepiness, progressing to coma and then on to an unprotected airway. And eventually if the levels permit or the situation permits you progress on to stopping breathing entirely. It isn't a guarantee that you are going to progress to that stage but given enough rapid ingestion of enough alcohol it will go that way.

[21] The toxicology report sets out Mr. Roy's blood alcohol content thus:

Blood (Aorta) -ETHYL ALCOHOL: 81 mmol/L (0.37 %)

* * *

Urine -ETHYL ALCOHOL: 69 mmol/L (0.32 %)

* * *

Vitreous Fluid -ETHYL ALCOHOL: 83 mmol/L (0.38 %)

[22] As to the effect of various amounts of alcohol, in answer to the question:

Q Well, a person who passes out because they have drunk too much alcohol, they're not necessarily going to go through this process leading to respiratory depression?

Dr. Charlesworth said:

A Not necessarily, no. Depends on what level they -- you know, an individual who consumes rapidly and reaches a level of .15 or .2, for the average individual that's stumbling drunk and they may pass out or fall asleep very shortly thereafter. At that level you are not losing control of your airway, you are not in a coma, you are not going to progress to respiratory depression.

About .3, .35 you are at a much greater risk of that occurring. And anywhere in the range of .35 to .5 can be fatal. It may not be depending on one's individual habits.

[23] He later said, about heavy drinkers:

A ... If they drink constantly and they have been drinking for ten years, individuals can easily run .4 levels of alcohol and not die.

Q They can be walking and talking at .3, .4?

A They can be, yes. Usually they're sitting and talking, mumbling on the streets. There are lots of cases. I've got cases of people driving when they've got .6. Now they have run into a post and cut their head off but they managed to get into the car and start it up, .6, .7. There are lots of ways to achieve high alcohol. Just depends on how it affects that individual at that time.

[24] As to the inference to be drawn from the toxicology findings, Dr. Charlesworth said:

You have to keep in mind these numbers reflect postmortem numbers and this occurred, he died at approximately 8:45. Presumably his last drink was at least an hour and a half before that so he has had an hour to metabolize so his blood alcohol would be probably at least .4 if not higher at the time he left the pub.

And then there is also the dilution that occurs when you start resuscitation and put fluid into people so these numbers aren't exactly what they would have been at the time when he initially stopped breathing. And as we can see here from this previous report, he collapsed on the street outside with an alcohol level substantially less than this one. So if he is a chronic alcoholic he is responding to alcohol pretty much the same way as everyone else would: .3, you are in a stupor and collapse, .4 you are at risk of death.

[The "previous report" is the report of an earlier occasion when Mr. Roy had been admitted to hospital because of his consumption of alcohol.]

- [25] Unfortunately, Dr. Charlesworth was not asked what Mr. Roy's blood alcohol content would have been at the time of his arrest if death was between 7:53 and 8:00 p.m., that is 45 to 50 minutes earlier than the time upon which he predicated the portion of his evidence which I have quoted. One can, however, infer that Mr. Roy's blood alcohol content, because of the shorter time for the alcohol to metabolize was not "at least .4 if not higher at the time he left the pub" but higher than .4.
- [26] To achieve such a high blood alcohol content, Mr. Roy, between the time he left home about 6:00 p.m., when he was said to be sober, and 7:16 p.m. or shortly thereafter when found by the police, must have consumed the equivalent of a 26 ounce bottle of whisky.
- [27] The learned trial judge addressed the cause of death in paragraphs 70 to 94 of her reasons and concluded:
- [93] The expert evidence established that Mr. Roy would have had to drink up to 26 ounces of hard liquor to reach that level. I have found that Mr. Roy drank most of that in less than an hour, between 6:00 and 7:00 p.m. The expert testimony indicated that absorption of alcohol in the blood usually peaks half an hour after the last drink, but that rapid consumption of a large amount can result in absorption continuing up to an hour after the last drink. I find that is what occurred in Mr. Roy's case, and his blood alcohol level continued to increase while he was in police custody. I find that the deterioration in his condition from the time Dr. Williams saw him to his death supports this conclusion.
- [94] For all of these reasons, I conclude it is more probable than not that Mr. Roy died from acute alcohol ingestion, which caused depression of his central nervous system, and ultimately respiratory arrest.
- [28] This finding is not disputed in this Court.

The Evidence Bearing on Negligence

[29] From the learned judge's account and references to the evidence of the two police officers, there emerge these salient facts: Each of them considered Mr. Roy was severely intoxicated. He had no sign of external injury. It never occurred to either that Mr. Roy was in need of medical attention. More particularly, it never occurred to either that Mr. Roy was of "questionable consciousness" within the meaning of that phrase in the R.C.M.P. operational policy quoted *infra* paragraph 31. He was, to them, simply a drunk who had passed out.

[30] The respondents did not call, for instance, evidence of other peace officers on when a peace officer with a prisoner who is apparently drunk ought to recognize that the prisoner has such a high blood alcohol content that he is at risk of central nervous system failure and thus in need of medical attention. Indeed, the respondents did not call any evidence that it is part of a peace officer's training that a high blood alcohol content will or may cause central nervous system failure or as to how much alcohol will bring about a high blood alcohol content.

[31] They rested on the R.C.M.P. operational policy:

5. MEDICAL TREATMENT

* * *

b. Questionable Consciousness

1. A person who is ill, injured, unconscious or of questionable consciousness at the time of arrest shall not be placed in a cell UNLESS medically examined and found fit to be incarcerated.
2. Questionable Consciousness means:
 1. a person is either conscious or questionable. If questionable, medical attention is needed immediately. Members will not attempt to determine the degree of consciousness of a person who appears to be less than fully conscious.

The Question

[32] The question for the learned judge was whether, in the 15 minutes or so that Mr. Roy was in their custody, the two constables failed to exercise reasonable care of their prisoner.

The Learned Judge's Reasons

[33] The learned judge said:

[118] In that context, there are a number of policy reasons that favour a standard of care requiring the police to secure a medical assessment for all persons of questionable consciousness. As previously noted, prisoners in police custody are vulnerable, and entirely dependent on the police to obtain medical assistance for them. A state of reduced mental awareness may well preclude them from being able to communicate their symptoms to police, or request assistance.

* * *

[124] I accept that the police detain a number of people for being drunk in a public place whose level of awareness is reduced by their alcohol consumption, but who are in no medical danger. They are taken into custody just to permit them to "sleep it off" in a safe environment. I agree it would be unreasonable to impose a standard of care that clogs medical and police resources by requiring medical examinations of each of these prisoners before they can be incarcerated. The problem is, by what means can the police ensure these prisoners are not in medical danger, given the concerns I have outlined previously?

[125] Having weighed these respective risks and burdens, I conclude that a reasonable standard of care must be conservative, and err on the side of caution, due to the significant harm that may befall a prisoner if a police officer, with no medical training, misjudges the situation. If there is any doubt about a prisoner's level of awareness, he should be assessed medically. However, the standard should also permit prisoners who are intoxicated, but still consistently responsive to their environment, to be incarcerated without an examination.

[126] Such a standard necessarily imports a requirement that the officer dealing with the prisoner conduct an appropriate investigation in making a determination as to the prisoner's level of awareness.

* * *

[128] Given the concerns I have outlined, I would expect such an assessment to include, at a minimum, an attempt to converse with the person about how much he or she has had to drink, and what other causes there may be for his or her condition. I would expect some attempt to make him or her respond to basic commands to assess the level of awareness. I would expect the officer to do a basic physical examination to determine if the person has suffered any injuries, and whether the vital signs such as pulse and breathing are stable. I would also expect the officer to investigate the circumstances in which he or she was found, including speaking to available witnesses about their observations.

[34] She then posed to herself the question, "Was there a breach of the standard of care?", and answered it in this way:

- [140] I find Corporal MacInnes' testimony about Mr. Roy's level of consciousness inconsistent and confused. I recognize that it is not all slanted in a manner to support the defence, but it reinforces my impression that, although he was aware of the RCMP policies, at no time did he make any real effort to assess Mr. Roy's level of consciousness.
- [141] Constable Ausmus testified that Mr. Roy was not awake at any time when he dealt with him, except when he moaned or mumbled something as they took him to the vehicle. He was snoring and smelled of liquor. He concluded he was highly intoxicated, and had passed out and gone to sleep. He said he believed Mr. Roy was conscious, and that the question of whether he was of questionable consciousness did not cross his mind. He gave no basis for these statements.
- [142] I conclude that throughout his dealings with the police, Mr. Roy was in a state of questionable consciousness, and his level of awareness was diminishing. He was unresponsive to verbal stimuli, and did not speak, other than to moan incoherently. He was not able to stand or move. He had no control and no strength, and demonstrated symptoms consistent with a subdural hematoma.

* * *

- [145] However, I find they did not perform any adequate assessment or investigation into Mr. Roy's state of consciousness or its cause. The thought that it was necessary to assess his significantly reduced level of awareness with a view to the possibility of seeking medical examination did not even occur to them. I find that failure to be a breach of the standard of care.
- [35] With respect, I am of the opinion that in her analysis the learned judge erred.
- [36] I take the following propositions to be established:
1. A peace officer owes a duty to his prisoner to take reasonable care for the prisoner's safety but he is not an insurer.
 2. "[A]n error of judgment may, or may not, be negligent; it depends on the nature of the error. If it is one that would not have been made by a reasonably competent professional man professing to have the standard and type of skill that the defendant held himself out as having, and acting with ordinary care, then it is negligent. If, on the other hand, it is an error that a man, acting with ordinary care, might have made, then it is not negligence." [Whitehouse v. Jordan, [1981] 1 All E.R. 267 (C.A.) at 281, adopted by Craig J.A. in Smith v. British Columbia (Attorney General) (1988), 30 B.C.L.R. (2d) 356 (B.C.C.A.) at 363.]
 3. The policy of a police force is an important factor in determining the standard of care a peace officer must observe, but it is not determinative, nor is it to be treated as if it were a statute imposing civil obligations.

4. Where, as here, at issue is the standard of a competent member of a trade or profession (and the occupation of peace officer falls within that rubric), evidence of those carrying on that occupation is necessary unless, in the words which McPherson C.J.M., in *Anderson v. Chasney*, [1949] 2 W.W.R. 337 (Man. C.A.) at 341, adopted from the American case of *Mehigan v. Sheeham*, 51 Atlantic Rep. 2nd series, 632, the matter is one of "non-technical matters or those of which an ordinary person may be expected to have knowledge."

[37] Here, the learned judge analyzed the policy as if it were a statute. She founded on the words "questionable consciousness", but the question was whether these peace officers, acting reasonably according to the standards of their profession, ought to have recognized that Mr. Roy's condition was one of "questionable consciousness" rather than that of the usual passed out drunk.

[38] It is worth noting that the term "passed out" was used not only by Constable MacInnis (who used it to describe Mr. Roy's condition when he found him) but also by Dr. Charlesworth in the passage quoted by me in paragraph 22, *supra*, and in this passage:

For a lay individual to come along and see this individual passed out on the side of the road with no information as to what had gone on before, no, I wouldn't presume to have them make a decision as to whether this guy is going to get better or worse. I couldn't make that decision. Basically you have to examine them and test them to see whether they're actually in control of their airway and see what's happening over the next half hour. That's why the sequence of events that the information passed on to me is so significant to me.

[39] In the absence of evidence that peace officers in Canada generally know the difference and are expected to recognize the difference between a person obviously inebriated who is merely "passed out" and such a person who is on the verge of central nervous system failure (the standard of care), the learned judge could not properly find that these officers failed in their duty to Mr. Roy to take reasonable care.

[40] It may well be that either the Royal Canadian Mounted Police, in their policy manuals, or the Attorney General of British Columbia, in his office as Minister in charge under the Police Act, should lay down as a requirement that peace officers confronting someone who is "passed out" should do those things which the learned trial judge sets out in paragraph 128 of her reasons.

[41] But in the absence of evidence that those are the standards of peace officers in Canada it was not, in my opinion, for the learned judge to impose her standard. In coming to this conclusion, I think it right that we remind ourselves of what the principal duty of a peace officer is. It is to keep the Queen's peace, an obligation which includes the prevention of crime and the detection of criminals. Peace officers are not emergency services personnel and cannot be held, unless and until they receive similar training, to a standard which would be appropriate for such persons.

- [42] Much can be learned from hindsight. Hindsight, in and of itself, cannot be a foundation for liability in circumstances such as these.
- [43] I would therefore allow this appeal and dismiss the action. That being so, I need not address the other errors alleged, one of which, the order for costs, was the foundation for a panel of five sitting on this appeal.
- [44] Since drafting these reasons, I have had the privilege of reading in draft the concurring reasons of my colleague, Hall J.A. I agree with those reasons.

"The Honourable Madam Justice Southin"

I agree:

"The Honourable Madam Justice Saunders"

I agree:

"The Honourable Mr. Justice Lowry"

Reasons for Judgment of the Honourable Mr. Justice Hall:

- [45] I have read in draft the reasons of my colleague, Madam Justice Southin. I am in agreement with my colleague that the learned trial judge erred in finding negligent conduct on the part of the police officers in the circumstances of this case. I only venture to add some concurring remarks in order to explain why I consider this case is distinguishable from two cases in which courts in this province found liability against police officers who had taken into custody injured individuals who were in a state of intoxication.
- [46] In *Fortey (Guardian ad litem of) v. Canada (Attorney General)* (1999), 125 B.C.A.C. 29, 1999 BCCA 314, a decision of this Court in which I was a member of the panel, this Court sustained the judgment of a trial judge finding police officers liable for 60 per cent of the damages sustained by the plaintiff respondent. The Court noted the main issue on the appeal was whether the trial judge had been correct in holding that the failure of the police officers to have the plaintiff medically examined before he was incarcerated fell below the standard of care of a reasonable police officer acting reasonably in the circumstances.
- [47] In *Fortey*, security guards discovered the plaintiff lying on a roadway and called an emergency ambulance service. A police constable from the Chilliwack RCMP detachment heard the call about a "man down" and came to the scene to assist and investigate. The plaintiff was observed at that time to have blood in his hair and blood on his shoulder. He was drunk and aggressive. Although the ambulance attendants suggested he should go to the hospital, as did the constable, the plaintiff refused. The officer then gave *Fortey* a choice to go to the hospital, go home, or be arrested. The plaintiff attempted to proceed to his residence. However, after *Fortey* disappeared off the roadway after only a short distance, the officer, fearing that he might harm someone or himself, took the plaintiff into custody and put him in the detachment's cells. The police officers took no further steps to have the

plaintiff examined at a hospital because they thought he was just a drunk with a cut on his head.

- [48] However, it turned out that - doubtless as a result of his fall - the plaintiff had a depressed skull fracture resulting in a large intercranial hematoma. Because of the hematoma, he suffered paralysis to an arm and a leg and his speech was impaired, which the trial judge held could have been prevented if the plaintiff had received immediate medical attention. The trial judge also found that the police officers knew or ought to have known that the plaintiff was unable to make a rational decision about whether he required treatment because of the plaintiff's obvious intoxication. The trial judge found the police partially at fault for the damages suffered by the plaintiff because they had not had him examined - even though the plaintiff had repeatedly refused treatment.
- [49] This Court sustained the judgment of the trial judge. Rowles J.A. agreed with the finding of the trial judge that because the police were aware at the time Fortey was taken into custody that he had suffered a head injury serious enough for the officer and ambulance attendants to suggest that he should be taken to a hospital, it should have been obvious to the officers that it would have been appropriate to have the plaintiff examined by a physician.
- [50] Similarly, in *Lipcsei v. Central Saanich (District)* (1994), 8 B.C.L.R. (3d) 325, [1995] 7 W.W.R. 582 (S.C.), liability was found against a police officer for 30 per cent of the damages suffered by an intoxicated plaintiff who had been taken into custody by a police officer in Saanich. In that case, a constable had observed a number of people at the side of the road on the Pat Bay Highway. The officer believed that there might be a fight in progress and called for assistance. From what he saw and heard at the scene, he gathered that the plaintiff was under the influence of drugs and was apparently contemplating jumping in front of oncoming traffic. Thereupon the plaintiff was arrested, carried to the police cruiser and subsequently dragged to the cells.
- [51] The plaintiff in that case was not ambulatory; he had sustained an injury to his left leg when he had earlier tried to leap over a ditch after leaving a party at which he had a great deal to drink. The plaintiff said he had complained of leg pain when he was arrested and during his time in the cells. The judge found that the plaintiff may have experienced pain but was unable to coherently communicate this fact to the police. However, the judge found that the arresting police officer had a duty to inquire concerning the inability of the plaintiff to stand or ambulate. He held that it would have been appropriate for the arresting officer to ask other persons present at the roadside or to ask the plaintiff about possible injury causing his difficulty in ambulation. As a result of the severe injury to his leg and the delay in getting treatment, the plaintiff's leg was amputated. There was medical evidence adduced, which the trial judge accepted, that the leg could have been saved if earlier treated.

- [52] To my mind, what distinguishes Fortey and Lipcsei from the case at bar is that in both those cases, it was obvious that the intoxicated individual taken into custody had physical injuries. These were both injuries of substance: Fortey had a fairly significant head wound and Lipcsei was unable to stand or walk. The case might be very different if a plaintiff had a minor injury such as a cut lip or a scraped finger. Not every untreated visible injury on an individual will necessarily be of particular significance to the health of that individual.
- [53] In the case at bar, as my colleague has narrated, there was absolutely nothing to indicate that the unfortunate deceased had suffered an injury. It was simply a case of the police dealing with an individual who appeared to have had a considerable amount to drink - an amount sufficient to cause him to pass out. If peace officers were required to take every individual they find heavily intoxicated to a hospital for assessment, it seems to me that this would have very dramatic implications for both hospitals and police forces. This could have a tendency to prevent police officers assisting in a timely way those in need of assistance. Here the officers took positive steps to place the deceased in what they thought was a safe environment; namely, the jail cells, in order to enable him to regain consciousness in a protected environment. Unfortunately, unknown to the officers, Mr. Roy had ingested so much alcohol that he died from the effects of alcohol on his vital functions. But I cannot see from the circumstances in this case that there was anything particular to alert the officers that this deceased was in peril. The factual situation therefore seems to me quite different from Fortey and Lipcsei.
- [54] The trial judge did make reference to these cases and did distinguish Fortey as a case where the person arrested had a visible head injury. However, I consider that that distinguishing feature ought to have led the trial judge to conclude that in the absence of apparent injury, what the police did here was not a negligent performance of their duties. For these reasons, as well as for the reasons expressed by my colleague, Madam Justice Southin, I consider that this appeal ought to be allowed and this action dismissed.

"The Honourable Mr. Justice Hall"

Reasons for Judgment of the Honourable Mr. Justice Oppal:

- [55] I have read the draft reasons of Madam Justice Southin and Mr. Justice Hall. With respect, I disagree with their conclusions. I would dismiss the appeal. I am in substantial agreement with the reasons of the trial judge, Madam Justice Neilson. In my view, she made no errors in law and with some minor exceptions, made no errors in fact.
- [56] The circumstances which give rise to this appeal are as follows. Shortly after 7:00 p.m. on 17 December 1998, Dr. Leslie Williams, an orthodontist, arrived at a restaurant in White Rock when she saw Mr. Roy standing beside a car. She saw him stumble and fall back to a sitting position. She approached him and offered assistance. After speaking with and observing him, it was her opinion that he was significantly intoxicated. Fearing that he would get into his motor vehicle, she called the White Rock R.C.M.P. It is agreed that she made the call at 7:14 p.m. After leaving and making the telephone call, she returned to find Mr. Roy lying on

his back between two parked cars. She said he was less responsive than he was when she first dealt with him. He was not unconscious. It was her opinion that he could not make a reasoned decision.

- [57] Corporal MacInnes arrived shortly after 7:15 p.m. He had a very brief conversation with Dr. Williams. He asked Mr. Roy if he was okay but he received no response. He checked and saw no sign of injury. Corporal MacInnes testified that his eyes were open and he muttered something under this breath. He was breathing normally. He did not seem to be in any pain or distress. Corporal MacInnes concluded that Mr. Roy was in an advanced state of intoxication. He then arrested him for being intoxicated in a public place. A second officer, Constable Ausmus, arrived to assist Corporal MacInnes. He said that he did not physically assess Mr. Roy. He had no discussion with Corporal MacInnes relating to Mr. Roy's condition. He also concluded that Mr. Roy was intoxicated. When Mr. Roy failed to respond to the officers' request to walk to the police car, the officers picked him up and carried him and placed him in the backseat. The officers noted that Mr. Roy was snoring as they transported him to the detachment where they arrived at 7:30 p.m. They placed him in Cell 3, otherwise known as the drunk tank. At 7:47 p.m. a jail guard checked Mr. Roy and found him to be "sleeping and snoring". At 7:53 p.m. he checked again and found that he was not breathing. When attempts at resuscitation failed, the guard called the ambulance service which transported him to the Peace Arch Hospital where he was pronounced dead at 8:18 p.m.
- [58] It is not in dispute that after his arrest and prior to his death Mr. Roy received no medical attention. It is also not in dispute that the cause of death was acute alcohol ingestion which caused depression of his central nervous system and ultimately led to respiratory arrest. His blood alcohol level was .37 or 370 milligrams of alcohol per 100 millilitres of blood. The judge accepted the expert evidence which stated that Mr. Roy would have had to consume up to 26 ounces of hard liquor between the hours of 6:00 and 7:00 p.m.
- [59] The respondents' cause of action was based on the negligence of the arresting officers in failing to provide Mr. Roy with necessary medical attention. According to the statement of claim, Mr. Roy was unable to make a reasoned decision due to extreme intoxication caused by an ingestion of alcohol. The respondents argued and the trial judge agreed that the officers breached the standard of care in failing to have a medical assessment done on Mr. Roy.
- [60] There are three policies that govern the conduct of White Rock R.C.M.P. officers in the arrest and detention of persons who may require medical attention. The national R.C.M.P. Operational Policy that is applicable to all officers in Canada reads in part as follows:
- E. 1. a. The RCMP is responsible for the well-being and protection of persons in its custody.

* * *

E. 3. Medical Treatment

E. 3. a. If there is any indication that a person in your custody is ill, suspected of acute alcohol poisoning or a drug overdose, injured or not fully conscious, even if the person denies same, ensure that he/she:

1. is examined by a qualified medical practitioner;
2. receives immediate medical treatment; and
3. is not placed in a cell unless a medical examination finds him/her fit to be incarcerated.

[61] In their claim for negligence the respondents rely on the provincial "E" Division Operational Policy which reads in part as follows:

5. MEDICAL TREATMENT

b. Questionable Consciousness

1. A person who is ill, injured, unconscious or of questionable consciousness at the time of arrest shall not be placed in a cell UNLESS medically examined and found fit to be incarcerated.
2. Questionable Consciousness means:
 1. a person is either conscious or questionable. If questionable, medical attention is needed immediately. Members will not attempt to determine the degree of consciousness of a person who appears to be less than fully conscious.

[62] As well, the White Rock R.C.M.P. detachment has a policy which contains the following provisions:

M. MEDICAL TREATMENT

1. a. If there is any indication that a person in the care or custody of the R.C.M.P. is sick, injured or of questionable consciousness, immediately obtain medical aid: Any medical treatment administered is to be noted on C-13. (ie. taken to hospital/given pain killers etc.)
- b. A person who is ill, injured, unconscious or of questionable consciousness at the time of arrest shall not be placed in a cell unless medically examined and found fit to be incarcerated.

[Emphasis in original.]

[63] Both officers testified that they were aware of the R.C.M.P. policy which stipulated that a person who was unconscious or of questionable consciousness at the time of arrest was not to be placed in a jail cell unless medically examined and found fit to be incarcerated. Corporal MacInnes testified, however, that he thought the policy was not applicable in this case. He based that opinion on his "personal experience". He agreed that the policy does not permit an officer to exercise discretion and furthermore does not take into account personal

experiences. He said that medical treatment was to be provided for prisoners who were either injured or ill. He testified that he was not sure if Mr. Roy was fully conscious or not. Corporal MacInnes said he believed Mr. Roy was conscious although he was unable to provide any basis for that opinion.

[64] There were a number of inconsistencies in Corporal MacInnes' evidence. He agreed that at an inquest he said that "I would say that he was semi-conscious at best. He was - appeared to be extremely intoxicated. He had trouble responding". In his statement to Corporal Shaw, he gave the following description of Mr. Roy when they arrived at the cells:

It was, an absolute blob type of thing.

It was just like he had no no control, no no strength of anything whatsoever. He just seemed to be totally passed out. His eyes would open and his eyes would close again but he offered no help whatsoever.

[65] At the examination for discovery, he gave the following evidence:

Q You'll agree with me that Mr. Roy in the circumstances was placed into the cell when he was unconscious?

A No, Mr. Roy had his eyes open when we put him in the cell.

Q When is it that he closed his eyes again, do you recall?

A I believe it was when he was put in the recovery position and covered with a blanket and started snoring again.

Q So from the moment that you and Constable Ausmus took him out of the car his eyes were open, correct?

A Correct.

Q Until he was put in the recovery position?

A Yes.

[66] At the inquest he gave the following evidence:

Q And just so I'm clear and the members of the jury are clear, Mr. Roy was unconscious from the moment you put him in the back of the car until you got to put him in the cell and left him there?

A He had his eyes open and was responsive until he got in the car. When he laid down in the back seat of the car, he began to snore.

Q And from that point forward he was unconscious?

A That's right.

Q Didn't wake up when you took him out of the car?

A No.

Q And when you took him into the lockup?

A No.

[67] At trial, Corporal MacInnes said that Mr. Roy opened his eyes only briefly when he was removed from the vehicle. According to the judge, Corporal MacInnes was unable to provide a satisfactory explanation for the inconsistencies in his evidence relating to Mr. Roy's level of awareness when he was taken to the jail cell.

[68] Corporal Ausmus said that he did not think that he had a discretion once it was determined that a person was unconscious. However, at the examination for discovery he said that Mr. Roy was highly intoxicated but that the question of whether he was of questionable consciousness did not cross his mind.

[69] It is apparent that the judge was troubled by the inconsistencies in the officers' evidence and she made note of the fact that the "E" Division Policy gives no discretion to the arresting officer. She also found that the policy does not take into account personal experiences. She noted that there are policy reasons that favour a standard of care requiring police officers to seek medical assessment for persons of questionable consciousness. The judge then went on to discuss the policy reasons behind seeking medical assistance. In so doing, she made the following comments:

[118] In that context, there are a number of policy reasons that favour a standard of care requiring the police to secure a medical assessment for all persons of questionable consciousness. As previously noted, prisoners in police custody are vulnerable, and entirely dependent on the police to obtain medical assistance for them. A state of reduced mental awareness may well preclude them from being able to communicate their symptoms to police, or request assistance.

[70] The judge correctly noted that the police are not qualified to accurately assess the medical condition of a person in custody. In her reasons she stated:

[119] Moreover, the police are not qualified to accurately assess a prisoner's medical state themselves. As Rowles J.A. stated at para. 36 of Fortey [(Guardian ad litem of) v. Canada (Attorney General) (1999), 63 B.C.L.R. (3d) 185 (C.A.)]:

... [P]olice officers are not in a position to make a medical assessment of the seriousness of an injury or the consequences that may flow from it, or to determine whether treatment is urgently required. Having an injured prisoner examined by a qualified medical practitioner is obviously one of the ways in which the police can guard against creating an unreasonable risk of harm to those in their custody.

- [120] In my view, these considerations apply with equal force to a prisoner's diminished state of awareness. This is evident in the policy itself, which discourages the police from attempting to assess the prisoner's state of consciousness.
- [71] The judge then went on to make a number of findings of fact and in so doing reached the following conclusions:
- [130] I find that when the police dealt with Mr. Roy on December 17, 1998, he was in a state of questionable consciousness. I also find that he showed signs of severe intoxication. It was therefore incumbent on Corporal MacInnes and Constable Ausmus to assess Mr. Roy, in accordance with the standard of care, to determine whether this was due to his having imbibed a safe amount of alcohol, or whether the circumstances pointed to more serious concerns, requiring medical examination before incarceration.
- [72] The respondents' position throughout the proceedings has been that the R.C.M.P. Operational Policies establish the requisite standard of care and that by failing to comply with their own policies the police breached that standard. The judge concluded that the police breached the standard of care established by their own policy. She went on to state that given the policy considerations and Mr. Roy's level of consciousness, the police ought to have been concerned about his condition in view of the fact that he was minimally responsive to his environment, he was deteriorating, and the police did not have the medical skills to determine definitively the cause of his deteriorating condition. In particular, she concluded the officers made no real effort to assess Mr. Roy's state of consciousness.
- [73] The appellant has argued that the judge erred by imposing an unrealistically high standard upon the police and that the police cannot reasonably be expected to assume the role of insurers. With respect, I must disagree. The judge adopted a realistic standard and carefully balanced the needs of a prisoner who may be in a state of unconsciousness with the demands placed with their heavy call loads. In considering this argument, the judge made the following comments:
- [124] I accept that the police detain a number of people for being drunk in a public place whose level of awareness is reduced by their alcohol consumption, but who are in no medical danger. They are taken into custody just to permit them to "sleep it off" in a safe environment. I agree it would be unreasonable to impose a standard of care that clogs medical and police resources by requiring medical examinations of each of these prisoners before they can be incarcerated. The problem is, by what means can the police ensure these prisoners are not in medical danger, given the concerns I have outlined previously?
- [125] Having weighed these respective risks and burdens, I conclude that a reasonable standard of care must be conservative, and err on the side of caution, due to the significant harm that may befall a prisoner if a police officer, with no medical training, misjudges the situation. ...

- [126] Such a standard necessarily imports a requirement that the officer dealing with the prisoner conduct an appropriate investigation in making a determination as to the prisoner's level of awareness.
- [74] Madam Justice Neilson found as a fact that Mr. Roy was in a state of questionable consciousness and he showed signs of severe intoxication. She concluded that in the circumstances the officers had a duty to determine whether the prisoner required a medical examination before incarceration. She also found as a fact that Corporal MacInnes failed to ask Dr. Williams about her observations of Mr. Roy. That evidence is particularly relevant because Dr. Williams' evidence was that she thought the police would assess Mr. Roy. The judge concluded that the police failed to perform any adequate assessment or investigation into Mr. Roy's state of consciousness or its cause:
- [140] I find Corporal MacInnes' testimony about Mr. Roy's level of consciousness inconsistent and confused. I recognize that it is not all slanted in a manner to support the defence, but it reinforces my impression that, although he was aware of the RCMP policies, at no time did he make any real effort to assess Mr. Roy's level of consciousness.
- [141] Constable Ausmus testified that Mr. Roy was not awake at any time when he dealt with him, except when he moaned or mumbled something as they took him to the vehicle. He was snoring and smelled of liquor. He concluded he was highly intoxicated, and had passed out and gone to sleep. He said he believed Mr. Roy was conscious, and that the question of whether he was of questionable consciousness did not cross his mind. He gave no basis for these statements.
- [75] The real issue at trial and on this appeal concerns the police policies. The appellant has argued that the violation of an operational policy does not in and of itself constitute negligence. I agree with that submission with some qualification. It should be noted that police departments adopt policies to meet various operational demands and needs. A policy is a code of conduct and as the word denotes, is designed to set out a standard of care. Every police department has a policy or standard of care relating to arrest and detention of persons who are in a state of questionable consciousness. It is clear that the R.C.M.P. has attempted to adopt a somewhat consistent policy with respect to people who are arrested and are of questionable consciousness at the time of the arrest. All three policies that the White Rock R.C.M.P. operate under have a common objective: that persons who are in a state of questionable consciousness must be medically examined before being incarcerated. The question of whether a breach of a policy will necessarily constitute a breach of a legal standard of care will depend upon the circumstances of a given case. This issue was before this Court in *Funk v. Clapp* (1986), 35 B.C.L.R. (2d) 222 (C.A.). The facts are worth noting. The deceased who was arrested and incarcerated for impaired driving hanged himself with his belt while in custody. A jail guard failed to follow the police policy of taking prisoners' belts. In noting that the operating manual established basic safety measures that were not questioned by the defendants, Seaton J.A. at 228 stated:

I think that breach of the practices that prison authorities generally employ, that the defendants accept as appropriate and follow and that the operating manual directs, is evidence of negligence. It is evidence that, in the absence of any explanation or rebuttal, could lead to a finding of negligence.

He went on to state that the standards of the operating manual were reasonable standards and the breach thereof constituted negligence. Similarly, in this case the judge found that there was no reasonable explanation for the failure of the officers to comply with the operational policy.

[76] More recently, the standard of care to which police are held and the relevance of police policy was discussed in *Doern v. Phillips Estate* (1997), 43 B.C.L.R. (3d) 53 (C.A.). In that case, Vancouver police officers were found to be negligent as a result of a high speed chase that violated police vehicle pursuit policy. The words of Finch J.A. (as he then was) are particularly instructive:

[13] There is no dispute in this case concerning the legal standard of care to which the police are to be held. After a through [sic] review of the relevant authorities the learned trial judge said:

Based on the authorities provided, there is little doubt that the standard of care to which a police officer will be held is that of a reasonable police officer, acting reasonably and within the statutory powers imposed upon him or her, according to the circumstances of the case. ...

Counsel for all parties concede that that is a correct statement of the applicable standard. The appellant's argument is that in the application of that standard to the conduct of the officers engaged in the pursuit, and in supervising the pursuit, the learned trial judge applied the standard too stringently, and failed to take into account the practical realities, and inherent dangers of a high speed police pursuit.

[14] I do not consider this allegation to be well founded. The learned trial judge carefully examined and reviewed the evidence concerning the conduct of each police officer and unit involved in the pursuit, and in supervising it, and measured that conduct against the police pursuit policy, of which all officers were aware, and which they understood to govern their conduct.

[15] As to the role or importance of the pursuit policy, the learned trial judge said this:

In this case, it is necessary to consider whether the pursuit policy, which constituted a self imposed standard of care, was followed. The police pursuit policy was obviously carefully and thoughtfully crafted. It was designed to assist officers in the conduct of the activity that put them at more risk of harm than any of their other duties. Although the policy does not, in itself, constitute the standard of care, compliance with the policy, in my view, is a very important factor to consider in determining whether the standard of care has been met.

* * *

- [18] Every one must recognize that the members of our police forces should not be unduly hampered in the discharge of their difficult and often dangerous work. The police vehicle pursuit policy is a guideline for officers which attempts to balance the public interest in the apprehension of suspected criminals, with the need to maintain reasonable levels of safety for the police and the public as the police discharge their duties. Whether particular police conduct departs so far from the guidelines and from the standard of care imposed by law, as to constitute negligence is a heavily fact dependent question. Even if I held a different view of the evidence to that of the trial judge, which I do not, it would not be open to us to substitute our judgment for hers in a case which is essentially one of fact.
- [77] In this case, the judge found as a fact that given the circumstances of Mr. Roy the officers ought to have recognized that he was in need of medical assistance. I am not prepared to say that she erred in coming to that conclusion. With respect, it is no answer to say that there were no signs of injury or other evidence that would have triggered a different response from the officers. It is an indisputable fact that the self-imposed policy of the White Rock R.C.M.P. detachment stipulates that where there is a person of questionable consciousness, that person "shall not be placed in a cell unless medically examined and found fit to be incarcerated" [emphasis added]. The policy is clear. The judge correctly noted that the policy leaves no discretion to the arresting officer.
- [78] The appellant has also argued that there is no causative link between the failure of the officers to have Mr. Roy medically assessed and his death. It is argued that there was no evidence that Mr. Roy would have lived had he received early medical attention. In other words, it is said that there was no evidentiary basis to support a finding of causation. I must disagree with this argument. Neilson J. found that Mr. Roy was progressing through stages of increasing central nervous system depression that would ultimately threaten his airway. She concluded that if he had been medically assessed and taken to the hospital, his condition would have been diagnosed and he could have survived by being intubated in order to keep his airway open. Those were findings of fact made by the trial judge. Obviously, it is not the function of this Court to interfere with those findings of fact.
- [79] In their cross appeal, the respondents have argued that the trial judge erred in finding contributory negligence on the part of Mr. Roy. With great respect, there is no basis for this argument. This was a case of egregious self-induced intoxication. Mr. Roy had an exceedingly high blood alcohol level of 370 milligrams per 100 millilitres of blood. To a large extent he was the author of his own misfortune. There was ample evidence from which the judge found that he was contributorily negligent. In the circumstances, I would dismiss the respondents' argument and their cross appeal.
- [80] The appellant has raised the following question of law: whether the Negligence Act, R.S.B.C. 1996, c. 333, applies to claims under the Family Compensation Act, R.S.B.C. 1996, c. 126, such that plaintiffs who claim in relation to the death of an individual found partially at fault recover costs on the same percentage as the damage. The appellant has argued that since there was a division of liability the judge erred in not apportioning costs. It is on the basis of

that argument that the appellant sought a five judge court. The appellant's argument is that under s. 2 of the Family Compensation Act, the plaintiffs have a derivative right of action and accordingly should not be in any better position to recover compensation and costs than the deceased Mr. Roy. To put it another way, it is argued that the defendant should only pay a percentage of the plaintiffs' costs that reflect the officers' degree of fault. It is submitted that since the death of Mr. Roy was caused by two persons, s. 1(1) of the Negligence Act is applicable. Section 2 of the Negligence Act applies to awards of damages in every case to which s. 1 applies. Section 2(c) provides:

the person sustaining the damage or loss is entitled to recover from that other person the percentage of the damage or loss sustained that corresponds to the degree of fault of that other person;

As well, s. 3(1) of the Negligence Act states as follows:

Unless the court otherwise directs, the liability for costs of the parties to every action is in the same proportion as their respective liability to make good the damage or loss.

[81] The trial judge rejected this argument and concluded that despite the finding of divided liability, this Court decided in *Thomson et al. v. British Columbia Toll Highways and Bridges Authority* (1964), 51 W.W.R. 62 (B.C.C.A.), that an apportionment of costs does not apply where there is a split in liability for the reason that the plaintiffs were not themselves negligent and they are not "liable to make good any damage in loss" pursuant to s. 3(1) of the Negligence Act. In the circumstances, the plaintiffs would recover 100 per cent of their costs notwithstanding the finding that in light of the decision in *Thomson*, supra, a five judge panel of this Court was convened so that the appellant could argue this issue. This issue was again considered by this Court in *Dos Santos Estate v. Sem* (1994), 98 B.C.L.R. (2d) 284 (C.A.). In that case, the trial judge apportioned liability in a motor vehicle case in a two-thirds, one-third proportion and apportioned costs on the same basis. On appeal, this Court followed the decision in *Thomson*, supra, and awarded the appellants 100 per cent of their costs. The appellant has argued that *Thomson* was wrongly decided. While the rights under the Family Compensation Act have been called derivative in that the plaintiffs can only sue if a deceased could have successfully brought his or her own action, it is important to remember that the damages are assessed for the plaintiffs' losses, not for those of the deceased. In *Personal Injury Damages in Canada*, 2d ed. (Toronto: Carswell, 1996) at 725, Ken Cooper-Stephenson states:

Actions by estates under survival legislation are conceptually quite distinct from claims on behalf of the deceased's survivors under fatal accidents legislation. Survival actions are brought to vindicate the rights of the deceased, whereas fatal accident claims vindicate the rights of his or her statutory dependants. Not only that, survival actions for the most part cover losses incurred by the injured party up to the moment of death, whereas claims by dependants cover their losses from that moment on.

Thus a family compensation action is not really a derivative action since the plaintiffs recover for their own losses and not for those of the deceased. Accordingly, I see no reason to depart from the general rule that where the plaintiffs were not at fault, they ought not to be liable to make good any loss or damage. For these reasons, I would dismiss this ground of appeal.

"The Honourable Mr. Justice Oppal"

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