

Indexed as:
R. v. Globocki

Between
Her Majesty The Queen, and
Liljana Globocki

26 M.V.R. (2d) 179; [1991] O.J. No. 214

**Ontario Court of Justice - Provincial Division
Scarborough, Ontario
MacDonnell Prov. Div. J.**

January 4, 1991

Criminal law — Careless driving — Motorist killing jaywalking pedestrian — Expert evidence — Standard of care — Whether defendant departed therefrom.

Accused charged with careless driving after her vehicle struck and killed a jaywalking pedestrian. There was conflicting evidence as to how much light there was, how fast the pedestrian was walking, how much time elapsed before accused reacted and applied her brakes, and whether she applied her brakes before or after the impact. Expert evidence was led in purported reconstruction of the accident. Court considered what standard to apply in assessing whether accused was careless and whether that standard required an element of mens rea.

HELD: Accused found not guilty.

To sustain a conviction for careless driving, the Crown must demonstrate beyond a reasonable doubt that the accused departed sufficiently from the standard of care expected of a prudent and reasonable driver to make the driving deserving of punishment. Here, accused applied her brakes before her vehicle collided with the pedestrian. Having regard to all the evidence, Crown failed to prove beyond a reasonable doubt that accused failed to meet the standard of an ordinarily prudent driver in the circumstances.

STATUTES, REGULATIONS AND RULES CITED:

Highway Traffic Act, R.S.O. 1980, c. 198, s. 111.

Criminal Code, R.S.C. 1985, c. C-46, ss. 219, 249(1).

S. Porter, for the Crown.

P. Carlisi, for the Defendant.

MacDONNELL J:—

A. INTRODUCTION

The defendant is charged that on the 13th day of January, 1989, at the Municipality of Metropolitan Toronto, she committed the offence of careless driving contrary to s. 111 of the Highway Traffic Act, R.S.O. 1980, c. 198.

The defendant was arraigned on October 3, 1990, and she pleaded not guilty. The trial proceeded on that date, and again on November 9 and 14. After hearing submissions, judgment was reserved until today.

B. OVERVIEW

The charge against the defendant arises from an accident which occurred in the southbound lanes of Victoria Park Avenue in the City of Scarborough shortly before eight o'clock in the evening of January 13, 1989, in which the defendant's motor vehicle struck and killed a pedestrian who was attempting to cross from the west to the east side of Victoria Park Avenue.

Victoria Park Avenue is a four lane highway running north and south. The two northbound lanes are divided from the southbound lanes by means of a solid yellow line. All lanes are clearly marked. There is a slight downgrade for southbound traffic for about one hundred metres before the apparent point of impact between the defendant's car and the pedestrian.

Victoria Park Avenue was in good repair at the material time. The weather was cold but clear. The road was bare and dry. There were street lights on both sides of the street, and, in addition, there was light cast on the accident scene from a supermarket located on the west side of the street.

The defendant's motor vehicle was in good repair. It is agreed by the parties that there was no mechanical defect, patent or latent, which contributed to the occurrence of this fatality.

There was no pedestrian crosswalk at the location where the deceased was attempting to cross Victoria Park Avenue. In common parlance, she was 'jaywalking' at the time she was struck.

C. THE EVIDENCE

(a) the civilian witnesses

Andrew Worth was driving his pickup truck southbound in the curb lane of Victoria Park Avenue at the material time. He was travelling at about 55 to 65 kilometres per hour. The defendant was driving in the southbound passing lane. She was a distance behind Mr. Worth, but she was travelling at a slightly greater speed, which he estimated to be 65 to 75 kilometres per hour, and she was overtaking him. At the same time, Mr. Worth was approaching a slow moving vehicle in the southbound curb lane. He slowed behind the other vehicle until the defendant's car passed him, and then he changed to the passing lane. After changing lanes, he observed a pedestrian crossing the southbound lanes of Victoria Park Avenue, two hundred yards ahead of him. At the time when he first saw the pedestrian, the defendant's car was about 175 yards ahead of him, and about 25 yards from the pedestrian, and the pedestrian was already at the line dividing the two southbound lanes. She was walking directly across the roadway carrying a white plastic grocery bag in her hand, not appearing to be taking any heed of the oncoming southbound traffic.

Mr. Worth applied his brakes when he saw the pedestrian, and he waited in anticipation for the

defendant to do the same. The latter did not appear to react to the pedestrian. Both the defendant and the pedestrian continued, and the defendant's car struck the pedestrian when the latter was about two-thirds of the way across the passing lane, knocking her cartwheeling through the air. Mr. Worth testified that he only saw the defendant's brake lights go on after the collision. He agreed that the entire incident had happened very quickly.

Ronald Da Silva was driving his car southbound on Victoria Park Avenue in the curb lane at the material time. He appears to have been the driver of the slower moving vehicle behind which Mr. Worth slowed to allow the defendant to pass just before the accident occurred. Mr. Da Silva recalled a car passing him, and then the truck. At that point, he looked and saw a pedestrian crossing Victoria Park. The pedestrian was almost at the centre line dividing north and southbound traffic when she was struck by the defendant's vehicle. Mr. Da Silva had applied his brakes when he saw the pedestrian. He did not see brake lights on the defendant's car until a split second after the collision. He estimated the speed of the defendant's vehicle to have been 65 or 70 kilometres per hour when it passed his car. His description of the collision made it clear that events unfolded very quickly.

Jamie McKinnon, fifteen years of age at trial, testified that at the moment of the collision he was playing at the front of the Food City store located at the scene of the accident. He heard the screech of braking, and he turned his attention to the roadway. He saw the defendant's vehicle just before it struck the pedestrian.

Kimberley Bell was proceeding on foot southbound on the sidewalk on the west side of Victoria Park Avenue at the time of the accident. About 30 feet in front of her she saw a pedestrian begin to cross Victoria Park from west to east. There had been a number of accidents at this location and Ms. Bell was somewhat apprehensive when she saw the pedestrian, but she did not focus on her. Suddenly she heard the screech of brakes, following which the pedestrian was struck.

Ms. Bell described the lighting in the area of the accident as poor.

(b) the expert evidence

The Crown tendered in evidence a scale diagram of the scene of this accident prepared by Constable John Seamans of the Metropolitan Toronto Police, and photographs taken by a police photographer.

The Crown also called Constable William Bower, a police officer of 23 years experience, and a traffic accident investigator for 17 years. Constable Bower had received specialized training in accident investigation at the police college, and he had successfully completed the accident reconstructionist course at the University of Jacksonville in Florida. He had had a great deal of experience in practical testing of the formulae which he had been taught to apply in his investigations. The Crown sought to qualify him as an expert in the stopping distances of motor vehicles, the reaction times of drivers, the determination of the point of impact in motor vehicle collisions, and the walking speeds of individuals. After hearing from Constable Bower and from counsel, I permitted the officer to give opinion evidence in those areas.

Constable Bower attended at the scene of the accident shortly after it had occurred. The area had been blocked off from other traffic at this time. According to this witness, the illumination in the area was very good. As well as the overhead street lighting on both sides of Victoria Park, there was light cast onto the roadway from the supermarket on the west side of the street. As one approaches southbound to the accident location, there is nothing to obstruct one's view of either the roadway or of the side of the roadway.

Constable Bower "walked through" the vicinity of the accident making observations of the roadway. He observed skid marks on the pavement which he believed to be from the defendant's motor vehicle. He also noted a large quantity of glass which he believed to be from the defendant's windshield. He noted the location where the body of the pedestrian first struck the roadway, as well as the site where it ended up. The officer determined a point of impact between the defendant's car and the pedestrian based on the concentration of glass indicated above and on the information he had received from the witnesses to the accident.

Constable Bower measured the distance from the west curb of Victoria Park Avenue to the apparent point of impact, about two-thirds of the Way across the passing lane, almost at the centre of the road, and found it to be 6.5 metres. He assumed that the pedestrian was walking at an average speed. Based on that he estimated that it would have taken the pedestrian 6.07 seconds to walk from the west curb to the point of impact; 3.52 seconds were required to cross the curb lane, and 2.55 seconds to proceed in the passing lane to the point of impact.

The officer prepared a chart (exhibit 16) which indicated the time and distance a motor vehicle would require to come to a stop at various speeds, making varying assumptions about the reaction time of the driver. Based on data contained in that chart, and utilizing the determinations he had made concerning the point at which the defendant's brakes locked up (and the car began to skid) and the point of impact, Constable Bower prepared a further chart (exhibit 17) which set out the distance, at varying speeds, that the defendant's motor vehicle would have been from the point of impact at the time when the pedestrian first entered the roadway, when the pedestrian entered the passing lane, and when the defendant began to react to the emergent situation.

Exhibit 17 indicated, for example, that if the defendant were travelling at the speed she had told the police after the accident (approximately 58 kilometres per hour), she would have been 98.84 metres from the point of impact when the pedestrian first entered the curb lane; she would have been 41.10 metres from the point of impact when the pedestrian entered the passing lane, and 16.92 metres away when she first began to react to the situation, a distance so close to the point of impact that the brakes were not applied until 7.3 metres after the collision.

To put the foregoing into less technical language, the purport of Constable Bower's analysis was that the pedestrian was on the roadway a significant period of time, representing a hazard to herself and to traffic, before the defendant apparently noticed her and attempted to stop. Based on Exhibit 17, it would appear that if the defendant had reacted instantly when the pedestrian entered the passing lane, the defendant would have been able to stop prior to the collision. Instead, she reacted one and one-half seconds after the pedestrian entered her lane, 1.05 seconds before collision.

(c) the statement of the defendant

Two days after the accident, the defendant was interviewed by Constable Seamans at her home concerning the matter. She told the officer that she had been under a lot of pressure at work at the time, and that she had been driving home from work when the accident occurred. Her radio was on at normal volume, and her windshield was clean. She stated that when she "got to the Food City, I just saw this woman in front of me, I didn't know where she came from, I think it was from the right. I slammed my brakes because she was just there in front of me ..."

She told Constable Seaman's that she knew that there had been many accidents in this area and that therefore she was sure that she was travelling under the speed limit.

(d) the defendant's testimony

The defendant confirmed that she was alone in her car driving home from work at the time of the accident. She stated that her speed was about 55 kilometres per hour or perhaps a little more. She has lived in this neighbourhood all of her life, and she was aware that there had been a lot of accidents at this location, so she was paying attention as she drove, looking ahead of her. She testified that the lighting just before the Food City was quite dim. All of a sudden, she saw a shadow a car length or so in front of her to the right. She immediately applied her brakes, and realized that the shadow was a woman in dark clothing. She was too close to avoid a collision.

According to the defendant, the collision occurred a distance further north than had been determined by Constable Bower in his reconstruction, and the area was quite dark.

She testified that the pedestrian just appeared in the middle of southbound Victoria Park Avenue.

D. THE LAW

Section 111 of the Highway Traffic Act, R.S.O. 1980, C. 198, provides, in part, as follows:

Every person is guilty of the offence of driving carelessly who drives a vehicle or street car on a highway without due care and attention or without reasonable consideration for other persons using the highway ...

It is apparent from a reading of that section that reference to a standard of care lies at the heart of an assessment of whether the offence of careless driving has been proved. In each case, it is necessary to consider whether and to what extent the defendant departed from the standard appropriate to the factual circumstances facing the defendant. The process was helpfully described by the Ontario Court of Appeal in *R. v. Beauchamp* (1953), 106 C.C.C. 6, at page 13:

It must also be borne in mind that the test, where an accident has occurred, is not whether, if the accused had used greater care or skill, the accident would not have happened. It is whether it is proved beyond 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. 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 ordinarily prudent drivers would take into consideration. It is a question of fact, depending on the circumstances in each case.

While the defendant's driving must be measured against a standard, that standard is not one of perfection. Further, in *Beauchamp*, at page 12-13, 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. [Mazengarb, pp. 176-177]

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), 53 C.C.C. (3d) 481, at 488 (S.C.C.), and dangerous driving: *R. v. Lowe* (1974), 21 C.C.C. (2d) 193 (O.C.A.). There is no logical reason why that principle ought not apply to the assessment of careless driving.

In order to be culpable, the defendant's departure from the required standard of care must be one which can be characterized as "deserving of punishment": *Beauchamp*, supra, at page 14. In *R. v. Divizio* (1986), 32 C.C.C. (3d) 239, at 248-249, Cartwright, D.C.J., sitting as a summary conviction appeal judge, relied on that proposition in stating that mens rea had to be found before a defendant could be found guilty of careless driving.

The sense in which Judge Cartwright was using the somewhat elastic term 'mens rea' is not clear from the text of his reasons. His Honour did not refer to the decision of the Supreme Court of Canada in *O'Grady v. Sparling* (1960), 128 C.C.C. 1, a case which dealt with whether the offence of careless driving created by the Manitoba Highway Traffic Act was constitutionally valid. The statute in question defined the offence as "driving without due care or without reasonable consideration for other persons using the highway". That definition is virtually identical to the definition of careless driving set out in s. 111 of the Ontario Highway Traffic Act. The issues before the Supreme Court of Canada were whether the provincial provision was legislation in relation to criminal law, and whether the federal legislation which enacted the offence of criminal negligence in the operation of a motor vehicle had occupied the field. In upholding the validity of the provincial law, Judson, J., for the majority, stated at pages 14 to 15:

What the Parliament of Canada has done is to define "advertent negligence" as a crime under s. 191(1) and 221(1). It has not touched "inadvertent negligence". Inadvertent negligence is dealt with under the provincial legislation in relation to the regulation of highway traffic.

The distinction drawn by the Supreme Court between advertent and inadvertent negligence has been the subject of no little difficulty for the thirty years which have followed: see the authorities referred to by Cory, J.A. in *R. v. Waite* (1986), 28 C.C.C. (3d) 326, at 334 (O.C.A.). The controversy has been, in large part, with respect to whether an objective test could be applied to the Criminal Code offences of criminal negligence and dangerous driving: see e.g., *R. v. Waite* (1989), 48 C.C.C. (3d) 1 (S.C.C.). Putting that controversy aside for present purposes, the Supreme Court's description of careless driving as involving inadvertent negligence remains. Judge Cartwright's comments concerning the necessity of mens rea with respect to careless driving must be taken as referring to something less than advertence by the driver to his or her departure from the standard of care due in the circumstances.

At the same time, it has been authoritatively held that mere inadvertent negligence will not necessarily support a conviction for careless driving: *R. v. Wilson* (1970), 1 C.C.C. (2d) 466, at 467. The Crown must do more than point to a bare act of negligence, however slight. It must show a sufficient departure from the standard of a prudent and reasonable driver to make the driving "deserving of punishment".

In my opinion, the process by which it is determined if the driving comes within s. 111 of the Highway Traffic Act is not dissimilar from the process the authorities have established to be appropriate for the determination of whether the requisite degree of blameworthiness has been shown in cases of criminal negligence involving motor vehicles and dangerous driving. In *R. v. Waite*, supra, Cory, J.A. stated at pages 339 to 340:

In cases where allegations of criminal negligence are based upon the manner of driving ... by the accused, an objective test should be applied to determine whether the requisite mens rea has been established. That is to say, the mens rea or requisite intent can be inferred from the driving ... itself. If the driving ... constitutes a marked and substantial departure from the conduct that could be expected of a reasonable man in the same circumstances, then, in the absence of some explanation, the act itself may determine culpability.

The Supreme Court of Canada was deadlocked in the *Waite* case on the issue of whether the test was subjective or objective. The Ontario Court of Appeal has since confirmed the position it took in *Waite*: *R. v. Nelson* (1990), 54 C.C.C. (3d) 285, at 289.

In *R. v. Sharp* (1984), 12 C.C.C. (3d) 428, the Ontario Court of Appeal had before it the relatively narrow issue of whether the jury in that case were required to find a mental element of intent or knowledge before they convict the accused of either criminal negligence or dangerous driving. Morden, J.A. prefaced his consideration of the instructions to the jury with the following comments with respect to the established principles, at page 434:

Both criminal negligence and dangerous driving are offences which require fault, in the sense of a blameworthy state of mind, to be proven, but in each case (assuming the criminal negligence to involve driving) it is open to a jury to find the required fault in the nature of the accused's driving if, objectively viewed, it amounts to that which is defined in the statute. (emphasis added)

Morden, J.A. went on to say that intention is not an essential element of those two driving offences, and that indifference in the sense of a negative state of mind would suffice.

The underlined words in the passage quoted from *Sharp* are, logically, equally appropriate to the determination of whether the conduct of a defendant charged with careless driving is "deserving of punishment". No higher state of mind is required, and in view of the authorities I do not understand Judge Cartwright's comments in *Divizio* (supra) on the necessity for mens rea to hold to the contrary.

Reference to the authorities in relation to dangerous driving and criminal negligence involving motor vehicles is, as I have stated, helpful with respect to identifying the approach to be followed in determining whether the conduct of a driver amounted to careless driving, but it must be borne clearly in mind that the standard against which the defendant's driving is to be measured is that contained in s. 111 of the Highway Traffic Act, not that contained in either s. 219 or s. 249(1) of the Criminal Code.

E. DETERMINATION OF THE FACTS

One of the key factual issues in this case is with respect to when it was that the defendant first noticed the pedestrian and where the pedestrian was at that time.

Mr. Worth and Mr. Da Silva both testified that they saw no brake lights from the defendant's car until at least an instant after the collision with the pedestrian. Constable Bower, relying mostly on the physical evidence but also on what witnesses had reported to him, concluded that the point of impact was 7.3 metres before the point where the defendant's brakes were applied and the skid began.

However, Jamie McKinnon testified that it was the screeching of the defendant's brakes which caused him to direct his attention to the roadway, and that when he looked he saw the defendant's car before it hit the pedestrian. Kimberley Bell also recalled hearing the screech of brakes before the pedestrian was hit by the car.

The apparent conflict between Worth and Da Silva on the one hand and McKinnon and Bell on the other is easily understandable given the circumstances under which the observations were made. Were it not possible to prefer one witness' recollection over the others, there would remain room for doubt with respect to this issue. That would be so notwithstanding Constable Bower's opinion, because the basis for that opinion was 30 to 40 per cent made up of what the witnesses had told him.

In this case, however, I find the evidence of Jamie McKinnon compelling. He made it clear that it was the screeching of the brakes that caused him to look to the roadway. He had been playing on the bars at the front of the Food City store. When he looked to where the screeching was coming from, he saw the defendant's car before it hit the pedestrian. The purport of his evidence is that were it not for the screeching of the brakes he would not have seen the collision. I believe him in that regard. Therefore the defendant's brakes must have been applied before the collision, not after.

This finding has implications for the opinions offered by Constable Bower, by means of Exhibit 17, with respect to where the defendant's motor vehicle was in relation to the pedestrian when the latter entered the defendant's driving lane, and with respect to how long it took the defendant to begin to react to the hazard posed by the pedestrian.

Before turning to those issues, one further matter should be addressed. Constable Bower had been taught about average, fast, and slow pedestrian speeds in his specialized training in relation to accident reconstruction, and he had supplemented that training with practical testing of his own to confirm what he had been taught. In preparing Exhibit 17, he assumed that the pedestrian was walking at an average speed. The only one of the four witnesses present at the time of the accident who had an opinion with respect to how fast she was walking was Mr. Worth, who thought she was walking "fairly slow". The other three had no opinion. Mr. Worth's opinion must be qualified by the fact that when he first saw the pedestrian she was already entering the passing lane.

In my opinion there is no reliable evidence about her walking speed at the time she was crossing the road. I think that it is part of the ordinary store of human experience that not all individuals walk at the same speed. Walking with some people requires us to try to keep up; walking with others requires us to slow down. The persons for whom we adjust our speed probably regard themselves as walking at an average or normal speed. The point is that simply knowing what an average walking speed is does not assist with respect to whether this pedestrian was average, nor with respect to whether, assuming she was average, she was hurrying or the reverse on this occasion.

Keeping in mind the finding which I have made concerning when the defendant applied her brakes, and the limits which must be placed on the relevance of knowing what the average walking speed is, the inferences which would seem, at first blush, to flow from Exhibit 17 must be carefully scrutinized. On the face of that Exhibit, it would appear that the pedestrian was actually in the defendant's lane, in her path, for 1.5 seconds before the defendant even noticed her. only then did the defendant begin to react.

That fact, if true, would bolster the Crown's contention that the defendant was not paying proper attention.

However, on analysis, a suggestion that the defendant failed to notice the pedestrian once the latter crossed into her lane rests on a tenuous foundation. Consider first the assumption that the pedestrian was walking at "average" speed. If that assumption underestimates her speed by, for sake of argument, 10%, then the pedestrian would have taken .25 second less to travel from the edge of the defendant's lane to the point of impact. By itself, one quarter of a second may not be particularly significant, although it does reduce the apparent delay in reacting to the pedestrian to 1.25 seconds.

Next, consider the effect on Exhibit 17 of the finding that the defendant's brakes were applied before the collision rather than after. That would move the point of impact further to the south on Victoria Park Avenue, and further to the right on the diagram contained within Exhibit 17. If the application of the brakes and the collision were simultaneous, then the time which it took the car to travel 7.3 metres would have to be subtracted from the apparent delay in reacting to the pedestrian. That is because the assumption of Constable Bower is that the pedestrian was in the defendant's lane for 2.55 seconds prior to being struck. He further assumed that the defendant had an average reaction time of 1.5 seconds between seeing the hazard and applying her brakes. If the brakes were applied at the moment of impact, then the defendant must have seen the hazard 1.05 seconds after the pedestrian entered her lane. If, as I have found, based on the evidence of Jamie McKinnon, her brakes were applied before the point of impact then even more time must be subtracted from that figure of 1.05. Assume that after allowing for McKinnon's evidence, the apparent delay is one second; now the .25 second which might reasonably be considered to be a margin of error in the estimate of walking speed becomes more significant. It brings the apparent delay in noticing the pedestrian entering the defendant's lane to literally a matter of a split second.

That is not the end of the matters which limit the utility of Exhibit 17. Constable Bower made the further assumption that the defendant's reaction time was 1.5 seconds. That is, the time which would be consumed between the accused seeing the hazard and applying the brakes was 1.5 seconds. However, he conceded that people have differing reaction times, and, indeed Exhibit 16 provides data based on four different reaction times varying between 1.5 seconds and three seconds. He also conceded that the reaction time of a driver could be affected adversely by lighting conditions. The accident in the case at bar occurred at night, and there is conflicting evidence with respect to the quality of the lighting at the scene. It is therefore not unreasonable to assume that there is an additional margin for error in Constable Bower's calculations. The potential effect of, for example, overestimating the speed of the defendant's reactions would be to make it wrongly appear that the defendant was unaware of the presence of the pedestrian for some period of time when she was in fact reacting. The split second of delay referred to at the end of the previous paragraph might well disappear altogether, with the result that the accused reacted the instant it became clear that the pedestrian was entering the defendant's driving lane.

The purpose of this analysis of Exhibit 17 and the assumptions underlying it is not to establish that in fact the defendant reacted instantly once the pedestrian entered her lane, but only to demonstrate that the evidence of Constable Bower, as illustrated by his chart, does not reliably or persuasively show that she did not react appropriately after the pedestrian moved from the curb lane into the path of the defendant's car.

I am not unmindful of the defendant's evidence on this issue and of her statement to Constable Seamans, the combined effect of which was that the pedestrian suddenly appeared in the path of her car, coming from the right. Her evidence seems to suggest that she never noticed the pedestrian at all until the latter was virtually in front of her. I make two observations about that evidence. First, what she said is not necessarily inconsistent with a finding that she reacted as soon as the pedestrian entered her lane.

Second, the defendant's evidence with respect to the details of what occurred in the few seconds material to this tragedy must be assessed with caution. The evidence of the eyewitnesses was that the defendant was very distraught after the accident, and she was visibly distressed during this trial whenever the details of the collision were described by the witnesses. I am satisfied that the accident had a profound impact on her and that she feels a strong sense of responsibility for the death of the pedestrian. I doubt that she has a clear recollection of the events leading up to the collision. For example, she testified to the point of impact being somewhere to the north of where, in fact, it was. I do not believe that she was being dishonest in giving that evidence: she was honestly in error. In the circumstances her confusion is unsurprising. In all the circumstances, I am not prepared to place reliance on the defendant's recollection of what happened immediately prior to the collision.

What has been established by the evidence is that the defendant took no notice of the pedestrian as the latter began to 'jaywalk' across the roadway, at least until the pedestrian reached the lane in which the defendant was driving. I am unable to find that the defendant did not react appropriately after that point. The case to be determined, therefore, is whether failure to take notice until that point constitutes careless driving.

To properly address that question requires consideration of a further issue of fact. The Crown's position is that the defendant did not merely fail to take precautionary action once she saw the pedestrian enter the roadway, but that she failed to see her at all. It is open on the evidence to come to that conclusion, but that finding is not inevitable. It finds its strongest support in the evidence of the defendant and in her statement to the police. As I have stated, however, I find the defendant's account of the accident to be unreliable. She was wrong with respect to the location of the point of impact, she was wrong in my opinion with respect to her speed, and I have no confidence that in the aftermath of this particular accident she was able to accurately reconstruct when or where she had first noticed the pedestrian. Not being prepared to accept the defendant's account of what happened, I am left to assess the evidence which I do accept. Based on the remaining evidence, I am unable to determine whether the inference that the defendant was oblivious to the pedestrian before the latter entered her lane ought to be drawn in preference to an inference that the defendant merely failed to perceive a need to take action until the pedestrian entered the passing lane.

In light of those findings, I turn to the application of the law to the established facts.

F. APPLICATION OF THE LAW TO THE FACTS

The statute, and the authorities which have considered it, require that the defendant's driving be measured against the standard of the care that an ordinarily prudent driver would have used in the circumstances faced by the defendant. That may be determined without the necessity of there being evidence of what that hypothetical driver would have done. Such assessments are not unusual in either the civil or the criminal law.

The Crown relies in this case on the fact that the defendant did not take notice of the pedestrian as the latter crossed the curb lane of Victoria Park Avenue heading directly for the defendant's lane. The Crown also relied on the alleged failure of the defendant to take notice of the victim until she was well into the defendant's lane, but for reasons already indicated, I am not prepared to find that fact to be established.

In relation to the failure to react to the pedestrian when she entered the roadway, it is fair to observe that the phenomenon of "jaywalking" is fairly common. It is a simple fact of life, observable to anyone who cares to look, that pedestrians often cross multilane roadways at places other than designated

crossovers, picking their way through the approaching traffic. It is a further fact, within ordinary experience, that a driver on a multilane roadway who sees a pedestrian enter a lane other than the driver's lane does not automatically take evasive action, come to a stop, or even slow down. A driver is entitled to make reasonable assumptions about the behaviour expected of other users of the road, and it is not unreasonable to assume that a pedestrian crossing the roadway at a time when vehicles are approaching will not simply walk in front of oncoming vehicles. Therefore, the mere fact that this defendant failed to take action as the pedestrian crossed the curb lane does not establish a departure from the standard of care expected in the circumstances.

I have no doubt that this accident was preventable in the sense that if the defendant had used greater care, it would not have happened. As the excerpts from Beauchamp set out, *supra*, make clear, that is not the test to be applied under s. 111 of the Highway Traffic Act. Paraphrasing the reasons of the Court in that case, the defendant cannot be required to have regulated her driving behaviour as if in constant fear that other users of the road might possibly act at a critical moment in disregard of themselves. The test is whether it has been proved beyond a reasonable doubt that in light of all the circumstances of which the defendant was aware or should have been aware she failed to use the care and attention or to give to other users of the road the consideration that a driver of ordinary care would.

Whether or not the driving behaviour of the defendant at the critical time was flawless, I am not satisfied that it sufficiently departed from the relevant standard of care as to render her guilty of the offence of careless driving.

G. DISPOSITION

For the foregoing reasons, the defendant is found not guilty of the offence with which she is charged.

MacDONNELL PROV. DIV. J.