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R. v. Belisle

Between
Regina, and
Travis Troy Belisle

[1992] Y.J. No. 119
DRS 93-00475
Yukon Registry No. T.C. 91-07503

Yukon Territorial Court
Whitehorse, Yukon Territory
Stuart Prov. Ct. J.

June 5, 1992
(15 pp.)

Criminal law — Careless driving causing death — Standard of care, whether breached — Jaywalking pedestrian — Driver's ability to see at night.

This was a trial on a charge of careless driving. The accused, a taxi driver, struck and killed a pedestrian who was wearing dark clothing and who was jaywalking. There was evidence that the pedestrian had lurched onto the street without checking for traffic and that he had been drinking. It was 1:30 a.m. and the streets were wet from intermittent drizzle. The accused was not impaired nor was he speeding.

HELD: The accused was not guilty. There was no evidence that he was negligent in doing anything which could have diverted his attention. The evidence raised a reasonable doubt about the amount of time the accused had to see and react to the pedestrian and his ability to notice a darkly dressed jaywalker in "black light" conditions. There was a reasonable doubt whether the standard of care expected of a reasonably prudent person had been breached. Neither was there proof beyond a reasonable doubt that the accused acted without due care and attention nor that he acted without reasonable consideration for persons using the highway.

STATUTES, REGULATIONS AND RULES CITED:

Motor Vehicle Act, R.S.Y. 1986, c. 118, s. 179.

Counsel for the Crown: Sylvia MacIntosh
Counsel for the Defence: Paul O'Brien.

STUART PROV. CT. J.:—

INTRODUCTION

On September 9, 1991, at approximately 1:30 a.m., the accused, Mr. Belisle was driving north on Second Avenue in Whitehorse, Yukon, when he struck and killed a pedestrian, Walter Jack. This tragic event is the basis of the offence before the courts: careless driving contrary to Section 179 of the Motor Vehicle Act, c. 118 R.S.Y. 1986.

At the outset, it is important to note that in law the court must focus on the elements alleged to constitute careless driving and not on the consequences of the driving, regardless of how serious or tragic the consequences of careless driving may be.

LEGAL ISSUES

Based principally on the authority of Wholesale Travel Group Inc. v. The Queen (1991), 84 D.L.R. (4th) 161 (S.C.C.), the Crown submitted careless driving is a strict liability offence. Imposing strict liability for careless driving dramatically changes the respective burdens of proof upon the Crown and the defendant, and thereby severely restricts the defendant's Charter rights.

If strict liability is imposed, the Crown need only establish the actus reus of the offence and having done so, a conviction will result unless the defendant can prove on a balance of probabilities that they acted with due diligence or have abided by the standard of care established by the regulatory regime or by universally recognized practices for such activities.

The State interest and ability to protect the public interest through ensuring safe use of public roads bears many striking similarities to other state regulated activities which have justified the imposition of strict liability.

A license must be obtained to drive on public roads. As with other regulated activities, carrying out a licensed activity acknowledges an acceptance by the licensee of the responsibilities and limitations of the statutory regime governing that activity. Abusing the privilege granted by a driving license by driving carelessly imposes a severe danger to the public. Protecting the public against dangerous conditions in other state-regulated fields is a primary justification for imposing strict liability. At the heart of creating strict liability lies the need to ensure activities sanctioned by the State do not jeopardize other public interests.

Strict liability removes many significant impediments in effectively utilizing the criminal process, to ensure compliance with standards of care. For example, it is possible that pollution can occur despite exercising the requisite standard of care. Since the internal workings of any operation are best known by the operator, once pollution has been established, the operator, to avoid conviction for a strict liability offence, must prove they exercised the requisite care. Similarly, once a driving accident has occurred, if strict liability is imposed, the onus would lie with the driver to prove the accident occurred despite exercising the requisite standard of care imposed upon all licensed drivers.

These and many other similarities between careless driving and other strict liability offences suggest the appropriateness of imposing strict liability for careless driving.

Except for R. v. McIver (1965), 4 C.C.C. 182 Ont.C.A., the mainstream of contemporary jurisprudence has not treated careless driving as a strict liability offence. R. v. McIver can be and has been rejected as authority for imposing strict liability in careless driving offences. (R. v. Johnson (1966), 58 W.W.R. 490 B.C.C.A.)

Since R. v. Sault Ste. Marie (1978), 40 C.C.C. (2d) 353 S.C.C., the courts have developed both an underlying rationale and a process for determining which offences should be classified as strict liability. Before an offence, which is not expressly created by the legislature as a strict liability offence, can be deemed to be such by the court, two related steps must be taken. First, the court must examine the overall context of the regulated activity to determine if the objectives of the regulating regime warrant the imposition of strict liability. Second, since strict liability offences significantly restrict Charter rights, the test imposed by R. v. Oakes (1986), 24 C.C.C. (3d) 321 S.C.C. must be addressed.

Both of these steps require an exacting analysis of complex matters. In the absence of comprehensive submissions from counsel, the court cannot, and should not, deem any offence to impose strict liability. To change the law in a manner that severely undermines the accused's rights requires a more thorough and detailed submission from the Crown than the presentation of relevant case authorities.

Further, while there are ample similarities between careless driving and other strict liability offences, there are equally several significant factors which may pose insurmountable difficulties for the Crown in establishing careless driving as a strict liability offence. Reluctantly the challenge of responding to the Crown's contention, that careless driving is a strict liability offence, or possibly a modified strict liability offence, as proposed by Lamer, C.J. in Wholesale Travel Group Inc. v. The Queen, must wait for another case.

BURDEN OF PROOF

Careless driving offences require the Crown to prove, beyond a reasonable doubt, that the accused drove either without due care and attention, or without reasonable consideration for persons using the highway. (Motor Vehicle Act Section 179, c. 1 18 R.S.Y. 1986). On this point R. v. Lee, [1989] Y.J. No. 73, May 31, 1989, Y.T.C., clearly and competently sets out the relevant jurisprudence in the Yukon.

STANDARD OF CARE

What is the standard of care for careless driving? Motor Vehicle Act c. 1 18 R.S.Y. 1986 s. 1 79 defines careless driving as:

"Every person who drives a vehicle on a highway:

a) without due care and attention, or
b) without reasonable consideration for persons using the highway,

is guilty of the offence of driving carelessly."

In prosecuting careless drivers, it is not necessary to establish a reckless disregard for others. Recklessness is the stuffing of criminal liability for crimes requiring advertent negligence (R. v. Tutton, [1989] 1 S.C.R. 1392). Careless driving is established if the conduct of the accused is less than the care expected of a reasonable person. As in civil liability, the standard of care depends entirely upon the circumstances surrounding the incident. For both careless driving and civil liability, the driver's conduct must measure up to what a reasonably prudent driver would do in the circumstances.

As the penalties for careless driving increase, the unresolved debate over the difference between advertent and inadvertent negligence, is introduced into the jurisprudence of careless driving. Pressed by concerns over attenuating Charter rights caused by imposing criminal liability based on a civil standard, the courts have recently begun to demand more than inadvertent negligence to establish a careless driving conviction. (R. v. Devizio (1986) 1 M.B.R. (2d) 226 Ont.D.C.) In doing so, the courts have demanded a higher standard than the civil test, despite relying exclusively on the expressions which state the civil standard.

In R. v. Beauchamp, [1953] O.R. 422 (Ont. C.A.), the nervousness of the criminal courts in using civil standards to impose criminal sanctions was addressed in a unique manner. The court, after unashamedly addressing the standard of care in the classic terms of civil liability, added a new dimension. The court at page 14 states:

> "There is a further important element that must also be considered, namely, - the conduct must be of such a nature that it can be considered a breach of duty to the public and deserving a punishment. This further step must be taken even if it is found that the conduct of the accused falls below the standards set out in the proceeding paragraph."

While the courts concern is understandable, this additional test incorporates an unworkable subjective assessment that may be more readily triggered by the consequences of the careless driving than by the absence of a duty of care. For example, a breach of the standard of care which causes the accused to drive into a tree may not be "deserving a punishment", but driving into a pedestrian might be. The added test may produce different results despite both accidents being caused by an identical breach of care. Careless driving is not an offence defined by consequences, whereas dangerous driving under the Criminal Code does indirectly incorporate the consequence or potential consequence of negligent driving as an element of the offence.

Determining what the ordinary prudent person might do, in each set of circumstances, does involve an assessment of a mental element. The mental element may be simply what a prudent person would have thought to do but the accused failed to do. Language may be at the core of the confusion. By attempting to classify and thereby separate negligence into theoretically distinct categories of advertent and inadvertent negligence, the criminal courts have launched an irresolvable debate guaranteed by the complexity of real life circumstances to be the source of interminable confusion. Many difficult cases of negligence could be classified into either category. The prudent reasonable man approach, while a country mile short of perfection, affords a practical, flexible basis for addressing what in any set of circumstances could generally be regarded as careless driving.

In careless driving prosecutions, the civil standard of care, namely what in the circumstances ought to be expected of a reasonably prudent driver is the determinative test.

The difference between civil and criminal liability is significant; the difference lies in the burden of proof to establish criminal liability, the civil burden of proof will not suffice to secure a conviction.

FINDINGS OF FACT

The following pivotal questions of fact lie at the heart of determining whether the accused was driving carelessly.

I) Where on the avenue did the impact between the taxi cab and the pedestrian take place?
II) At what pace did the pedestrian cross the avenue to the point of impact?
III) For what period of time could the accused have viewed the pedestrian before impact?
IV) When did the accused first see the pedestrian?
V) Why was the accused unable to avoid the pedestrian?

The following findings of fact assist in setting the overall context for resolving the contentious facts relevant to these questions.

a) Mr. Belisle was on duty, driving a taxi cab north on 2nd Avenue.
b) The taxi cab was in good mechanical condition, steering, brakes and lights were all in good working order.
c) 2nd Avenue is a six lane city street consisting of two parking lanes

and two lanes of traffic in each direction. Each lane of traffic is approximately 3.65 meters wide.

d) The speed limit in this area is 50 km/hr. Mr. Belisle was driving at the speed limit, in the centre lane, travelling north.

e) At the time of the accident, 1:30 a.m., vehicle and pedestrian traffic on 2nd Avenue, in the immediate vicinity of the accident, was light.

f) The streets were wet from intermittent drizzle, but were not slippery.

g) The pedestrian emerged on to the north bound lane of the avenue from in front of a parked car. The car was parked in the parking lane facing north.

h) Despite crosswalks in the immediate area, the pedestrian was "jaywalking" when he proceeded into the avenue.

i) When hit, the pedestrian was on the inside of the north bound lanes (the lane closest to the centre line).

j) The impact on the taxi cab took place on the left front fender, 0.19 meters from the left side of the vehicle.

k) The pedestrian, Mr. Jack, had been drinking that night. Autopsy results indicated a blood alcohol content of .170 milligrams. Constable Diack testified that with this blood alcohol content, the pedestrian's motor skills and thinking were definitely impaired, but "he would not have been falling down drunk".

I Where did the impact take place on 2nd Avenue?

Ross Douglas Milward, an R.C.M.P. officer, provided expert evidence as an accident analyst. He has testified as an expert accident analyst in all levels of courts, in numerous cases. His expertise was acknowledged by the court and by counsel. His competent and professionally prepared accident reconstruction report and his fair, precise testimony, were extremely instructive in understanding the fact pattern of events constituting this offence.

The positioning of the exact point of impact on the avenue is subject to several problems. The essential references for positioning the point of impact were derived from two "mud marks" found on the inside north bound lane, the markings on the vehicle caused by the impact on the taxi cab, and the testimony of eye witnesses.

Two mud marks were noted by Mr. Milward when he arrived at the scene of the accident at 2:15 a.m. These marks are clearly evident in photographs 1 and 3 taken by Mr. Milward. The first mud mark was located 1.95 meters east of the centre line, the second mark was located 1.9 meters east of the centre line and 2.70 meters north of the first mark.

In the opinion of Mr. Milward these marks were caused by the impact and came from the undercarriage of the taxicab.

Constable Diack saw three mud marks in the same general vicinity as the mud marks in the photographs taken by Mr. Milward. There is no persuasive proof that the mud marks seen by Constable Diack at the time of the accident and those photographed by Mr. Milward, when he arrived at the scene, 1 hour and 15 minutes later, are the same.

The pavement was wet, and rain continued to drizzle from the time of the accident until the arrival of Mr. Milward. The mud marks noted by Constable Diack could have been obliterated by the rain.

The evidence is not clear if the area was blocked off to all traffic after the accident and until the arrival of Mr. Milward. Other traffic could have passed through the area, creating the possibility that these marks were left by another vehicle. Similarly, the mud marks could have been deposited by another vehicle before the accident. There is no proof the mud marks came from the defendant's vehicle.

Even if these mud marks were from his vehicle, there is no evidence to establish from what part of the vehicle the mud marks came from. If they came from the left tire or somewhere else on the vehicle, then there could be a difference of a few feet in using the mud marks as a precise reference for the point of impact.

All of these difficulties reduce the reliability of the mud markings as the solitary basis for determining the precise point of impact.

All eyewitnesses place the impact close to the centre line.

On all of the evidence the point of impact could be anywhere from 6 to 8 feet from the centre line. This difference at best could marginally reduce the distance travelled by the pedestrian before impact and thereby equally marginally reduce the time the pedestrian was visible to oncoming traffic.

II At what pace did the victim cross the street?

The answer to this question is crucial in determining the length of time the pedestrian was observable to oncoming traffic.

> There is a marked difference in the testimony of the eyewitnesses. Both Mr. Chambers and Mr. Beattie, who were sitting together in a parked truck, testified they saw the pedestrian proceed in a normal walking pace from the side of the street to the point of impact.
>
> Mr. Basset, a taxi driver, was sitting in his parked cab facing north on Second Avenue. He testified that the pedestrian walked past his cab, stumbled into the side of the car parked in front of his taxi, then proceeded

past the front of this car and "lurched out into the street". Mr. Basset described this "lurching" movement as someone who's upper body lurches forward and moves his feet quickly to gain his balance.

The evidence of intoxication based upon a blood sample, and from the testimony of Mrs. Desmoulion, the bartender, provides the basis for explaining stumbling or lurching into the street.

Only Mr. Basset's testimony significantly addressed the question of whether the pedestrian took any measures to check for oncoming traffic before crossing the avenue. Mr. Basset stated, the pedestrian did not stop or look for oncoming traffic before entering the street. Whether he walked or lurched into the street, the evidence indicates the pedestrian did not hesitate at the edge of the parked cars to check for oncoming traffic. Consequently, at no time was the pedestrian standing at the edge of the street for any period of time in view of oncoming traffic.

Nothing in the manner of giving evidence from any of the eyewitnesses, nor in their opportunity to view the accident, is sufficiently different to favour one view over the other. Mr. Basset knew the accused and had spoken to the accused after the incident prior to testifying. Under cross examination, while some doubts were raised revolving around bias and credibility, these doubts were not sufficient to deny the relevance and probative value of his testimony.

As with respect to all matters of proof in a criminal case, if there is reasonable doubt over a crucial fact, the benefit of that doubt must be accorded to the accused. Accordingly for the purposes of this case, the pedestrian is found to have "lurched" out onto the street without checking oncoming traffic.

III. How long was the pedestrian in view of oncoming traffic?

In Mr. Milward's opinion the pedestrian was in sight of oncoming traffic for 4.1 seconds. This conclusion is based upon his belief that:

a) the distance from the edge of the parking lane to the point of impact was 5.4 metres (this belief assumes the point of impact was at the site of the soil markings, 1.95 metres inside the centre line, and that the pedestrian walked directly not diagonally to the point of impact); and

b) an average 50 year old male's walking speed is 1.316 metres per second.

On the evidence of Mr. Chambers and Mr. Beattie, the pedestrian walked diagonally across the avenue in a northerly direction. Thus the distance from the edge of the parking lane to the impact point would be longer and the time the pedestrian was in view to oncoming traffic would also be longer. Mr. Basset's evidence suggested a direct route and a faster pace.

Taking all the evidence into consideration, the Crown has failed to establish beyond a reasonable doubt that the pedestrian proceeded diagonally across the avenue and was walking not "lurching". Consequently, the amount of time the pedestrian was in view was less than 4.1 seconds. How much less is difficult to determine. There is no evidence to establish how much less time it would take to reach the impact point if part or all of the distance was covered by "lurching" as opposed to walking at a normal gait.

IV. When did the accused first see the pedestrian?

In a statement provided to the police within a few minutes of the incident, the accused stated he saw the pedestrian "about 20 feet away, pretty close".

Mr. Basset testified he heard braking a split second before the impact. All other witnesses did not hear any sound of braking before the sound of the impact.

At best, the accused saw the pedestrian with only enough time to brake just before impact or at the moment of impact.

Constable Diack testified the reaction time, that is the time it takes to perceive what is happening and initiate a response, is a 1/2 a second for a young person and 3/4 of a second for an older person. Mr. Milward testified the average reaction time is 1 second.

All this evidence tends to support the accused statement that the pedestrian was "pretty close", before he saw him.

Based on the premise that the accused was travelling at 50 km/hr. and that it took 4.1 seconds for the pedestrian to move from the outside of the parking lane, Mr. Milward concluded the accused was 56.9 metres south of the impact point when the pedestrian emerged onto the avenue from the outside edge of the parking lane. Since the findings of fact have established that the pedestrian moved faster than a normal walking gait, the time the pedestrian was in view was less than 4.1 seconds. Accordingly the accused was closer than 56.9 metres when the pedestrian proceeded into the avenue.

V. Why was the accused unable to avoid the impact

The Crown submits that had the accused been exercising proper care in looking out for pedestrians in his line of travel he would have seen the pedestrian in time to avoid the accident.

There are a number of relevant factors which partially explain why the accused did not see the pedestrian until it was too late to take any effective evasive action.

A) Ability to see the Pedestrian

The area was illuminated by a series of street lamps including one light in the immediate vicinity of the accident. Despite this illumination, Constable Parsons introduced the concept of "black light". He state that a black, wet, illuminated road on a very overcast night creates a condition he referred to as "black light". All of the requisite conditions to create this effect existed at the time of the accident. Constable Parsons indicated that such conditions creating "black light" adversely affect visibility.

The pedestrian was decked out head to toe in black or dark clothing. He was wearing a black baseball cap, dark baseball jacket and blue jeans.

Despite the evidence that overall the visibility in the area was good, the particular combination of the "black light" and the dark clothing may have made the pedestrian uniquely difficult to detect.

B) Reasonable Distractions

Constable Diack acknowledged that safe drivers must take in the "big picture". To do so drivers must scan the road ahead to note any particular potential problems. The Constable acknowledged immediately prior to approaching the accident site a safe driver would scan down both directions of the cross street to note any oncoming traffic, check both street corners for any pedestrians proceeding from either direction into the crosswalk and finally because the area is notorious for jaywalkers, especially intoxicated jaywalkers, a scan of both sidewalks would be prudent.

To carry out this prudent scan of the "big picture" in the immediate area of the accident, a prudent driver's attention from the immediate area in front could be distracted for 1 or 2 seconds.

CONCLUSION

The time to notice the pedestrian and the visibility of the pedestrian are crucial in assessing whether the accused is guilty of careless driving.

In the opinion of Mr. Milward, the pedestrian was visible to the accused for 4.1 seconds. There are a number of factors which potentially reduce this time to as little as 2 seconds. Discrepancies over the distance travelled by the pedestrian could marginally reduce the time. Mr. Milward acknowledged that his opinion was premised on the pedestrian walking to the point of impact. "Lurching" as described by Mr. Basset, could have significantly increased the pace of the pedestrian, and thereby significantly reduced the time, perhaps by as much as 1 or 2 seconds.

In scanning the area to take in the "big picture", the darkly dressed pedestrian in "black light" conditions could have been overlooked or perhaps not even seen despite the exercise of appropriate care by the accused.

The evidence clearly established the accused was not impaired and not driving at an excessive speed. There is no evidence that the accused was doing anything which could have negligently diverted his attention.

The evidence as found raises a reasonable doubt about the amount of time the accused had to see and react, and equally raises a reasonable doubt about the ability of the accused to notice a darkly dressed jaywalker in "black light" conditions. The combination of these factors raises a reasonable doubt that the standard of care expected of a reasonably prudent person, in these circumstances, has been breached.

The carelessness of the accused has not been established beyond a reasonable doubt to have been a contributing factor to the tragic accident that took the life of Wafter Jack.

There is neither proof beyond a reasonable doubt that the accused acted without due care and attention nor that he acted without reasonable consideration for persons using the highway. Consequently, the accused is not guilty of careless driving.

STUART TERR. CT. J.

DRS/DRS