

CITATION: *Burlington (City) v. Boyd*, 2019 ONCJ 584
DATE: August 20, 2019

ONTARIO COURT OF JUSTICE

BETWEEN:

**HER MAJESTY THE QUEEN
Regional Municipality of Burlington**

Prosecutor

and

Neil Boyd

Defendant

Heard March 25, 26 2019 & May 3, 2019
Decision Filed August 20, 2019

For the Crown (Prosecution): E. Roda
For the Defendant: F. Shanahan

Gerry Manno
Justice of the Peace
Central West Region

Materials Cited:

Statutes Cited:

Highway Traffic Act, R.S.O. 1990, c. H-8, s. 130
Provincial Offences Act, R.S.O. 1990, as amended.

Cases:

R v. Ali, [2003] O.J. No. 2045.
R v. Beauchamp, [1952] O.J. No. 495.
R v. Belisle, [1992] Y. J. No. 119.
R v. Borenstein, [2016] O.J. No. 6475 C.J.
R v. Globocki, [1991] O.J. No. 214.

R v. Hutchings, [2004] O.J. No. 3526 (O.C.J.).
R v. Kinch, [2004] O.J. No. 486 (S.C.J.).
R v. Lattimore, [2015] O.J. No. 5572
R v. McIver, [1965] O.J. No. 998.
R v. O'Dowd, [2015] O.J. No. 6685.
R v. Pease, [1999] O.J. No. 5105 (O.C.J.).
R v. Roza, [2011] O.J. No. 4927 (O.C.J.).
R v. Sault Ste. Marie, [1978] 2 S.C.R. 1299, 1978 CanLII 11 (S.C.C.).
R v. Shergill, [2016] O.J. No. 1503, O.C.J.
R v. Shergill, [2016] O.J. No. 4294, ONCA.
R v. Van Heest 2009, ABQB 198.

Books:

Libman, E., *Libman on Regulatory Offences in Canada*, (Earlscourt Press, 2002).
 Dukelow, D., *Dictionary of Canadian Law* 3rd ed. (Thomson-Carswell, 2004).

Exhibits:

March 25th exhibits tendered

Exhibit 1 – *Agreed Statement of Facts*, as amended (on consent).
 Exhibit 2 – Diagram of Intersection.
 Exhibit 3 – Google Map – aerial view of intersection.
 Exhibit 4a – Photograph of accident scene.
 Exhibit 4b – Close-up Photograph of accident scene.
 Exhibit 4c – Photograph of Square Tubing.
 Exhibit 4d – Photograph Of red scooter, with circle drawn over location of tubing in exhibit 4c above.
 Exhibit 4e – photograph of scratch mark and ruler.
 Exhibit 4f – photograph of scratch mark and vehicle.
 Exhibit 4g – photograph of scratch mark and wheel imprint.
 Exhibit 4h – photograph of tissue and blood mark.
 Exhibit 4i – photograph of truck and spray paint on roadway.
 Exhibit 4j – photograph of wheel imprint and ruler.
 Exhibit 4k – photograph of damaged wheel.
 Exhibit 4l – photograph of vehicle beside scratch marks.
 Exhibit 4m – photograph of front of pickup truck grille.
 Exhibit 4n – photograph of close up of truck grille.
 Exhibit 4o – photograph of damaged scooter handle.
 Exhibit 4p – photograph of damaged scooter – left side.
 Exhibit 4q – photograph of damaged scooter – right side.
 Exhibit 4r – photograph of more damage to scooter.
 Exhibit 4s – photograph of damage to front fender of scooter.
 Exhibit 4t – photograph of damage to scooter seat.

Exhibits tendered on March 26, 2019

Exhibit 4u – photograph of side/front of pick-up truck.

Exhibit 4v – photograph of front bottom bumper.
 Exhibit 4w – photograph of close up front bumper.
 Exhibit 4x – photograph of close up - corner of bumper.
 Exhibit 4y – photograph of sensor markings on road.
 Exhibit 4z – photograph of truck and debris on road.
 Exhibit 4aa – photograph of foliage at intersection.
 Exhibit 4bb – photograph of intersection taped off.
 Exhibit 4cc – photograph of Drury Lane and Stinson Ave. sign.
 Exhibit 4dd – photograph of intersection.
 Exhibit 4ee – photograph of intersection.
 Exhibit 4ff – Photograph of interior of pick-up truck.
 Exhibit 5 – Defendant’s (Neil Boyd) Statement.
 Exhibit 6 – C.V. of Oliver Caves, HRPS Constable.
 Exhibit 7 – Accident Reconstruction Report authored by O. Caves.

Introduction:

1. This is a Part III Provincial Offence (POA) under the *Highway Traffic Act*, R.S.O. 1990, c. H-8, s. 130 (hereinafter also referred to as the *HTA*). The Information #189337 before the court charges that on or about the 14th day of June, 2018 in the City of Burlington, Region of Halton, Mr. Neil Boyd (also hereinafter referred to as the *defendant*) drove a vehicle on a highway without due care and attention or without reasonable consideration for other persons using the highway, contrary to section 130 of the HTA.
2. Before September 2018, a conviction of careless driving came with a fine of between \$400 and \$2,000, a possible licence suspension of up to two years and as many as six months in jail. As of Sept. 1, 2018, drivers convicted of careless driving **causing bodily harm or death** could face a fine of between \$2,000 and \$50,000, six demerit points and a licence suspension of up to five years. It could also call for as much as two years in jail. In part, the higher penalties were imposed by legislators to recognize the increased public interest in deterring both dangerous and careless driving which in many cases led to devastating life-altering injuries and/or death for potential victims and a recognition that such tragic events also led to significant consequences for surviving family members and friends.

Decision of this Court

3. The Court finds that the *actus reus* has not been proven beyond a reasonable doubt given the particulars of this case, the actions of the driver, and after due consideration of all of the circumstances surrounding this event. Consideration has been accorded to the indirect evidence as well as to the ‘voice’ of the expert opinion reported in the *Accident Reconstructionist Unit’s* report (hereinafter ARU). This decision renders the consideration of a due diligence defence as well as consideration of the applicable penalties both moot.

The Facts of this Case

4. On June 14, 2018, Mr. Neil Boyd (hereinafter also referred to as the *Defendant*) was driving his Chevy pick-up truck (hereinafter also referred to as *truck*) southbound on Drury Lane approaching the intersection of Drury and New Street in Burlington, Ontario. He was planning to turn left (going eastbound) on New Street. That particular intersection is governed by traffic lights with the inclusion of pedestrian crossing signals and a clearly marked pedestrian crosswalk. Before making his left-hand turn, the Defendant came to a complete stop at that intersection and awaited the light to cycle and change to green.
5. It was a bright, sunny morning with light traffic. The roads were dry, paved and absent any unusual condition that would cause drivers to take additional care and attention such as rain, construction workers being present and/or potholes in the pavement etc.
6. This particular area is known to have seniors since further to the north on Drury, and on the east side of the road, there is a Burlington lawn bowling club, a curling club and the Burlington Seniors Centre (2285 New St.). To the south of the intersection of Drury and New Street, Drury becomes Stinson Avenue. Though New street is considered one of the more major east-west arterial roads from Burlington to Oakville, one visiting this intersection will find it to be populated by mature residences on the south side of New Street as well as a mix of mature greenery on both sides of the intersection.
7. On this date, time and place, as the Defendant began to execute his left-hand turn, he felt a bump and heard a noise, a metallic type of sound and believed he had hit a large rock or a man-made metallic object on the road. He stopped his truck and got out to examine if there was any damage. Upon circling around to the front of his truck, he came upon a felled electric-powered mobility scooter (hereinafter also referred to as *scooter*) and still on that scooter was the victim, 94-year-old Maria Richter (also referred to as the *victim*). She was still strapped in her seatbelt but was on the ground with her leg pinned between the truck's front bumper and her mobility scooter. She was bleeding, breathing but unresponsive. The Defendant as well as two post-accident witnesses remained on the scene to help the victim.
8. Shortly after the accident, for which there were no witnesses, two vehicles stopped to lend assistance to the accident participants before police and other emergency personnel arrived. These model citizens helped to examine the victim's breathing, tend to the Defendant's obvious shock and to call 911 to beckon the arrival of emergency personnel. The victim's scooter had been dragged outside the crosswalk, but ARU personnel determined that the point of impact was within the crosswalk lines. Ms. Richter unfortunately succumbed to her injuries in hospital a short time later with the cause of death being listed as blunt force trauma.

9. When Police arrived and began the customary process of gathering information as to what occurred from the various parties on scene. The Defendant indicated to both one of the witnesses as well as in the accident report (see Exhibit 5) he filled out (which were statutorily compelled statements given by the Defendant) that he had not seen the victim prior to the accident and that he believed that 'she came out of nowhere'. The police charged the Defendant with Careless Driving contrary to the *Highway Traffic Act* (HTA) section 130.

Issues and Focus of the Court

10. The offence of Careless Driving is a part three offence and considered a *strict liability* offence under the *Provincial Offences Act* (see also *Sault Ste. Marie*). The Prosecution bears the onus of proving that the Defendant committed this offence (*the actus reus*) beyond a reasonable doubt. *Reasonable doubt* is best defined, most notably in two Supreme Court cases, namely, *R v. D.(W.)* and *R v. Lifchus*. That onus never shifts to the Defendant.
11. If the Prosecution is successful in convincing the Court that the *actus reus* has been proven, then and only then would the onus shift to the Defendant to show or prove to the Court, on a balance of probabilities basis, that he held a reasonable belief in a mistaken set of facts and/or he acted with *due diligence*. If he is successful in proving that to the Court it is then open to the Court to find him not culpable despite the *actus reus* having been proven.
12. It should be distinctly understood that the mandate of this Court is quite narrow. It is to focus on the regulatory offence before the Court and on the respective onus of, and evidence presented by, each party. There are no civil/tort considerations being made or implied nor is there an assignment of blame in accordance with the principles of *contributory negligence*. *Mens Rea*, which would be a hallmark of criminal trials is also not at bar and the prosecution does not have to prove intent or forethought to establish the charge. In fact, in *R v. Kinch*, where there is an accident, the focus remains on whether or not the driving was careless. It is not focused on the consequences of the driving or accident. It must not focus on the consequences of injury and/or death (*para. 51-52, supra*) or on who bears the civil liability. That is for a different court of competent jurisdiction to decide.
13. Having said that, the Court understands the sensitivity that accompanies tragic death and/or injury and the court is mindful of the effect of those consequences. Our sympathy goes out to the family members of the deceased. Our sympathy also goes out to the Defendant who we understand suffers from Post Traumatic Stress Disorder (PTSD) because of the accident. He no longer drives that vehicle and cannot bring himself to return to that intersection. These are emotional and psychological scars that the Defendant must endure for the rest of his life. Though we do understand these consequences, the court cannot and has not considered them in the determination of the *actus reus* or any defence mounted by Mr. Boyd.

14. The Court is also mindful that drivers are not expected to demonstrate a standard of driving perfection. What is **reasonable** under given circumstances must be considered and whether or not the driver's (Defendant's) actions fall below that reasonable standard.
15. The Court, *inter alia*, must address the following questions:
- Has the Prosecution proven its case (the *actus reus*) *beyond a reasonable doubt*?
 - Has the Defendant articulated a *due diligence* defence or believed in a mistaken set of facts on a *balance of probabilities* that should render him not culpable?
 - Within the consideration of a *due diligence* defence, the Court asks that after due consideration of all of the evidence and circumstances surrounding the accident, was there something more or better that the Defendant could have reasonably done to mitigate or avoid this tragic accident?
 - If the Court finds that the Defendant is guilty as charged, and assuming the *due diligence* defence has failed, what would the appropriate penalty be using the sentencing principles of *Specific and General Deterrence* once factoring in the submissions on such penalties from both parties?

The Law

16. The offence of careless driving is a *strict liability* offence. This proposition was established by the Ontario Court of Appeal (OCA) in *R v. McIver* from 1965. J.A. MacKay in writing for the majority wrote:

*Section 60 [now 130] of the Highway Traffic Act prohibits a defined type of conduct; it is silent as to intent or **mens rea**. In such a case, the Crown will only need to prove that the accused committed the prohibited act and the accused will be convicted unless he can show that the forbidden act was done without negligence or fault on his part. If there were an explanation of this accident having occurred without fault on the part of the accused, it was wholly within his knowledge...*

In *Beauchamp* (supra) a case from 1953 at page 13 of that decision the OCA stated that the test of careless driving is:

...not whether, if the accused had used a greater care of skill, the accident would not have happened. It is whether it is proved beyond a reasonable doubt that the accused, in light of the existing circumstances of which he was aware or of which a driver exercising ordinary care should have been aware, failed to use the care and attention or to give to other persons using the highway the consideration that a driver of ordinary care would have used or given in the circumstances.

In his decision in *Regina v. Kinch*, [\[2004\] O.J. No. 486](#) (Ont. Sup. Ct.) at paragraph 50, Justice Durno S.C.J. noted that the test for careless driving has remained constant since the time of the decision of the Ontario Court of Appeal in *Regina v. Beauchamp*, *supra*. In the decision, Mr. Justice Durno summarized the "main criteria" for the establishment of a case of careless driving, as enunciated in *Beauchamp*, as follows:

- * *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 for 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 do.*
- * *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 consideration.*
- * *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 and 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.*

Witness Evidence

17. Both witness #1 and #2, that being Jordan Switzer and Giselle Jones, respectively both testified that they did NOT see the accident but lent much appreciated assistance and comfort to those involved at the scene post-collision.
18. The Defendant 'blurted' out to witness #1 that the pedestrian came out of nowhere.
19. Witness #1 called 911 and emergency personnel arrived on scene about 5-6 minutes after the 911 call was made. Witness #1 testified that the white truck belonging to the Defendant was quite large and visible on scene. He did not see the colour of the traffic signals. Witness #2 also called 911 but had no communication with either involved party to the accident.
20. Witness #3, Officer Dawn Freeland was the first officer who came upon the scene. She had no recollection of having spoken to the driver or other witnesses, nor did she recall the position of the truck, of any cell-phone use or the Defendant's demeanour that day. She admitted on the stand that she had very little or no independent recollection of that day.
21. Witness #4 was Lanaya Greco, the second officer on the scene. She arrived at 9:16 a.m. and noted the victim on the road, skid marks and various personal items strewn across the road. She determined that Mr. Boyd was the driver of the truck, noted the various witnesses on scene and began to take statements at roadside.
22. Officer Oliver Caves was the 5th witness and was an officer with the Accident Reconstructionist Unit (ARU) and deemed by all parties to be an expert witness. He authored the report dated September 9, 2018 which was filed as Exhibit 7.
23. The ARU, *inter alia*, was able to determine the following;
 - a. There was no evidence of pre-accident driving behaviour;
 - b. No evidence or no way to determine who entered the intersection first;
 - c. No evidence either way as to whether or not the Defendant signalled;
 - d. The ARU's measurements demonstrate that the victim's scooter was well within the crosswalk at the point of impact;
 - e. Measurements and visible damage points confirm that the scooter was in front of the pick-up truck;
 - f. The traffic lights were operational, but it was not possible to determine how or who initiated the light cycle. It could have been the victim who pressed the walk signal button, OR it could have been the Defendant's vehicle stopped at the red light that would have activated the cycle from

the weight of his vehicle on the asphalt pad sensor in the roadway but the ARU was able to determine that the cycle was initiated at 9:11 a.m.;

- g. The victim's scooter was set to 'rabbit' mode or speed which was the highest or fastest speed the scooter could be set at to obtain a top speed of 8 kph;
 - h. The ARU could not determine how far the truck had to travel to reach the speed of 10 kph to effect the turn that day;
 - i. The ARU could not determine the force the truck exerted on impact;
 - j. The exact direction in which the scooter was travelling prior to the accident was not determinable. The scooter could have started from a stopped position on the sidewalk or in a continuous movement from the roadway to the south and moving through the intersection thereby bypassing the sidewalk;
 - k. The ARU determined that the scooter height was 112 centimetres while the truck stood 124 centimetres in height proving that the truck was higher than the upright scooter and that difference might have impacted visibility assuming a proximate location to each other;
 - l. The victim was still strapped in their seatbelt post accident and was not required to wear a helmet. Assuming a speed of 8 kph the scooter would have travelled 2.2 meters per second which implies that it took approximately 1 second to go from the edge of the road or sidewalk to the point of impact in the crosswalk;
 - m. On page 7 of the ARU report (Exhibit 7) there was no pre-collision evidence to suggest that there had been a sharp acceleration or application of the brakes on the truck;
24. Witness #6 was the defendant himself Mr. Boyd who told the court he was a 56-year-old, father of two adult children, married and had been working as a landscaper for years when in 2018 he began to turn his mind towards retiring after consulting with his spouse and family. That morning he was travelling to Tim Hortons to pick up a coffee and then to visit a job site located on Morrison Rd., Oakville.
25. Mr. Boyd was not impaired by any drugs, nor had he been drinking. He was emphatic and certain that he was not listening to loud music nor was he using his cellphone. He testified that traffic was light that morning.
26. While Mr. Boyd was stopped at his red light poised to turn left when the light permitted his movement, he visually panned the intersection and the corners. He

looked behind his vehicle as well and noticed that a vehicle had pulled up behind him looking to turn right or move westbound on New Street once the light changed.

27. Mr. Boyd testified that the roads were dry, traffic light and that the sunlight and shade, though present did NOT affect his vision or cause him to alter his driving behaviour that morning.
28. Boyd said that he looked over to New Street and saw or noted anyone walking, standing or riding a bicycle. Upon making his turn he said that he hit something that he thought was a large rock or metallic object due to the sound it made. He stopped and exited his truck to find the object and to see what damage it had made to his vehicle.
29. He said he came upon Ms. Richter lying on the ground in front of his truck grill. He was asked to move his truck back so that the witnesses could disengage the victim's leg which at that point was trapped between the felled scooter and his truck front.
30. Mr. Boyd asserted that he took about 3-4 seconds to make his turn and was travelling at no more than 10 kph. (see Exhibit 5-HRPS collision statement).
31. The Defendant was upset and immediately called his wife for support and then helped the victim who appeared to be breathing but was non-responsive to verbal commands.
32. He was in shock and as most would do, tried to reconstruct how the accident could have occurred. In order to do this, he returned to the scene of the accident the next day and on the south side of New St. noted several overgrown bushes and trees in the 'visibility triangle' which is the area normally kept clear to enhance visibility for drivers travelling through that intersection.
33. Boyd said that he called the municipality to inform them what had occurred and to inspect the greenery at that intersection. The municipality issued notices to the residents at that intersection to cut back the greenery shortly after the day of the accident.
34. Under cross-examination, the Defendant denied being distracted by his cellphone, any food or drink or any loud music within his truck cab. The Prosecution asked why he did not come in with his cellphone statements to prove he was not on the phone. The court has discounted this exchange as it implies that the onus is reversed onto the Defendant which would not be proper for the court to consider.

35. Mr. Boyd emphatically denied that the sun or the shaded areas were of such a concern as to cause him to alter his driving behaviour. In his recollection, Boyd testified that he did not believe his vision had been impeded.

The Position of the Parties

Agreed upon Statement of Facts (as amended, on consent -Exhibit 1)

36. Neil Boyd, the defendant before the court, was the driver of the white, Chevrolet Silverado pickup truck license plate AH26300 at the time that it was involved in a collision on June 14, 2018;
37. The pedestrian involved in the collision was 94-year-old Maria Richter. She lived independently and at the time of the collision was enroute to the nearby Burlington Seniors Centre at 2285 New Street;
38. Because of the collision, Ms. Richter suffered from tracraneal bleeding, multiple pelvic fractures, and soft tissue injury to the right leg. Her cause of death was determined to be blunt force trauma;
39. At the intersection of New St. and Drury Lane where the collision took place, there is a pedestrian walk signal that is displayed when one of the multiple buttons at the intersection are (*sp*) pressed, or when a motor vehicle triggers the sensor. At 9:11 a.m. on June 14, 2018 there was a request for the lights at that intersection to cycle. The 911 call reporting the collision was made at 9:13 a.m. It is unknown whether the light cycle request was triggered by a pedestrian pressing the walk signal button, or a motor vehicle setting off the sensor;
40. Mr. Boyd made a written, cautioned statement to police on June 14, 2018. It was admitted that the statement was made voluntarily;
41. Firefighters arrived on scene. The victim's leg was caught under the scooter, and she was still strapped in with the seatbelt. Firefighters unclipped the seatbelt to free her and moved the scooter back approximately 4 feet. It remained in the same position as it had been at impact.

The Defendant's Position

42. Counsel reminded the court that there was no direct evidence from which to draw from. There were no witnesses to this tragic event.
43. There were no unusual circumstances at play – no adverse road conditions, no allegation of distracted or impaired driving, the Defendant was not in a hurry to go somewhere that morning.

44. That the Crown's case was highly dependent on the findings contained in the Accident Reconstructionist's Report.
45. There were no witnesses to testify how or from where the victim entered the intersection, at what speed the scooter was travelling, or who had the 'right of way' given the signal lights.
46. Though the victim was wearing her seatbelt did she remove it to stand and reach or operate the pedestrian signal button or was the walk signal ever actually engaged?
47. Counsel suggested that had the victim properly pressed the pedestrian walk signal, she would have had to rise or stand after removing her seatbelt then to sit to re-engage her seatbelt which would have given the Defendant an opportunity to see the victim pressing that button while still on the sidewalk.
48. On page 12 of the ARU report (see Exhibit 7) the author suggested that the walk signal button must be pressed to get a walk signal. The Defendant raised some doubt as to whether the victim pressed the button prior to the movement and subsequent collision.
49. On page 25, para. 2 of the ARU report (Exhibit 7) argued that the light cycle process could have been initiated by a pedestrian or by a car whose weight and presence would have set off the sensor in the road to commence the light cycle. It remained unclear whether that button was pushed by the pedestrian or the cycle was initiated by the position of the Defendant's pickup truck weighing on the street sensor.
50. None of the witnesses nor the Accident Reconstructionist expert presented evidence of whether the walk signal had been activated.
51. Counsel suggested that given some of the photographs tendered as Exhibits, that the trees and shrubs on the southside of New Street were overgrown and created shadows across the sidewalk and the road which made it difficult for drivers to see in the presence of bright sunshine and shaded areas created by such greenery.
52. Other factors where that the Driver's view was obstructed by the grade in the road and/or the bright sunshine and related shadows for southbound drivers.
53. Counsel supported his argument regarding the overgrown shrubbery and trees by referring to Exhibit 4y which provides photographic support for that argument.
54. Counsel Shanahan postulated that the scooter never actually stopped but simply moved from the roadway to the south, on Stinson Avenue at the speed she was travelling at, saw the light was green and continued to enter the crosswalk, not

from the sidewalk, but directly from the road thereby making it more difficult for southbound drivers to see her or her intention.

55. The officer who laid the charge did so before the completion of the ARU report. Counsel suggested that this might have been done as a result of a fatality being involved but wondered if that created the apprehension of bias in the report – confirmation bias to be exact.
56. The Defendant referred to pg. 14 of Exhibit 7 where the accident reconstruction expert noted that he could not determine the exact starting point or direction of the victim's scooter, again suggesting that the overgrown greenery and significant contrasting shadows played a role in obfuscating vision that morning.
57. Defendant's counsel argued that in a sense it wasn't fair to compare a normally erect pedestrian crossing at a crosswalk to a pedestrian sitting in a scooter particularly since the scooter's speed would normally outpace the speed at which a pedestrian walked across a roadway and in a silent manner being electrically powered.
58. This particular scooter was equipped with two speeds, the first and slowest speed would be 'turtle' and the maximum speed ('rabbit') had a dial setting of 'rabbit'. On this day, at impact, the scooter was set to operate at maximum speed. The operators of mobility scooters wear seatbelts but are NOT required by law to have a safety helmet unlike traditional bicycles nor were scooter operators required to wear reflective clothing.
59. Counsel also suggested that the victim was wearing clothing described as having muted colours and the scooter was a dark crimson red that did not stand out particularly when in shadowed areas.
60. In Exhibit 4(a) and 4(z) the viewer noted dark shadows on that morning which in counsel's opinion tended to mask or partially mask the scooter to other drivers sharing the road.
61. The ARU determined that assuming the scooter was travelling at top speed of 8 kph, it would be travelling a distance of 2.2 metres per second. The scooter had travelled 2.44 metres into the crosswalk that morning which would have taken approximately one second from the sidewalk area to the point of impact.
62. There was no evidence before the court that the Defendant was speeding.
63. Counsel requested that the Court be persuaded by the argument in *R v. O'Dowd* where the Justice of the Peace dismissed the charge having ruled that the negligence of the driver in a single car rollover was the result of momentary inadvertent attention and did not meet the threshold required to prosecute for careless driving.

The Crown/Prosecution's Submissions

64. The Prosecution began by reminding the Court that *R v. D.(W.)* applies to the *actus reus* and that the only fact in dispute in this trial is whether or not the Defendant had driven carelessly.
65. This is a strict liability offence under the *POA* and is contrary to section 130 of the *HTA*.
66. The Prosecution argued that despite the Defendant testifying in a forthright manner, he tended to be somewhat evasive in his responses to the Prosecution while under cross-examination. For instance, as to whether or not the shrubs and trees had impacted his vision on that day the Defendant appeared to change his replies from '*not at all*' to '*yes*' or '*perhaps*' to the same questions depending on who was asking the questions. This was true particularly when addressing the question as to whether or not the greenery and the sun affected his vision on that morning.
67. There was **no** evidence one way or the other as to whether the Defendant had employed his left-turn signal.
68. Additionally, the Prosecution believed that the shadows cast that day would not have been over the crosswalk and so they were quite limited in helping to build case of obscured vision.
69. The victim was within the crosswalk at impact (see pg. 12 of Accident Report – Exhibit 7).
70. There was no definitive evidence one way or the other that the pedestrian had a green walk light signal but asked the court to accept that both parties had a green light facing them.
71. Even if the pedestrian walk signal had been red, the Prosecution says that a pedestrian was still entitled to deference when crossing the road that day and particularly at or on a crosswalk area. That the right of way is always given to the pedestrian over vehicles sharing the same road.
72. In summary, the Prosecution asked the court to accept the findings of the ARU report but to accept the shadows in the photo exhibits with '*a grain of salt*' in that the shadow placement and sun placement were not reflective of the orientation and the angle of the sun when the accident happened some 1.5 to 2 hours earlier.
73. The Prosecution reminded the Court that the Defendant himself, when he testified, asserted that the trees and/or shrubs nor the shadows they created impeded his vision that morning. He felt there was nothing significant that would have required him to adjust his driving behaviour. The Prosecution as a result,

believed that the sun and shadows were essentially ‘*red herrings*’ in the context of the evidence.

74. The prosecution conceded that had the victim been jaywalking that not crossing the road in a proper manner it might have affected vision and the point of impact however in this case, the victim was sitting in a scooter, a rather large scooter. The victim was also a rather large woman on a rather large scooter sporting a red flag on a pole which rode above the scooter. All this should have been visible to the Defendant but oddly, he claimed he never saw the scooter pre-impact.
75. The ARU report concluded that the Defendant drove into the scooter and not the other way around. There was no evidence of braking and to repeat, the Defendant admitted to not having seen the victim pre-impact.
76. On page 56 of the transcript, the Defendant said he visually panned the area and used his peripheral vision to see the crosswalk. There was no evidence as to whether or not he **continually** checked the intersection once he commenced his turn.
77. The Prosecution submitted that in *R v. Shergill*, momentary inattention alone would not amount to careless driving. All of the circumstances must be assessed. In *R v. Lattimore* (Para. 9), the direction of where the person was going was not known in contrast to this case where the exact point of impact had been reconstructed.
78. The Prosecution requested that the Court register a conviction under or contrary to section 130 *HTA*.

Case Review and Analysis

79. In *R v. McIver* (1965), in para. 6, there was no explanation as to the cause of the accident other than inferring that it must have been careless driving. Driving based on the facts, absent any direct evidence and absent other evidence to support any other version or finding with respect to the events would necessarily open the door to infer that the driver must have been careless in their driving behaviour.
80. In an even older case, in *R v. Beauchamp* (1953) the OCA drew from Dr. Mazengarb’s textbook “*Negligence on the Highway*” 2nd. Ed., 1952 at pg. 176-177 to assert the following;

“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 men 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.”

81. In paragraph 21 of *Beauchamp*, the OCA considered the phrase ‘**due care**’.
- “The use of the term “due care”, which means care owing in the circumstances, makes it quite clear that, while the legal standard of care remains the same in the sense that it is what the average careful man would have done in like circumstances, the factual standard is a constantly shifting one, depending on road, visibility, weather conditions, traffic conditions that exist or may reasonably be expected, and any other conditions that ordinary prudent drivers would take into consideration. It is a question of fact, depending on the circumstances of each case.”*
82. In *R v. Lattimore* (2013), on appeal from J. P. Conacher’s decision to convict a driver who killed a pedestrian, the appellate court reversed the decision based on the following;
- That the Crown was unable to exclude other possibilities or scenarios which would have mandated an acquittal. The appellate court found that those other possible scenarios did not constitute speculative machinations; and,
 - The victim could have been in the roadway for less than a second before impact and the Defendant was travelling at a low speed and that before proceeding on his green light signal, the Defendant checked both corners and made a slow left turn while continuously checking. There was no evidence that would show anything but at worst momentary inattention (para. 9, 11 and 12).
83. *Lattimore* had some similarities to the case at bar in that both drivers failed to see the pedestrian prior to the collision and were both making a left hand turn at a relatively slow speed and both indicating that they looked around their vehicle before commencing to make the turn, yet both saw nothing. In this case, the accident reconstructionist determined that the victim’s scooter would have taken approximately one second to move from the sidewalk area to the point of impact in the crosswalk. Boyd also testified that he estimated that it took 4 – 5 seconds to execute his left turn. The time frame was relatively brief. The Court was provided no evidence on how long Boyd was sitting at the intersection awaiting the light to change, nor how long the cycle took or if it included an activated pedestrian walk signal or not.
84. In *R v. Shergill* (2016) on appeal from a careless driving acquittal, the Defendant’s tractor-trailer rear ended a truck stopped and poised to make a left-hand turn. At that time, it was determined that certain aspects of *Beauchamp* were no longer valid. In para. 28 & 29 the Court articulated its view on the concept of ‘*momentary inattentiveness*.’ On its own and without considering any other factors, the presence of momentary inattentiveness does not build a

definitive case to either support or refute a charge of careless driving. It is highly dependent on the arbiter considering all of the circumstances in each case as well.

85. Put another way, is 'momentary inattentiveness' a defence to careless driving? The answer depends on the circumstances of each case. If, given all of the surrounding circumstances, momentary inattentiveness by a driver does not constitute a departure from the due care and attention or reasonable consideration demanded of an ordinarily prudent driver then it cannot constitute careless driving and is not punishable. If the court considers that given all of the circumstance the degree of inattentiveness displayed by the defendant goes beyond what one would expect of a reasonably prudent driver in such circumstances, then the offence has been made out.
86. The Court in *Shergill* was quick to point out that it would be incorrect to boldly state that momentary inattentiveness cannot constitute careless driving. The trier of fact must conduct/consider an analysis of the evidence in each case and must measure the evidence of inattentiveness against the standard expected of a reasonably prudent driver.
87. One of the distinguishing factors in *Shergill* was that the victim's vehicle was stopped at a light and was measured at waiting 12 – 16 seconds with their turn signal engaged and the Defendant's vehicle rear-ended the stopped car causing the accident. The Justice of the Peace at trial found that momentary inattentiveness did not constitute careless driving and dismissed the charge. The appellate court thought differently since the J.P. had not considered all of the other circumstances. The decision was reversed and a conviction entered. Additionally, the appeal court found that the J.P. may have been overly persuaded by the Defendant's good driving habits for 5 kilometres driven before the accident ensued. The court believed that prior driving behaviour has little impact on the consideration of the relevant factors at the point of the accident.
88. As such, with the case at bar, the prior driving behaviour of the Defendant is not relevant to the consideration of this case. Momentary inattention in and of itself does not necessarily prove careless driving unless the arbiter considers and weighs all of the relevant factors. Of distinction however, is the fact that in *Shergill* the vehicle had been stopped for some 12-16 seconds with their signal engaged. That was considered a significant block of time in which it was argued that the Defendant should have noticed the victim's vehicle and adjusted their behaviour appropriately. To repeat, in the case at bar, there is no evidence before the court as to how much time the Defendant had spent or was stopped at the intersection.
89. In *R v. Hutchings* (2004) a Defendant's vehicle struck and killed a pedestrian who he claimed as in *Boyd*, 'came out of nowhere'. The J.P. found that the Defendant was not driving with due care and attention after considering the circumstances, with particular emphasis on the fact that;

-this was a roadway where pedestrians were known to cross in a jaywalking fashion; and,

-That the 250 lb. woman who was stationary in the middle of the road, awaiting a safe crossing opportunity should have been seen by a motorist who was paying due care and attention. The arbiter found that the *actus reus* had been proven by the Prosecution beyond a reasonable doubt. There was little to no instruction on whether or not the offence was a *strict liability* offence or whether or not the Defendant was able to show due diligence or believed in a mistaken set of facts. The obvious factual distinctions to the case at bar include the fact that the pedestrian in one circumstance was stationary in the middle of the road whilst in this case the pedestrian was in a mobility scooter potentially travelling up to 8 kph. As well the pedestrian in *Boyd* was well within the crosswalk at the point of impact and not jaywalking.

90. In *R v. Globacki* (1991), in paragraph 30, the court ruled that;

“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. This principle has been authoritatively established with respect to the criminal offences of criminal negligence causing death (involving a motor vehicle): R v. Anderson, [1990] 1 S.C.R. 265, 19 M.V.R. (2d) 161, [1990] 2 W.W.R. 481, 64 Man. R. (2d) 161, 75 C.R. (3d) 50, 105 N.R. 143, 53 C.C.C. (3d) 481, at 488, and dangerous driving: R v. Lowe (1974), 6 O.R. (2d) 585, 21 C.C.C. (2d) 193 (C.A.). There is no logical reason why that principle ought not to apply to the assessment of careless driving.”

91. The Court also went on to say that;

“While the defendant’s driving must be measured against a standard, that standard is not one of perfection. Further, in Beauchamp, at pp. 12-13 [C.C.C.], the Court of Appeal adopted the following proposition: 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.” (see Mazengarb, pp. 176-177).

92. In *Globacki*, the defendant had a 1.5 second delay in his reaction to the deceased who simply walked onto the roadway. This short period to time was not

determined to be careless driving by the court considering all the circumstances in that case.

93. In *R v. Borenstein* two vehicles collided and a charge of careless driving was levelled by the police against the defendant Ms. Borenstein. Similar to *Boyd*, the accident happened at an intersection controlled by traffic lights. The victim was stopped ahead of Ms. Borenstein's vehicle at a red light awaiting the light to change to turn left at the intersection. The Defendant rear-ended the victim's vehicle while the lights facing them was still red. The accident resulted in extensive injuries. Distinct to the case at bar, the accident occurred during the evening though the intersection was well lit with lights and were visible for approximately one kilometre. Though the J.P. originally acquitted on the basis that this amounted to mere inadvertent negligence, he/she failed to take all of the circumstances into consideration according to the appellate court. The evidence demonstrated that the victim had been stopped at that light for 10 seconds which was considered a significant block of time in which the Defendant should have seen the stopped vehicle had they not been negligent.
94. In *R v. O'Dowd* my learned colleague, in an *ex parte* part III trial, found that the Prosecution did not meet its burden of proving the *actus reus* of careless driving. In a statement the defendant made to police, he stated that he was approaching a curve in the road and the vehicle did not accept the curve and instead continued to move in a straight line causing him to move off roadway. His car rolled over in this single car collision. The Prosecution argued that since the defendant was speeding over the posted speed limit, he lost control of his vehicle. J. P. Dechert found that though he accepted that the defendant was speeding and his driving did depart from the norm, he found that the negligence amounted to inadvertent negligence and not sustained to the point that attracted or was deserving of punishment.
95. A Defendant's vehicle struck a pedestrian who was walking across the highway in *R v. Pease* (1999). In that case it was determined that the defendant was not driving at excessive speeds and the intersection was well illuminated. There was a witness who noted that the pedestrian was crossing the road but that the Defendant did not reduce his speed as he approached the pedestrian. There was some discussion in this case whether or not *mens rea* was or had been proven. The law regarding careless driving has evolved since the release of this case where *mens rea* no longer plays a role as the offence is considered a *strict liability* offence. The factual distinction with *Boyd* is that the *Pease* case had a witness that gave some evidence such that when combined with all of the other circumstances demonstrated to the court that the accident was not the result of mere inadvertent lack of attention.
96. In *Belisle* (1992), another crown proffered case, the defendant, a taxi driver who in that case was referred to as the 'Accused' struck and killed a jaywalking pedestrian. The arbiter in that case had some evidence that the pedestrian lurched

onto the street without checking for traffic and might have been drinking. The accident occurred at 1:30 a.m. and the streets were wet with intermittent drizzle. Speed, nor impairment of the driver was not at issue.

97. In evidence, a witness opined that the pedestrian was in sight of oncoming traffic for about 4.1 seconds based on certain assumptions. The defendant first noticed the pedestrian about 20 feet in front of his moving vehicle and despite some adverse conditions to visibility, the court did not find that the driving fell below the standard expected from a reasonably prudent driver. The Defendant in that case was found not guilty of offending s. 130 of the *HTA*.

Conclusion and Decision of this Court

98. This court has had to rely on indirect evidence to determine whether or not the Prosecution had proven the *actus reus* beyond a reasonable doubt.
99. The court has considered all of the circumstances, the evidence and the ARU report to reach its decision. The issue is whether or not the momentary inattention rose to a level that is considered careless and deserving of punishment. The court always asks itself in *strict liability* cases on whether a Defendant could have done something more or better to avoid or mitigate the accident.
100. Despite the consequences of this accident, it would be an error in law to rule based on the consequence or loss of life. That has become an aggravating aspect that could be employed on sentencing particularly given the careless driving causing injury or death which was enacted in September, 2018. Also, as the court mentioned earlier, there is no criminal intent or *mens rea* that needs to be proven here. The concept of *contributory negligence* sometimes used in the civil courts, is also **not** within the mandate of this court or its decision.
101. The court is also mindful of the instructions or guiding principles provided in the common law. All of the relevant circumstances must be considered in reaching a decision. Some of the prior common law would suggest that if an explanation cannot be found for the accident and after considering all of the circumstances, the court may be open to conclude that the driver must have been operating their vehicle in a careless fashion. However, that is not always the case or conclusion the court should reach particularly without considering all of the circumstances and evidence. Of course, factors that might have been at play here include the relative differences in the height of each of the involved vehicles, the bright sunlight and cast shadows, the speed at which the victim was travelling etc. However, the burden of proving the *actus reus* remains the concern of the Prosecution and never shifts to the Defendant.
102. The court is persuaded by the common law that would support the finding that if the time frame is relatively brief and would qualify as momentary inattention and not deserving of punishment. As much as many of us would say that the Defendant should have seen this scooter cross his path particularly in a marked crosswalk,

there is no time estimate as to how long the Defendant was sitting at the light. The only measurement the court has to assess the charge is the 3-4 seconds the Defendant said he took to make his turn and the one second it took the scooter to reach the point of impact on the road (see ARU report conclusion). This court cannot determine what more the defendant could have done to avoid the accident except to conclude he should have seen the victim. Having said that and considering all of the circumstances, the lack of other aggravating or contributory factors and given the relatively short time frame noted above, it is the court's belief that the crown has not met its onus beyond a reasonable doubt and as such the charge against Mr. Boyd is endorsed as dismissed.

103. Given the decision of this Court the consideration of a due diligence defence and/or sentencing principles is rendered moot.

Respectfully submitted and filed with the parties

August 20, 2019

G. Manno