

ONTARIO COURT OF JUSTICE

IN THE MATTER OF an appeal under Section 116(1) of the *Provincial Offences Act*, R.S.O. 1990, c. P.33, as amended;

B E T W E E N :

ARIGANELLO, Ottavio
Appellant

— AND —

Her Majesty the Queen
Respondent

Before Justice L.M. Baldwin
Heard on September 7, 2012
Reasons for Judgment released on January 17, 2013

C. Gelbard for the Respondent
T. Thoma agent for the Appellant Ottavio Ariganello

This is an appeal under s. 116(1) of the *Provincial Offences Act* R.S.O. 1990, c. P.33, as amended, from the conviction entered by His Worship P. Macphail, J.P. on January 26, 2011, at the City of Burlington, Ontario, against the Appellant, Mr. Ottavio Ariganello. Mr. Ariganello was found guilty of the offence of Careless Driving contrary to s. 130 of the *Highway Traffic Act*.

BALDWIN J.:

[1] The trial took place over 3 days; November 1st, 2nd, and 15th, 2010.

Summary of the Evidence:

[2] The learned Justice of the Peace detailed all of the evidence heard in his Reasons for Judgment from pages one through to 12 in the Transcript dated January 26, 2011.

[3] Briefly, on February 21, 2008, Mr. Ariganello was operating a motor vehicle in the

Town of Halton Hills in the Region of Halton going south on Winston Churchill Blvd. at approximately 1:21 p.m. in a semi-rural part of the town.

[4] Mr. Ariganello suffered an intense cough. His eyes closed, he was dizzy and lost control of his car within 2 to 4 seconds. At that time he was travelling at 50 k/hr. and had travelled 0.1 kilometers in distance.

[5] Mr. Ariganello's car veered off the roadway, collided with Ms. Carolyn McTavish who was on the shoulder of the road, and ended up in a snow bank.

[6] Officer Steve Anderson was one of the officers who investigated the case. He testified that he was unable to conclude what the speed of the car was during the collision, but indicated that there was breaking on the part of the driver during the collision.

[7] Mr. Ariganello exited his car and called 911 as soon as he realized that he had struck a pedestrian.

[8] Civilian witnesses came upon the scene and tried to assist. There was evidence that Mr. Ariganello appeared to be in shock.

[9] Mr. Ariganello reported his coughing episode to the 911 operator and to Officer Ivey on scene.

[10] Officer Ivey noted a coughing episode at the scene.

[11] A co-worker testified that Mr. Ariganello was coughing at work that day.

[12] Tragically, Ms. McTavish died at the scene.

[13] The Halton Regional Police conducted an extensive accident reconstruction investigation in the matter.

[14] Mr. Ariganello was charged with this offence almost 3 months later.

Issues on Appeal:

- (1) Did the learned Justice of the Peace err in shifting the burden of proof to the Appellant?
- (2) Did the learned Justice of the Peace err in his interpretation of the essential elements of the offence of Careless Driving?
- (3) Did the learned Justice of the Peace err in finding the Appellant's testimony not credible?
- (4) Did the learned Justice of the Peace err in not considering the defence of involuntariness?

- (5) Did the learned Justice of the Peace err in finding the Appellant guilty beyond a reasonable doubt?
- (6) Did the learned Justice of the Peace err in how he applied the law to the facts of the case?

Issue #1: Did the learned Justice of the Peace err in shifting the burden of proof to the Appellant?

[15] The offence of Careless Driving under the *HTA* is a strict liability regulatory offence for which the defence of due diligence is available.

[16] The onus of proof when raising a due diligence defence is on the balance of probabilities.

[17] The party with the onus of proof on a balance of probabilities has the obligation to prove that the existence or non-existence of a fact of issue is more likely than not: *H. (F.) v. McDougall* [2008] 3 S.C.R. 41, S.C.J. No. 54 (S.C.C.).

[18] *Regina v. WD* [1991] 1 S.C.R. 742 does not apply to regulatory offences where the defence of due diligence is to be assessed by the trial court.

[19] As stated by Mr. Justice Bruce Duncan (OCJ) in *R. v. Defaria* [2008] O.J. No. 5427 at paragraph 16:

“The direction in *W.D.* speaks to the proper assessment of a defendant’s evidence in the context of a criminal case where the Crown bears the burden of proof beyond a reasonable doubt. As mentioned, in this case, the matter in issue was due diligence, a point on which the appellant carried the burden on the balance of probabilities. In my view, it would be illogical and inappropriate to give the defendant the benefit of reasonable doubt on credibility when he bears the burden of proof on a balance of probabilities. I am firmly of the view that *W.D.* has no application to regulatory offences where the defence of due diligence is to be assessed by the trial court.”

[20] The *W.D.* instruction does not apply where the accused has the onus of proof or where the standard of proof is on a balance of probabilities: *R. v. Carpentier* (2005) 201 Man. R. (2d) 1; [2005] M.J. No. 418, @ para. 27 (Man. C.A.).

[21] “The lower standard of proof on a balance of probabilities applies in the prosecution of a criminal or regulatory offence where the persuasive burden rests upon the accused. This standard applies where the accused must prove an element of an offence, a defence, or an evidentiary issue and whether its incidence arises at common law, a statute or a presumption. For example, the presumption of sanity requires the accused to prove, on a balance of probabilities, that, he or she was suffering from a mental disorder during the commission of the act or omission so as to be exempt from criminal responsibility. Similarly, the accused must prove the common law defence of due diligence to a balance of probabilities in a regulatory offence.” (Bryant, Lederman, Fuerst: *The Law of Evidence in Canada*, Third Edition, LexisNexis Canada Inc. 2009, p. 221, para. 5.85)

[22] The trial Court and this Appeal Court have been referred to the decision of *R. v. Kotar* [1994] O.J. No. 763, Lenz J. (OCJ) by the Appellant. This is a summary conviction appeal case concerning a charge of Careless Driving with similar facts to the matter before this Court. In that decision, His Honour found that the Crown had to prove beyond a reasonable doubt that the defendant drove without due care and attention. He found that it was inappropriate to shift the burden to the accused to prove absence of negligence on a balance of probabilities. In my opinion, this case does not state the correct evidentiary burden in strict liability regulatory offences.

[23] Where the prosecution has established a *prima facie* case (as in this case), the onus then shifts to the defendant to establish a defence of due diligence on a balance of probabilities. The onus will be met when the explanation provided is not rejected and reasonably explains that the driving in question does not meet the test for careless driving.

[24] The offence of Careless Driving (or any other offence) cannot be both a quasi-criminal and a strict liability offence. Confusion in the law has arisen when it has been described as being both. In my opinion, an offence should not be characterized as ‘quasi-criminal’ as there is no such category of offence and it confuses the parties with respect to the onus of proof issues.

[25] There is no *mens rea* component required for a strict liability offence to be proven.

[26] If a due diligence defence is not raised, or is raised and rejected, the *actus reus* is all that is required for the prosecution to meet its onus of proof beyond a reasonable doubt.

[27] In his Reasons for Judgment, the learned Justice of the Peace stated as follows:

“The burden of proof for the *actus reus* does not rest with the defendant. Here the *actus reus* has been acknowledged and the defendant has asserted the defence of due diligence. The burden of proof does not rest with the defendant for this purpose. He must adduce sufficient evidence to establish due diligence on the balance of probabilities. The direction to the Court established in *R. v. W.D.*, has no application to the assessment of the due diligence defence in regulatory defences.”
(Transcript dated January 29, 2011, Page 15, line 29 – Page 16, line 7)

[28] Accordingly, His Worship correctly articulated the onuses required at trial on both the Respondent and the Appellant as the Appellant chose to testify and raise a due diligence defence.

Issue #2: Did the Court err in interpreting the essential elements of the offence of Careless Driving?

[29] The offence of Careless Driving contrary to s. 130 of the *HTA*, is defined as driving on a highway “without due care and attention or without consideration for other persons using the highway.”

[30] A charge of Careless Driving may be proven by evidence that the accused either drove the vehicle on a highway without due care and attention, or operated it without reason-

able consideration for other persons using the highway. One of the two ingredients must be proven to support a conviction. Mere inadvertent negligence, whether of the slightest type or not, will not necessarily sustain a conviction: *R. v. Wilson* (1970), 1 C.C.C. (2d) 466 (Ont. C.A.)

[31] As Mr. Justice Durno stated in the case of *R. v. Kinch* [2004] O.J. No. 486 (Ont. SCJ) at paragraph 50:

“The test for careless driving has remained constant since the Court of Appeal decision in *Beauchamp* [1953] O.R. 422 the main criteria are the starting point in determining whether the Crown has established the trial judge erred in law:

- The evidence must be such as to prove beyond a reasonable doubt that the accused drove without due care and attention or without reasonable consideration of others;
- The standard of care and skill is not one of perfection. Rather, it is a reasonable degree of skill, and what an ordinary person would so.
- The use of the term “due” means care owing in the circumstances. While the legal standard of care remains the same – what the average careful man would have done in the circumstances, the factual standard is constantly shifting, depending on road, visibility, weather conditions, traffic conditions and any other condition that ordinary prudent drivers would take into account.
- The law does not require of any driver that he should exhibit perfect nerve and presence of mind, enabling him to do the best thing possible. It does not expect him to be more than ordinary men. Drivers of vehicles cannot be required to regulate their driving as if in constant fear that other drivers, who are under observation, and apparently acting reasonably and properly, may possibly act at a critical moment in disregard of the safety of themselves and other users of the road.
- The standard was objective, impersonal and universal, in no way related to the degree of proficiency or experience of a particular driver.
- There was a further important element – that the conduct must be of such a nature that it could be considered a breach of duty to the public, and deserving of punishment. This further step must be taken even if the accused’s conduct fell below the standard.
- The test where an accident has occurred, is not whether the accident would not have happened if the accused had used greater skill or care, but whether it was proved beyond a reasonable doubt that the accused, in light of existing circumstances of which he knew or should have known, failed to use the care or attention or to give to other users of the highway the consideration that a driver of ordinary care would have used, or given in the circumstances.”

[32] In cases involving accidents, the gravamen of the offence is whether the prosecution established the accused was driving carelessly, and not the consequences of the driving: *R. v. Pyszko* [1988] O.J. No. 1218 (OCJ).

[33] Where an accident has occurred, the fact that serious injury or death has resulted is

not, except in unusual cases, relevant to an assessment of whether there has been a departure from the standard of care which would justify a finding of careless driving: *R. v. Globocki* (1991), 26 M.V.R. (2d) 179 (OCJ). The Crown had to show a sufficient departure from the standard of a prudent and reasonable driver to make the driving “deserving of punishment.”

[34] It is the wrongful act or omission of the accused which renders them liable, not the unhappy result: *R. v. Ashton* [1985] O.J. No. 1795 (Ont. Dist. Ct.)

[35] The learned Justice of the Peace in this case correctly articulated the *Beauchamp* test in his Reasons for Judgment.

Issues # 3 through to #5 are subsumed in Issue #6: Did the learned Justice of the Peace err in how he applied the law to the facts of the case?

[36] There were no witnesses to this accident.

[37] Mr. Ariganello testified on November 2, 2012 (transcript pages 40 through to 86).

[38] He woke up on February 21st 2008 at 4:00 a.m. to get ready for his work as a maintenance man at an ice arena.

[39] He had a sore throat and took a spoonful of Benylin to sooth his throat.

[40] He arrived at his work at 5:15 a.m. where he worked his normal 8 hour shift.

[41] He described his duties in the arena that day, the varying temperatures he was exposed to, and his intermittent coughing.

[42] He left work at 1:15 p.m. and was driving home on Winston Churchill Blvd. at the 60 k/hr. speed limit.

[43] Just before he crested a small hill, a Canada Post car stopped on the side of the road. That vehicle could not pull off of the road because of snow banks – estimated to be 5 feet high at the time.

[44] The Appellant stopped his vehicle on the road and then pulled over. He started moving to a speed of approximately 50 k/hr. when

“I started coughing violently, like harshly, because my throat was drying out...It was just a persistent cough. It was like cough, cough, cough, cough, cough. Like my throat dried out and my body was trying to create saliva to moisten my throat. Almost like a choking cough...I was coughing in my hand as I guess anybody would I closed my eyes like as I was coughing and I had lightly pressed the brake pedal because I knew there was traffic behind me...and I didn’t want to hit the brake pedal to cause...an accident behind me and what I thought I ran into was a snow bank...I was like light headed, dizzy, ‘cause I was coughing so hard.” (Transcript pp. 46, 47)

[45] The Appellant testified that his eyes were closed because he was coughing.

- [46] “I had no control over anything.” (Transcript p. 61)
- [47] He had not experienced a coughing episode like this either before or after the accident.
- [48] He was not aware of his car swerving off the road. He only recalls his car driving straight and then hitting the snow bank.
- [49] When he exited the car he was shocked to see that a person was between his car and the snow bank.
- [50] He called 911 as soon as he could – “15 to 20 seconds from figuring out it was a pedestrian.” (Transcript p. 49)
- [51] The Appellant told the 911 operator that he had coughed harshly and was light headed and he veered off the road and hit somebody. (Transcript p. 49)
- [52] The 911 call was played at trial and filed as an Exhibit.
- [53] Police were on scene 10 to 15 minutes later.
- [54] He spent one and a half hours to two hours at the scene with Officer Ivey.
- [55] Officer Ivey noted in his notebook that the Appellant had a ‘significant cough’ and at one point was bent over at the waist. The officer feared that the Defendant was about to vomit.
- [56] The accident happened only 5 minutes into the Appellant’s drive home from work. When he left work he was feeling okay to drive.
- [57] His co-worker, Shawn Keating, testified that the Defendant had a heavy cough that day.
- [58] The Appellant has taken the same route every day to his job at the arena for the past 5 years. He still drives that route and he knows it well.
- [59] From when he started the choking type cough to the accident “two seconds maybe” had passed.... I guess a few, three, four seconds. I was choking.” (Transcript pp. 68, 69)
- [60] He opened his eyes when he stopped choking. His car was into the snow bank. (Transcript p. 72)
- [61] He was slowing down because he was choking. He was trying to stop his vehicle without being hit from behind. (pp. 74, 75)
- [62] In his Reasons for Judgment, the learned Justice of the Peace stated as follows:
“The defendant’s testimony is that he took no action other than to brake gently. He did not open his eyes to look for traffic ahead. He continued to drive with only

one hand on the steering wheel. He did not attempt to verify if there was traffic behind him. He did not attempt to move onto the shoulder of the road and stop. Instead, and over a distance of at least 0.1 kilometer, he continued to operate with his eyes closed. It appears that he chose to react to the coughing encountered by closing his eyes, braking lightly and hoping for the best. This is not the conduct of a reasonably prudent driver in the circumstances encountered. Such a driver would be alert to the possibility of other users of the roadway, both before and ahead of that driver's vehicle." (Reasons for Judgment p. 25 – emphasis added)

[63] His Worship found that the defendant's evidence fell short of what is required to satisfy the Court on the balance of probabilities that his actions were duly diligent.

[64] His Worship stated:

"The evidence before the Court speaks to far more than an act of inadvertent negligence or momentary error in judgment. The Court agrees with the Crown's submissions that although the cough may have initially led to a momentary lapse on the part of Mr. Ariganello his reaction went on for at least several seconds... The extended continuation of this driving behaviour took it beyond any reasonable definition of momentary lapse." (p. 26 – emphasis added)

Conclusion:

[65] His Worship articulated all the correct legal tests.

[66] His Worship however, failed to properly consider the uncontroverted testimony of the Appellant, that his eyes were closed without his control because of a coughing/choking episode that lasted mere seconds, when he determined that due diligence had not been established.

[67] His Worship misapprehended that evidence when he concluded that the Appellant had likely "chosen" to close his eyes in response to the coughing episode. There was nothing in the trial evidence to permit this inference.

[68] Further, His Worship also erred in finding that the several seconds of driving was an extended period of driving. No time period could be more fleeting than 'several seconds'.

[69] I have no doubt that, but for the tragic accident that resulted in the death of a pedestrian who was retrieving her mail at the road side, a conviction would not have been registered in this case.

[70] This is a case of an involuntary physical reaction to a coughing/choking episode, which through no fault of the Appellant, resulted in his eyes closing for a matter of seconds.

[71] The Appellant had met the evidentiary burden of explaining an accident as indicated in *R. v. McIver* [1965] 2 O.R. 475 (Ont. C.A.). *McIver* held the prosecution need only prove that the accused committed the prohibited act, and unless he or she can show that such act was done without negligence or fault on his part he will be convicted. If the accused showed otherwise on the balance of probabilities, there could be no conviction.

[72] Pursuant to s. 120 (1) (a) (i) of the *POA*, the finding should be set aside on the ground that it is unreasonable or cannot be supported by the evidence.

[73] Accordingly, **the appeal is allowed and an acquittal is entered.**

Released: January 17, 2013

Signed: “Justice L.M. Baldwin”