
CANADA / JUDGMENT

Tabor v. Bridge

2013 BCSC 1427

COURT

Supreme Court of British Columbia

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2013 BCSC 1427 Tabor v. Bridge

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Tabor v. Bridge,

2013 BCSC 1427

Date: 20130808

Docket: M116952

Registry: New Westminster

Between:

Judy Radford and Timothy Tabor

Plaintiffs

And

James Bridge and Roadway Towing Ltd.

Defendants

Before: The Honourable Mr. Justice Cohen

Reasons for Judgment

Counsel for the plaintiffs:

D. Kennedy

Counsel for the defendants:

I.D. MacKinnon

Place and Date of Trial:

New Westminster, B.C.

June 18-19, 2013

Place and Date of Judgment:

New Westminster, B.C.

August 8, 2013

[1] This is a trial about liability only.

I. BACKGROUND

- [2] On December 16, 2006, the plaintiffs were involved in an accident while riding as passengers in their vehicle which was being towed by a truck driven by the defendant James Bridge (the "defendant driver"). The circumstances leading up to the accident are somewhat bizarre.
- [3] The plaintiffs, Timothy George Tabor (hereinafter called the "father") and Judy Doris Radford (hereinafter called the "mother") are members of the ILWU Local 502. They live in Surrey, British Columbia. They have a longstanding common law relationship and have two children, a son who was 12 years old and a daughter who was 8 years old at the time of the accident.
- [4] The mother and father were both working shifts on December 16, 2006 at the Deltaport terminal in Tsawwassen, British Columbia (the "terminal"). The father's shift ended at 1:00 a.m., and the mother's shift commenced at 1:00 a.m. On the day of the accident, the plaintiffs' babysitter failed to show up. As a result, the mother decided that she would drive herself and the children in the plaintiffs' BMW vehicle to the terminal so that she could work her shift. She planned to transfer the children to the father when he came off shift so that he could then drive himself and the children home in the BMW. It should be mentioned here that the mother owns a Ford Explorer which had been driven to the terminal a couple of weeks earlier by the father and left in the terminal parking lot.
- [5] In any event, the mother drove herself and children to the terminal and had a brief meeting with the father after which the father started his drive home in the BMW with the children. Shortly after commencing her shift, the mother received a call notifying her that the father and the children had been in a motor vehicle accident and were in the first aid room at the terminal. She immediately attended the first aid room where she found the children crying and scared, and the father injured. She comforted the children, washed them and then made a plan with the father to drive him and the children in the Ford Explorer to the site on the Deltaport causeway (the "causeway") where the BMW had been in the accident. The BMW was left at the site after the accident, and the father and children were given a ride to the terminal first aid office by another longshoreman shift worker who was driving by the accident scene shortly after the accident.

- [6] The mother explained that she decided to drive back to the accident site in the Ford Explorer because the children would not leave her sight, and she did not wish the father to drive given his injury. Her plan was to retrieve the registration papers from the BMW so as to be able to report the details of the accident both to the plaintiffs' superintendent at work, and to the Insurance Corporation of British Columbia.
- [7] When the plaintiffs arrived at the site of the accident, they discovered a half-naked bleeding man standing behind the BMW. Shortly thereafter, the CN Rail police showed up with the Delta police. The police questioned the plaintiffs about what they were doing on the causeway, and the plaintiffs explained about the accident and their intent to collect the registration papers from the BMW and return to the terminal. The plaintiffs were detained for about two hours while the police verified their identity and the fact that they were employed at the terminal and not part of a group of partygoers who the police had been pursuing in the area.
- [8] During the plaintiffs' detention by the police, the police checked the registration papers for the Ford Explorer and discovered that the insurance for the vehicle had expired. The police then decided that a tow truck, which they had summoned to be used to tow the BMW, would instead be used to tow the Ford Explorer back to the terminal. The mother testified that the plaintiffs asked the police to drive them and the children back to the terminal, but they told her that she and her family could go in the tow truck.
- [9] It was now about 3:00 a.m. on December 16th. According to the mother, the defendant driver told her that the plaintiffs and the children could not ride in the tow truck but they would ride in the Ford Explorer which was being towed. She said that her concern at the time was for her children, but she did not consider she was accepting any risk because the defendant driver assured her they would be safe. She did not give any thought to what the consequences might be of riding in the Ford Explorer while it was being towed because of the assurance she had received.
- [10] The mother said that after the Ford Explorer was hooked up to the tow truck, the plaintiffs and the children, who were now all seated in the Ford Explorer, buckled up their seat belts for the ride to the terminal. She said that the tow truck drove over a bridge and was travelling pretty fast when she heard a "bang" after which the Ford Explorer started bouncing and swaying around the causeway. She said that there was a bit of a decline on a hill leading to the terminal.
- [11] The mother was unable to estimate how far the tow truck travelled after she heard the bang. She said that as the Ford Explorer was moving back and forth sideways, her upper body was moving inside the vehicle.
- [12] In cross-examination, the mother said that when the plaintiffs decided to take the Ford Explorer to the accident site she was unaware that the insurance had expired for that vehicle. The mother insisted that the defendant driver told the plaintiffs that they were safe riding in the Ford Explorer while it was being towed, but she could not quote his exact words

to them. She said that her children had just been in a car accident and she wished to make sure they would be safe. She said she had this discussion with the defendant driver before the plaintiffs and the children got into the Ford Explorer, even though she had testified at her examination for discovery that she did not have any discussions with the defendant driver before she got into the Ford Explorer. Nevertheless, she insisted that she did ask the defendant driver if the children would be safe and the driver assured her that they would be.

- [13] The mother testified that the father was having a conversation with the defendant driver and she was listening to the conversation while she was standing beside them with the children. She said she was indirectly part of the discussions that were taking place. When counsel asked the mother if she could estimate the speed of the tow truck, she replied, "no, it was fast". She said that the site of the BMW accident was about halfway distance-wise from the terminal along the causeway. She also explained that the plan was for the plaintiffs and the children to return to the terminal after collecting the registration papers from the BMW and then arrange for a taxi to drive them all home to Surrey. She explained that her employer routinely provides taxi rides at no cost to her at the end of a normal shift, but this was 3:00 a.m. so she needed the job superintendent to requisition a taxi given the extenuating circumstances. Her plan was to tell the superintendent exactly where the site of the BMW accident was, supply him with the registration papers and then have everyone travel home in a taxi from the terminal. She said that the superintendent needed all of the details so that he could requisition a taxi.
- [14] The mother said that she takes a taxi to and from her employment 70% of the time. When asked why the plaintiffs did not call a taxi from the BMW accident site she replied that the police had told them to get into the tow truck and the tow truck would drive them back to the terminal. The police said they would not drive the plaintiffs back, and the plaintiffs did not argue with them. Thus, at the time, the plaintiffs did not consider the option of calling a taxi. The mother also said that it was the defendant driver who told the plaintiffs to get into the Ford Explorer with the children for the ride back to the terminal. She said that, given the time of day, there was no traffic on the causeway.
- [15] The mother conceded that before the date of the accident she had never seen persons riding in vehicles that were being towed. She agreed that the circumstances were unique, but said it was a short distance to the terminal from the accident site, on a private road with no other traffic and she had been assured by the defendant driver that it was safe to ride in the Ford Explorer. She said she would have not done it if the vehicle was being towed on the busy King George Highway.
- [16] The mother said that after the tow truck came to a stop and the driver reassembled the towing equipment to tow the Ford Explorer, she and her daughter got into the tow truck to continue the drive to the terminal. She explained that she did not get into the tow truck at the BMW accident site because the defendant driver said they should all get into the Ford Explorer while he towed the vehicle back to the terminal.

- [17] The mother said that at the BMW accident scene, the police, defendant driver, plaintiffs and their children were standing on the causeway in a group and the police would have heard the conversation between her and the defendant driver.
- [18] The father testified that he was driving home to Surrey from completing his shift at Deltaport when he was involved in an accident on the causeway. It was around 1:00 a.m. He was driving the plaintiffs' BMW. The children were in the car with him. He said that while he was proceeding on the causeway, a vehicle clipped his vehicle, which sent the BMW into a ditch. The other vehicle did not remain at the scene of the accident. He suffered some injuries and the children were shaken up. Another longshoreman was travelling on the causeway bound for the terminal and this person gave him and the children a ride back to the terminal. The first aid attendant at the terminal contacted the mother. After they got together, a decision was made for them all to return to the accident site to get the registration papers from the BMW as well as his front tooth plate, which he had left behind after the accident. He said they decided to take the Ford Explorer, which was owned by the mother but which he had used to get to work some weeks earlier and then left it parked in the terminal lot.
- [19] After the father and mother arrived at the BMW accident scene, he was able to retrieve the registration papers for the BMW and his tooth plate. He said the police detained him and his family for quite a while to confirm that they were not part of the group that the police were pursuing, and to check their story about why they were at the BMW accident scene in the Ford Explorer.
- [20] The father said that after he and his family were released by the police, the defendant driver directed all of them to get into the Ford Explorer. He said it was not walking distance back to the terminal, and in any case his knee was very sore and the children were hysterical. He said it was about a 10 to 15 minute drive back to the terminal, it was by then about 3:00 a.m. and there was no traffic on the causeway. He asked the defendant driver if it was safe for all of them to travel in the Ford Explorer while it was being towed and the driver assured him that it was safe. He said he was totally worn out given the time of day and the fact that he had been dealing with his children who were upset and scared.
- [21] The father and the plaintiffs' son got into the front seats of the Ford Explorer, and the mother and the plaintiffs' daughter got into the back seats. They all had their seat belts on. In fact, his son asked him if he had his seat belt on. He said the Ford Explorer was hooked up to the tow truck with the front end on a hook and the rear wheels on a dolly. He said the tow truck was just coming off a bridge when he heard a "loud noise" and almost immediately thereafter the plaintiffs and their children were thrown around inside the Ford Explorer, which was bouncing from side to side. Specifically, he testified that he was restrained by a seat belt while he was violently thrown from side to side. He said it took the tow truck about 2 to 3 minutes to come to a stop after he heard the loud noise. He said the tow truck was moving pretty quickly and as far as he was concerned, was speeding. He said he hurt his face in the mouth area when he was being bounced from side to side and this loosened 12 of

his teeth. However, he had no memory whatsoever of what transpired after the tow truck came to a stop, and did not even recall how they all got back to the terminal.

- [22] In cross-examination, the father testified that he was not aware that the insurance had expired for the Ford Explorer. He only found out when the police attended at the BMW accident site. Counsel asked him why he did not take a taxi directly home once he got back to the terminal after the BMW accident. He said that it sometimes took an hour and a half for a taxi to arrive to this area, and in any case they decided to return to the scene of the BMW accident to retrieve the registration papers and his tooth plate. He also said he did not really have an explanation for why they took the Ford Explorer instead of a taxi, given that no matter what, they had to travel by the BMW accident scene to get back to their home in Surrey and the taxi could have stopped at the scene. He said that sometimes a taxi driver will not agree to pull over and stop so that a passenger can get out to do something. As for why he did not call a taxi from the BMW accident scene to take them all back to the terminal, he said that he did not have a phone and was directed by the police officer. He said he did what he was told.
- [23] The father said that he takes a taxi to and from work about 80% of the time. He was not familiar with the telephone number of the taxi company because he had never called one himself to take him to or from work. He explained that the job superintendent is the only person authorized to call for a taxi. However, he agreed that he was capable of finding a phone number for a taxi to attend. He also said that he did not want to wait around at the scene of the BMW accident given the time of day and could not see him and his family waiting inside his vehicle for a taxi to arrive.
- [24] The father testified that he has seen lots of tow trucks towing vehicles, but has never noticed anyone travelling inside a towed vehicle. He agreed that his situation was unique, but he saw no danger because he had been directed to do something by persons he trusted, especially the police, and he did not think there was any risk whatsoever. The police told him to get into the "truck" and the defendant driver told him to get into the Ford Explorer. When counsel asked him what he understood "truck" to mean, he said his first thought was the tow truck, but he was not thinking all that clearly at the time. Counsel suggested to him that the police were not part of his conversation with the defendant driver, and he disagreed stating that they were all standing together in a small group. Counsel pointed out that at his discovery, he testified that he did not recall any conversation between the defendant driver and the police about him getting into the Ford Explorer. He offered no explanation for why he gave this testimony.
- [25] The father testified that shortly after the tow was underway, there was a noise and the Ford Explorer shook for 2 to 3 minutes, although it might have been less time.
- [26] The defendant driver testified that at the time of the accident he had been driving a tow truck for roughly one year. As preparation for his job he had three weeks of training with multiple drivers on different pieces of equipment.

- [27] It was approximately 3:00 a.m. when he got a call from his dispatcher to attend at the Deltaport causeway. He said the lighting at the scene of the BMW accident was very poor such that initially he did not even see the BMW, although he did see the Ford Explorer. When he arrived, he spoke with the police who told him about the BMW accident and that the owner had shown up in the Ford Explorer, but it was not insured. He said that when he had a conversation with the police about the plaintiffs and their children riding in the Ford Explorer for the tow to the terminal, he commented to the police officer that the officer would be the one to give him a ticket for towing a vehicle with persons inside.
- [28] The defendant driver then hooked up the Ford Explorer to his truck. He said he could not recall at that point who in fact was in the Ford Explorer. He said that he did not recall having any conversations with the father or mother before he left the scene with the Ford Explorer in tow. He also said that he thought it was company policy that frowned upon having passengers inside a vehicle that was being towed. He said he learned that it was against the law to do so after the incident.
- [29] The defendant driver said that when his tow truck left the scene of the BMW accident, the plaintiffs and the children were inside the Ford Explorer. When asked why he let them ride in the towed vehicle he said he was trying to be nice - they had had a "crappy" night and he was trying to help them out a little.
- [30] The defendant driver said that he did not recall where the plaintiffs were when he was talking with the police. Counsel asked him if he told the plaintiffs that they could not ride in the tow truck, and he said it did not sound like something he would have said to them because it was company policy to permit passengers to ride in the tow truck, but he honestly could not recall.
- [31] The defendant driver described the procedure to hook up a four-wheel-drive vehicle to the tow truck and said his description of the hook-up was his practice at the time of the accident for 99.9% of the vehicles he towed.
- [32] He said once the vehicle was hooked up, he started to move towards the terminal and as he crossed the overpass he heard or felt a noise or a jerk. He saw in his rear view mirror that the Ford Explorer was moving from side to side. He brought the tow truck to a stop, which took him no more than 20 seconds, although it felt to him like a lifetime. He said that he could not say how fast he was going from the time he left the BMW accident site to where he heard the noise, but said that in no way would he have been speeding. He could not actually explain why the dolly used to transport the Ford Explorer fell apart. He said that before this incident, nothing similar had happened to him. After he stopped, he checked to see if everyone in the Ford Explorer was alright. He then rebuilt the dolly and proceeded to the terminal with the mother and the plaintiffs' daughter riding with him in the tow truck. The father and the plaintiffs' son remained in the Ford Explorer.

- [33] The position of the defendants is that there was no negligence on the part of the defendant driver, or alternatively, if he is found to be negligent, then the contributory negligence of the plaintiffs must be considered.

II. NEGLIGENCE

- [34] Section 7.07(6) of the Motor Vehicle Act Regulations, B.C. Reg. 26/58 provides that no person shall tow a motor vehicle if there is a person in or on the towed motor vehicle. There is no doubt that provision was breached in this case. However, the law provides that mere breach of a statute, standing alone, does not constitute negligence per se: see *Van Tent v. Abbotsford (City)* 2013 BCCA 236.
- [35] With respect to the issue in this case as to whether a breach of the standard of care could be inferred from the evidence - in other words, can the court conclude that the dolly broke apart because of improper assembly of the dolly, the defendant driver's speed or a combination of such factors - the law applicable to the court's analysis is set out at paras. 18-20 of *Michel v. Doe*, 2009 BCCA 225:
- [18] In *Fontaine [v. British Columbia (Official Administrator)]*, [1998] 1 S.C.R. 424, the Supreme Court of Canada concluded that the "doctrine" of *res ipsa loquitur* in Canadian jurisprudence ought to be treated as "expired". In view of the arguments advanced in this case on the burden of proof, it may be helpful to refer to the reasoning of Major J. in reaching the conclusion that the legal maxim was unnecessary in deciding cases in which the evidence of negligence is largely or wholly circumstantial. Mr. Justice Major began his analysis by noting that for *res ipsa loquitur* to arise, "the circumstances of the occurrence must permit an inference of negligence attributable to the defendant": 1) the defendant had sole management and control of the thing that inflicted the damage; and 2) the occurrence was such that it could not normally have happened without negligence, that is, "whether, in the particular circumstances established by the evidence, the accident would ordinarily occur in the absence of negligence." Should *res ipsa loquitur* apply, the strength or weakness of the resulting inference of the negligence will depend on the factual circumstances of the case (paras. 17-19, 22).
- [19] As to the effect of the application of *res ipsa loquitur*, Major J. stated:
- 23 As in any negligence case, the plaintiff bears the burden of proving on a balance of probabilities that negligence on the part of the defendant caused the plaintiff's injuries. The invocation of *res ipsa loquitur* does not shift the burden of proof to the defendant. Rather, the effect of the application of *res ipsa loquitur* is as described in *The Law of Evidence in Canada* (1992), by John Sopinka, Sidney N. Lederman and Alan W. Bryant, at p. 81:

Res ipsa loquitur, correctly understood, means that circumstantial evidence constitutes reasonable evidence of negligence. If, at the conclusion of the case, it would be equally reasonable to infer negligence or no negligence, the plaintiff will lose since he or she bears the legal burden on this issue. Under this construction, the maxim is superfluous. It can be treated simply as a case of circumstantial evidence.

24 Should the trier of fact choose to draw an inference of negligence from the circumstances, that will be a factor in the plaintiff's favour. Whether that will be sufficient for the plaintiff to succeed will depend on the strength of the inference drawn and any explanation offered by the defendant to negate that inference. If the defendant produces a reasonable explanation that is as consistent with no negligence as the res ipsa loquitur inference is with negligence, this will effectively neutralize the inference of negligence and the plaintiff's case must fail. Thus, the strength of the explanation that the defendant must provide will vary in accordance with the strength of the inference sought to be drawn by the plaintiff.

[20] Mr. Justice Major went on to conclude that as res ipsa loquitur was unhelpful it should be treated as "expired", and provided a simpler formulation of the correct approach for dealing with circumstantial evidence in negligence actions:

26 Whatever value res ipsa loquitur may have once provided is gone. Various attempts to apply the so-called doctrine have been more confusing than helpful. Its use has been restricted to cases where the facts permitted an inference of negligence and there was no other reasonable explanation for the accident. Given its limited use it is somewhat meaningless to refer to that use as a doctrine of law.

27 It would appear that the law would be better served if the maxim was treated as expired and no longer used as a separate component in negligence actions. After all, it was nothing more than an attempt to deal with circumstantial evidence. That evidence is more sensibly dealt with by the trier of fact, who should weigh the circumstantial evidence with the direct evidence, if any, to determine whether the plaintiff has established on a balance of probabilities a prima facie case of negligence against the defendant. Once the plaintiff has done so, the defendant must present evidence negating that of the plaintiff or necessarily the plaintiff will succeed.

[Emphasis in Michel.]

[36] In the case at bar, the defence contends that the possibilities of non-negligence and of negligence were equally consistent with the available evidence. I disagree with this submission. I find that the plaintiffs have proven on a balance of probabilities that the defendant driver was negligent.

[37] The defendants admit that the defendant driver affected the tow by using a dolly system to pick up the Ford Explorer. They also admit that during the course of towing the vehicle the dolly broke apart completely leaving the Ford Explorer connected only by a system of L-arm chains which caused it to swing back and forth.

- [38] Although there is no actual evidence of what caused the dolly to break apart (the defendant driver said he had no idea why it broke apart), there is nevertheless compelling evidence from which I find that the reasonable inference can be drawn that the cause was a combination of human error and speed.
- [39] First, the evidence is that after the dolly broke apart, and after the tow truck came to a stop, the driver was able to reassemble the dolly and carry on with the tow. I think this evidence strongly militates against a conclusion that there was some mechanical defect in the dolly system which caused it to break apart.
- [40] Second, the plaintiffs both testified that in their estimation the driver was driving too fast while he was towing the Ford Explorer. On the other hand, the defendant driver said that there was no way that he was speeding. However, I prefer the plaintiffs' evidence over the evidence of the defendant driver on this point. His recollection was generally weak about many of the details surrounding the incident, and I formed the strong impression that the memories of the plaintiffs are far more reliable than that of the defendant driver on what took place at the BMW accident scene, as well as during the tow of the Ford Explorer.
- [41] Thus, I find that it was a failure on the part of the defendant driver to properly assemble the dolly system at the outset of the tow, on its own or in combination with the fact that he was driving too fast, that caused the dolly to break apart.

III. CONTRIBUTORY NEGLIGENCE

- [42] Having found that the defendant driver was negligent, I turn next to the issue of contributory negligence. The onus is on the defendants to prove that the plaintiffs are in part to blame for their injuries.
- [43] The position of the plaintiffs is that they had no real option other than to get into the Ford Explorer. In support of that position, they note that they found themselves in a situation through no fault of their own on a dark stretch of a road with two traumatized children and an injured father. They asked and were denied a ride back to the terminal by the police. Four of them could not all ride in the tow truck. They insist that calling a taxi was not a realistic option given the time of day. They were primarily concerned about the children and they had already been detained at the BMW accident site by the police for about two hours. Further, the defendant driver told them that riding in the Ford Explorer would be safe. On that basis, the plaintiffs submit that no blame can be ascribed to them in all of the circumstances. I disagree.
- [44] In *Cempel v. Harrison Hot Springs Hotel Ltd.* (1997), 43 B.C.L.R. (3d) 219 at paras. 18-19 (C.A.), Lambert J.A. explained the approach to be taken for apportionment of liability under the Negligence Act, R.S.B.C. 1996, c. 333:

18 I believe the trial judge's choice of words and the syntax of the last two sentences indicate that the reason that the plaintiff was required to pay 75% of her own loss was that she was "primarily the author of her own misfortune". I consider that the trial judge reached his conclusion on apportionment by deciding that the apportionment should be based on an assessment of relative degrees of causation as between the plaintiff as an active causative force at the moment of the injury and the defendant as a passive causative force at the moment of the injury.

19. I think that such an approach to apportionment is wrong in law. The Negligence Act requires that the apportionment must be made on the basis of "the degree to which each person was at fault". It does not say that the apportionment should be on the basis of the degree to which each person's fault caused the damage. So we are not assessing degrees of causation, we are assessing degrees of fault. In this context, "fault" means blameworthiness. So it is a gauge of the amount by which each proximate and effective causative agent fell short of the standard of care that was required of that person in all the circumstances.

[45] In *Bradley v. Bath* 2010 BCCA 10 at paras. 24-25, Tysoe J.A. noted:

[24] At common law, contributory negligence on the part of a plaintiff was a complete defence to his or her claim. This was considered to be unjust, and legislatures in many common law jurisdictions passed contributory negligence statutes (also referred to as apportionment legislation). The statute in this province is currently called the Negligence Act, R.S.B.C. 1996, c. 333, s. 1(1) of which reads as follows:

If by the fault of 2 or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree to which each person was at fault.

If damage or loss has been caused by the fault of two or more persons, s. 4 of the Act requires the court to determine the degree to which each person was at fault. While the prerequisite to apportionment is that the damage or loss has been caused by the fault of two or more persons, the apportionment must be done on the basis of the degree to which each person was at fault, not on the basis to which each person's fault caused the damage: *Cempel v. Harrison Hot Springs Hotel Ltd.*, [1998] 6 W.W.R. 233, 43 B.C.L.R. (3d) 219 (C.A.).

[25] The concept of contributory negligence was described in John G. Fleming, *The Law of Torts*, 9th ed. (Sydney: LBC Information Services, 1998) at 302, as follows:

Contributory negligence is a plaintiff's failure to meet the standard of care to which he is required to conform for his own protection and which is a legally contributing cause, together with the defendant's default, in bringing about his injury. The term "contributory negligence" is unfortunately not altogether free from ambiguity. In the first place, "negligence" is here used in a sense different from that which it bears in relation to a defendant's conduct. It does not necessarily connote conduct fraught with undue risk to others, but rather failure on the part of the person injured to take reasonable care of himself in his own interest. ... Secondly, the term "contributory" might misleadingly suggest that the plaintiff's negligence, concurring with the defendant's, must have contributed to the accident in the sense of being instrumental in bringing

it about. Actually, it means nothing more than his failure to avoid getting hurt ...

- [46] In the case at bar, I find that the plaintiffs appreciated the risk associated with them riding together with their children as passengers in the Ford Explorer while it was being towed. I also find that they accepted the risk not only because of the assurance they received from the defendant driver as to their safety, but also because they considered this option in all of the circumstances to be more convenient than waiting at the BMW site for a cab to take them home, especially because once they were back at the terminal they could ask the superintendent to arrange a cab to drive them to Surrey at no cost to them.
- [47] In my opinion, regardless of what the plaintiffs were told by the defendant driver about their safety, or for that matter the fact that the police observed the situation and did nothing to stop it, they nevertheless had an obligation to assess the risk and act reasonably. The fact that the defendant driver told them it was a safe option did not mean that the risk associated with the situation they accepted was unforeseeable. Thus, I am satisfied that to some degree the plaintiffs were to blame, but I find that the defendant driver was at fault to a much greater degree.
- [48] I find that the defendant driver knew full well that it was against the law to permit persons to ride in a vehicle being towed. His responsibility in this regard was not removed by the fact that he believed the police would not penalize him in the circumstances. In addition, he was completely in control of the situation in terms of allowing the plaintiffs and their children to ride in the Ford Explorer while it was being towed. He could have easily refused them this option or have offered to take two of them at a time back to the terminal in his tow truck.
- [49] When I balance the relative degrees of fault, I find that liability should be apportioned 25% to the plaintiffs and 75% to the defendant driver.

"B.I. Cohen J."

The Honourable Mr. Justice B.I. Cohen

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