

CANADA / JUDGMENT

Tabori v. Renaud

2017 BCCA 189

COURT

British Columbia Court of Appeal

DECIDED

5 May 2017

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2017 BCCA 189 Tabori v. Renaud COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Tabori v. Renaud, 2017 BCCA 189 Date: 20170505 Docket: CA43823 Between: George Paul Tabori Appellant (Plaintiff) And Daniel Anthony Renaud and Virginia Renaud Respondents (Defendants) Before: The Honourable Mr. Justice Donald The Honourable Mr. Justice Willcock The Honourable Mr. Justice Savage On appeal from: An order of the Supreme Court of British Columbia, dated July 6, 2016 (Tabori v. Renaud, 2016 BCSC 1242, New Westminster Registry M126870). Oral Reasons for Judgment Counsel for the Appellant: M. Van Nostrand Counsel for the Respondents: L.G. Harris, Q.C. Place and Date of Hearing: Vancouver, British Columbia May 5, 2017 Place and Date of Judgment: Vancouver, British Columbia May 5, 2017 Summary: An impaired motorcyclist attempted to pass a vehicle turning left at a T-intersection by moving into the on-coming lane of traffic. The driver of the vehicle had checked traffic behind through his rear-view mirror, slowed as it approached the intersection and activated its left turn-signal. Held: appeal dismissed. The judge's interpretation of the evidence as a whole has not been shown to be in error.

- [1] SAVAGE J.A.: This appeal is from a liability only trial. The appellant, George Tabori was driving his Kawasaki motorcycle behind the respondent, David Renaud, who was driving a vintage Volkswagen. At a T-intersection Mr. Renaud slowed, checked, signaled and turned left, but Mr. Tabori tried to pass, striking the Volkswagen in the intersection and was injured. Mr. Tabori, who was impaired at the time, says the trial judge, Madam Justice Devlin, should have found Mr. Renaud 25% at fault.
- [2] I will not repeat the facts which are fully set out in the decision below. A finding that a party was or was not negligent is a question of mixed fact and law: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 29. It is wrong for an appellate court to set aside a trial judgment where there is not palpable and overriding error and the only point at issue is the interpretation of the evidence as a whole: *Jaegli Enterprises Limited v. Taylor*, [1981] 2 S.C.R. 2 at 84.
- [3] A palpable error is variously described as "clear to the mind or plain to see", "so obvious that it can easily be seen or not" and "readily or plainly seen". An error is overriding if it is material to the outcome: *Swiss Reinsurance Company v. Camarin Ltd.*, 2015 BCCA 466 at para. 62-63.

- [4] Counsel has referred us to *Samograd v. Collison* (1995), 17 B.C.L.R. (3d) 51, 67 B.C.A.C. 223. I find helpful the reasons of Finch J.A. (as he then was) who discussed the role of this Court in the apportionment of fault as follows: 64 It is well settled law that an appellate court ought not to vary the apportionment of fault found by a trial judge except in "strong and exceptional" circumstances: *Sparks v. Thompson*, [1975] 1 S.C.R. 618 (S.C.C.), *Stynes v. Corporation of City of Victoria* (1990), 43 B.C.L.R. (2d) 118 (B.C.C.A.), and *Grewal v. Simoncioni Estate* (1993), 78 B.C.L.R. (2d) 69 (B.C.C.A.). The facts found by the learned trial judge, and the language he used in his oral reasons to express those findings, do not meet this test.
- [5] It was admitted that at the time of the accident, at 3:00 p.m. on a clear day with normal lighting conditions and good visibility, Mr. Tabori was significantly impaired. Mr. Tabori did not testify as he had no recollection of the events. The trial judge found that expert evidence was not helpful. The decision, then, turned on the evidence of Mr. Renaud and Dong (Sean) Zhao, a friend of Mr. Tabori.
- [6] The judge gave cogent reasons for preferring the evidence of Mr. Renaud to that of Mr. Zhao:
- [24] From my observations of Mr. Zhao, I was left with the impression that he was reluctant to say anything that might be perceived as critical of Mr. Tabori. As a result, I have some concerns about the credibility and reliability of his evidence. While he may not have noticed Mr. Renaud's left turn signal, I am not persuaded that his evidence detracts from Mr. Renaud's evidence that he had signalled his turn. I am also perplexed with Mr. Zhao's description that the VW Beetle did not appear to know what it was intending to do as it slowed down given that the only option at the T intersection was for Mr. Renaud to make a left turn onto Barr Street or continue straight ahead on Ferndale Avenue. It would have been reasonable for one, in the position of Mr. Tabori and Mr. Zhao to assume that a car which slows down as it approaches a T-intersection most likely intends to turn left. I also have difficulty accepting Mr. Zhao's evidence that he and Mr. Tabori maintained a constant speed of 45km/hr when the speed limit was 50km/hr and they were proceeding down a hill. Mr. Zhao's estimate of their speed conflicts with that of accident reconstruction experts who estimated, at the lowest, Mr. Tabori was travelling 50km/hr. Finally, I am not persuaded that Mr. Zhao actually saw Mr. Renaud "cut the corner" despite the fact that he repeated that phrase numerous time in his testimony. I am troubled that Mr. Zhao's description of the turn maneuver when speaking with the ICBC investigators was significantly different from his testimony in court. I do not think this is a case of faulty memory due to the passage of time. Rather, it is an effort by Mr. Zhao to present his evidence in a manner that would benefit Mr. Tabori. Therefore, where Mr. Zhao's evidence conflicts with that of Mr. Renaud, I prefer the evidence of Mr. Renaud.

- [7] The judge was alive to discrepancies in the evidence, the trial occurred over seven years after the events, and Mr. Renaud had not reviewed his earlier statements. That said, she found Mr. Renaud to be a reliable and credible witness, fastidious about safety, and candid. She rejected Mr. Tabori's characterization of his evidence as "carefully calculated to deceive the court":
- [33] I reject the characterization of Mr. Renaud's evidence urged upon me by the plaintiff. Rather, I found Mr. Renaud to be a reliable and credible witness who is clearly haunted by the collision which occurred almost 8 years ago. I found him to be an honest and careful witness who acknowledged the inconsistencies in his testimony and admitted to certain things that were potentially contrary to his own interest. I found Mr. Renaud someone who was particularly fastidious about safety as demonstrated by his routine of conducting a safety check each time he used his vehicle. I have no basis to doubt the veracity of his testimony. I had an opportunity to observe Mr. Renaud throughout an aggressive cross-examination and I found him to be a candid witness who was doing his best to explain what took place on the day in question. I find no support for the Plaintiff's submission that Mr. Renaud carefully calculated his evidence in order to deceive the court. Accordingly, I accept Mr. Renaud's evidence that he had slowed his vehicle as he approached the intersection with Barr Street, checked his rear view mirror to ascertain the location of the motorcycle and activated his left turn signal in order to commence a left turn. In summary, I find that Mr. Renaud had taken the necessary steps to ensure he could safely turn left.
- [8] With respect to liability she found Mr. Tabori 100% at fault saying this:
- [47] Mr. Renaud had exercised the requisite standard of care one would expect in these circumstances. There should have been little uncertainty in Mr. Tabori's mind as to Mr. Renaud's expected course of action at the intersection given his slowing down and signalling to the left, but even if there was uncertainty in his mind, for example, failing to see the left turn signal, he should have erred on the side of caution and simply waited before passing in order to ensure it was safe to do so.
- [48] I find that Mr. Renaud slowed his vehicle as he approached the T-intersection, intending to turn left onto Barr Street. He checked his rear view mirror, saw the motorcycle behind him at a safe distance, turned on his left signal and commenced the turn. He then noticed Mr. Tabori's face in his driver side mirror. He had no time to react. This is not a case where one failed to see what was there to be seen. I am satisfied that Mr. Renaud took all the necessary steps in the circumstances to ensure it was safe to proceed with the left turn.
- [49] I find that Mr. Tabori did not ensure that his passing could be completed in safety contrary to section 159 of the MVA. The left turn signal of the vehicle in front of him was activated and the vehicle had slowed down. Regardless of whether he saw the left turn signal or not, the vehicle had slowed down as it approached the T-intersection where it was reasonable to assume the vehicle was intending to turn left. Mr. Tabori failed to sound his horn to alert Mr. Renaud that he was passing on the left. Mr. Tabori was impaired and that impairment

affected his reaction time and his ability to assess the immediate risk. He took an ill-advised risk. All of these factors lead me to conclude that Mr. Tabori failed to exercise the requisite standard of care. [Emphasis added.]

[9] Counsel has said all that could be said in arguing this appeal, however, in my view, the case turned on the evidence, and the judge's interpretation of the evidence as a whole has not been shown to be in error.

[10] For these reasons, and for substantially the reasons of the trial judge, I would dismiss the appeal.

[11] DONALD J.A.: I agree.

[12] WILLCOCK J.A.: I agree.

[13] DONALD J.A.: The appeal is dismissed. "The Honourable Mr. Justice Savage"

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Prepared on 29 October 2026 · Esheria