

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: HER MAJESTY THE QUEEN v. WILLIAM KINCH

BEFORE: DURNO RSJ.

COUNSEL: DAVID HAY, for the Appellant/Crown

AMY ROBERN, for the Respondent

ENDORSEMENT

[On appeal from the judgment of the Honorable Madam Justice J.A. Morneau,
dated March 4, 2003]

[1] A tractor trailer was proceeding northbound on a two-lane highway, followed by a dump truck. The tractor trailer swung out of its lane to the left in order to make a right turn into a driveway on its right side. As it swung back to its right, it crossed the path of the cement truck, driven by the Respondent. The dump truck struck the tractor trailer on the northbound shoulder, killing its driver. The Respondent was charged with careless driving, tried and acquitted by a judge in the Ontario Court of Justice.

[2] The Crown appeals, contending the trial judge erred in acquitting because she had a doubt whether the accident was avoidable after finding the Respondent had driven carelessly.

[3] Relying upon the right to raise any ground of appeal that supports the order being appealed, even if it was argued unsuccessfully at trial, the Respondent raises four additional issues. *Izdiak v. Canada (Minister of Justice)* (1992), 77 C.C.C. (3d) 65 (S.C.C.); *R. v. Keegstra* (1995) 98 C.C.C. (3d) 1 (S.C.C.)

[4] First, that the Crown brought the charge in the Ontario Court of Justice instead of the Provincial Offences Court, with neither a statutory right to do so, nor the Respondent's consent. Second, that the trial judge erred in not granting the Respondent's motion for a directed verdict on the issue of identity. Third, that the trial judge misapprehended the evidence in reaching her conclusion regarding when the Respondent started to slow down his vehicle. Fourth, the trial judge applied a higher standard of care to the Respondent because he was a truck driver.

Evidence

[5] At roughly 9:30 a.m. on November 23, 2001, three vehicles were traveling northbound on Highway 10. The road consists of two paved lanes with narrow gravel shoulders. In the relevant area it was straight and level with an 80 k/hr speed limit. The road was dry. The sun was shining. A tractor trailer driven by Ronald Ferguson was the lead vehicle, followed by the Respondent's dump truck

loaded fully-loaded with chunks of asphalt and finally, a mini-van operated by David Henderson. Mr. Henderson testified the dump truck was about 100 feet in front of him and the tractor trailer 200 feet in front of the dump truck.

[6] Mr. Henderson testified that as a result of the tractor-trailer pulling completely into the oncoming/southbound lane, he started to slow down. He knew "something was going to be happening, it just wasn't a normal ... circumstance on the road." While he wasn't sure what was happening, he assumed the truck was going to turn. "Knowing truck drivers" he knew it was not going to be a left turn because it would have required more room. As the distance between his mini-van and the dump truck was increasing, he concluded the dump truck was not slowing down.

[7] The tractor trailer then began a slow wide turn across the southbound, and then the northbound lane. While the Henderson vehicle slowed down, they saw no brake lights on the dump truck in front of them. Mr. Henderson felt the dump truck sped up as the tractor trailer approached, in an effort to get by the turning vehicle.

[8] Lois Osborne was a passenger in the mini-van. She testified the first thing that came into her mind was seeing the tractor trailer completely in the oncoming/southbound lane "as if to make a turn." She was not sure if it had

gone onto the southbound shoulder and did not see any danger at that time. The tractor trailer was entirely in the southbound lane for two to three seconds before it started to turn very slowly into a driveway on the right hand side of the road. She did not believe the tractor trailer stopped before turning. The speed of the mini-van remained the same at that point as they did not see any danger yet. Their speed changed as they got closer, because it “just looked like a very dangerous situation, [they] knew something was going to happen” because there was a tractor trailer across the road in a jackknife position. Henderson braked the mini-van when the tractor trailer was across both lanes of traffic. The dump truck also tried to stop, but was too close to the tractor trailer.

[9] In Ms. Osborne’s opinion, when the crash was inevitable, the dump truck moved towards the shoulder. No one had anywhere to go. The tractor trailer didn’t have time to clear the road. The dump truck didn’t have anywhere to go, didn’t have a shoulder to take, and wasn’t going to stop because his speed was the same as the mini-van’s.

[10] After the collision, Ms. Osborne went to the tractor’s cab. When looking inside she saw the dump truck driver moving in the dump truck cab. He crawled across the seat and got out the passenger side. She did not see where he went. She continued:

And then about, like a couple of minutes later, I think it was him that was at the door of the other cab and said, "Is he okay?"

Q: Do you recognize that person here in the courtroom today?

A: Yeah, I think this fella here.

Q: Okay your pointing to the person next to Mr. Thibaudeau?

A: Yes

Q: When you say you think, what do you mean by that?

A: Well, I believe it was him

Q: Alright

Mr. Thibaudeau: Identifying the accused.

Q: Did you have any discussion with the driver of the dump truck?

A: Yes, I did

Q: Okay, and when was that?

A: Um, just a little bit after that, um people started to come. Um, first of all some other people that helped us; a guy who was a fireman and a nurse was in another vehicle I think.

Q: Right.

A: I ran to, um, the driver of the dump truck was in trouble in a way from, from walking around and I'm thinking he's okay, then he wasn't looking okay anymore.

Q: Right, so what if anything did you do?

A: I sat on the ground beside him and I kind of rubbed his back because he was really upset.

Q: Did you talk to him?

A: Yes.

Q: And what did you say?

A: I think I asked him his name.

...

Q: And what was the response?

A: I think he said Bill Kinch.

[11] The man kept saying, "Oh, my gosh" and "I'm okay" because people were asking him if he was alright. Ms. Osborne was sitting with Mr. Kinch when the police arrived. He never admitted to her that he was the driver of the dump truck.

[12] Frank Taylor testified he was driving a truck southbound on Highway 10. He passed a northbound tractor trailer moving slowly in the northbound lane with its right hand turn signal on. It waited until he passed before pulling into the southbound lane in order to make the right turn into the driveway. The tractor was pulling a flat bed trailer. He flashed his lights at a dump truck which was a quarter of a mile south of where the tractor trailer was turning to warn the driver. He saw the dump truck's brake lights come on as he hit the northbound shoulder.

[13] An accident re-constructionist concluded the Respondent entered the east shoulder in an attempt to avoid the collision, and had applied his brakes 20 – 25 metres from the tractor trailer, based on the scuff marks on the highway. The dump truck struck the tractor trailer while traveling at a speed in excess of 74

k/hr. Following the impact, the dump truck was traveling at a minimum speed of 74 k/hr. The tractor was pulling a trailer with sides. It was not a flat bed.

[14] An inspection determined there were no mechanical defects on either truck. There was nothing obstructing the Respondent's view of the tractor trailer.

[15] When the investigating officer went to the area of the dump truck he saw the Respondent sitting on the ground on a grassy area immediately to the right of the dump truck, being treated by civilians. The officer believed the Respondent was the driver of the dump truck, because no one else came up and identified himself as the driver. A statement obtained from the Respondent was ruled inadmissible.

[16] The Respondent testified he had previously let the tractor trailer pass him, because it took him time to get his speed up with the load he was carrying. The other truck was two to three kilometres ahead of him but he started to catch up without increasing his speed of 80 – 90 k/hr. Concluding the other driver was slowing down, he initially testified he “geared down and braked” when he got within a couple of hundred feet of the tractor trailer. He later said he “backed off.” Later he said he slowed down before he got to within 200 feet of the other truck. He believed he geared down three gears, which would have put him at about 60 – 65 k/hr.

[17] He knew he had a heavy load and that it was going to take him a long time to stop. His speedometer said he was going 90 k/hr, but he did not believe it was accurate. He did not know what speed he was going. The Respondent agreed that if someone he could not have stopped his truck within 200 feet if he were travelling 80 – 90 k/hr. He added the qualification - if someone cut him off.

[18] Without any signal indicators, the tractor trailer started veering over to the southbound lane “pretty quickly.” While Mr. Kinch did not know what the other driver was doing, he thought he was going to a laneway on the west side (southbound side). The tractor trailer continued in the southbound lane for two to three seconds, before veering to the southbound shoulder, causing dirt to fly. Because there was a house on the west side, the Respondent concluded the other driver was stopping. He came to an “actual stop” for a few seconds, with three quarters of the vehicle off the southbound lane. In cross-examination he agreed that at that time he felt he could “breeze by” the other truck.

[19] Upon seeing the tractor trailer stopped, and concluding he had reached his destination, the Respondent started to “power back up” – going to a higher gear. Had the tractor trailer been in front of his dump truck, he would have been immediately behind when he geared up. The tractor trailer then started to move towards the dump truck northbound, before totally committing to the southbound

lane and then started turning right. The Respondent took his foot off the gas and applied the brakes, although he had started to slow down before that. He saw the tractor trailer was turning eastbound directly in front of him, and was not stopping. He aimed the dump truck for the ditch in an unsuccessful attempt to try to avoid the collision. The left front corner of the dump truck struck the right side of the tractor trailer. The dump truck entered the right ditch, just passed the driveway the tractor trailer was attempting to enter.

**Reasons on the application to transfer
the trial to the Provincial Offences Court**

[20] Before the trial commenced, the Respondent's agent applied to have the trial "transferred" to the Provincial Offences Court. Mr. Kinch had been summonsed to appear in the Ontario Court of Justice at the outset of the proceedings. He made three appearances with agents, and agreed to a one day trial. There was no indication on the information that there was any objection to the trial occurring in the Ontario Court of Justice. No transcripts were filed to indicate if the issue had been raised in earlier appearances or at the pre-trial conference. The application was filed on Friday, September 27th, without any supporting affidavit or other evidence. The trial was scheduled for Monday, September 30th.

[21] The applicant did not dispute the jurisdiction of an Ontario Court Judge to hear the trial. He “preferred” to have a justice of the peace preside. Underlying the submission, with neither a clear written articulation of a basis nor an evidentiary foundation, was the suggestion of some *mala fides* on the part of the Crown Attorney. The only explanation for the Crown’s decision was that the case involved a fatality.

[22] The applicant first argued that he was prejudiced by the trial being heard in the Ontario Court because any appeal would be to the Superior Court of Justice instead of the Ontario Court. A Superior Court appeal would involve more “money and effort.” Her Honour concluded it would be inappropriate to determine the issue on the basis of where an appeal would be heard.

[23] Her Honour found the costs of an appeal begged the very issue of why the trial was in the Ontario Court. There were 7 Crown witnesses present. While the applicant conceded Her Honour was competent to hear the case, on the date of trial, in effect, he sought an adjournment. The trial judge asked rhetorically, if in good conscience she could reasonably ask all of the witnesses to return on another date which she could not fix. She noted the offence date was November 23, 2001, and felt confident that any trial in the Provincial Offences Court would be not be held before November 23, 2002.

[24] While the applicant was prepared to waive his s. 11(b) *Charter* rights, Her Honour found there were other issues bigger than *Charter* delay, such as the benefit to the witnesses testifying closer to the alleged offence date, and to the judicial officer in hearing allegations close in time to the alleged offence date.

[25] Finally, being satisfied she had authority to proceed under s. 38 of the *Courts of Justice Act*, Her Honour was not prepared to use the trial time available to hear further evidence on the issue, and ordered the trial to proceed. The issue of further evidence arose because the Respondent's agent failed to file any affidavit or other evidentiary record to support his motion. Crown Counsel appropriately opposed any "evidence by submissions" from the agent, and asked that any argument be based on evidence.

Reasons on the Directed Verdict Motion

[26] The Respondent applied at the conclusion of the Crown's evidence for a directed verdict, on the basis that there was no evidence he was the driver of dump truck.

[27] Her Honour concluded there was some circumstantial evidence of the identity of the dump truck driver, finding:

Looking at it at a practical level, there is Ms. Osborne, who there is no evidence to suggest ... that she had any contact or prior knowledge of Mr. Kinch. She heard, or believed the man she identified she believed was him say, "Bill Kinch"

at the scene. The only evidence I have is that [he] is the only person sitting being tended by anyone. It is a male person and this male person is the person she saw climb out of the – or crawl out of the dump truck. I am satisfied on all the circumstantial evidence that the matter of identity of the accused – there is some evidence before the Court and therefore, I dismiss the application to non-suit.

Reasons for Judgment

[28] Her Honour summarized the law in relation to careless driving in accordance with the Court of Appeal judgment in *R. v. Beauchamp* [1953] O.R 42.

[29] In a lengthy reserved judgment, Her Honour made a number of findings of fact:

- (a) The weather and road conditions were ideal. The dump truck was mechanically fit although the speedometer was not working which should have led Mr. Kinch to drive accordingly. No vehicles interfered with his visibility of the other truck. He knew that if he had to stop his fully loaded dump truck while traveling at 90 kilometres per hour he could not do so within 200 feet.
- (b) The tractor trailer driver did not signal his veering off to the left, or the turn back to the right.
- (c) It would be dangerous to rely on the evidence of Frank Taylor in the absence of more precision and she declined to do so
- (d) The tractor trailer had slowly and gradually moved into the southbound lane, and the Respondent had to have seen it do so. She rejected his evidence that the movement was made quickly and found his evidence did not raise a reasonable doubt on the issue, accepting Mr. Henderson and Ms. Osborne's evidence on this issue.
- (e) David Henderson and Lois Osborne could see what was going to unfold, that the tractor trailer was slowing down and was going to turn right into a laneway without having seen any turn signal. Henderson, with no experience as a truck

driver, reacted to the fact the tractor trailer was slowing, entering the southbound lane and apparently intending to turn right. Henderson was driving with due care and attention and slowed down.

- (f) The Respondent, an experienced truck driver, testified he did not know what the tractor trailer was doing. If that was accepted, he should have slowed down. If that evidence was rejected, and he knew the tractor trailer was going to turn right, then he still should have slowed down. Either way, a prudent driver should have slowed down.
- (g) What the tractor trailer did may have been potentially dangerous. However, there was no reason that Mr. Kinch could not see that something was happening out of the ordinary. He saw or should have seen what others saw unfolding in front of him. His own evidence was that he did not know what the tractor trailer was doing. He was obliged therefore to slow down and proceed with caution if it was safe. A prudent driver would slow down as best they could until they understood what was happening.
- (h) As regards the conflicting evidence as to whether or not the tractor trailer stopped on the southbound shoulder, she concluded that if there was a stop, it was almost unnoticeable to Ms. Osborne. A stop of two or three seconds was not much more than a hesitation, which was consistent with her evidence. It was unreasonable for Mr. Kinch to conclude that the tractor trailer had stopped completely and was at its destination. Mr. Kinch was the only witness whose evidence was not rejected who did not realize what the tractor trailer was going to do.
- (i) The dump truck sped up before the collision, which was consistent with the evidence of Henderson and the Respondent. If she was wrong in that conclusion, the trial judge examined the Respondent's evidence that he slowed down to 60 – 65 k/hr. before he started to speed up again and found that he

could not have reached 74 k/hr. within the short period of time before the two collided. Even if she was wrong on that analysis, Her Honour found he could not have slowed down as he said, given the marks on the pavement which suggested he applied his brakes 20 – 25 metres before impact.

- (j) She rejected the Respondent's evidence that he was slowing down by gearing down earlier than the civilians reported him slowing down. His evidence did not raise a doubt on the issue. She accepted Mr. Henderson's and Ms. Osborne's evidence that the dump truck did not brake until the tractor trailer was actually making its turn back east across the highway. Henderson said the Respondent was 50 feet behind the tractor trailer when he braked. This was consistent with the markings on the roadway. The dump truck's skid marks started 20 – 25 metres before the tractor trailer's turn marks. He did not react until it was too late. However, had he been paying attention he could have reacted sooner.
- (k) The Respondent braked, leaving skid marks on the road, in an effort to avoid the accident. However, he was going too fast to come to a safe stop, and must have been going over 74 k/hr at the time of the collision. He had sped up. Her Honour accepted Henderson's evidence that he could see no reason for the Respondent to do that. While Mr. Kinch thought he could get by the tractor trailer, that was an imprudent decision. A prudent driver would not pick up speed and try to "breeze by", based on the tractor trailer unit having become stationary on part of the west shoulder for a few seconds. This was even more the case when one is driving a loaded dump truck that could not be brought to a quick stop.
- (l) Her Honour examined if she was wrong in the above conclusion, if the Respondent was driving with due care and attention, if he slowed down to 60 – 65 k/hr, and decided to speed up while the other truck had stopped for only two or three seconds on the southbound shoulder, when immediately before he had been uncertain what the tractor trailer was going to do. She concluded that if he

slowed down as he said he did and sped up to get by, he was not driving with due care and attention. Two or three seconds were fleeting. Given the size of the tractor trailer and the size and weight of the dump truck, objectively assessed, Mr. Kinch's decision not to continue slowing down a vehicle he knew required more than 200 feet to stop while fully loaded and going 90 k/hr. was a very poor decision.

- (m) Her Honour examined whether, objectively, a motorist should be expected to anticipate a tractor trailer that did what this one did, would be turning right, and concluded the answer depended on the distance between the vehicles, the road and weather conditions, as well as the speed of the vehicles. She found the tractor trailer had to proceed with caution. The anticipation of the actions of the tractor trailer were made more complicated by the absence of any turn signal.
- (n) The trial judge asked if an average careful driver exercising ordinary care would have understood what the tractor trailer was going to do. Noting Mr. Henderson and Ms. Osborne understood what was unfolding, she concluded Mr. Kinch saw or should have seen the same thing unfolding in front of him. He did not reduce his speed until he saw the tractor trailer come back across the highway into his lane.

[30] After making these findings Her Honour concluded:

However, this is not to say that had Mr. Kinch started slowing down his dump truck at 200 feet from the transport truck and continued that effort that there still would not have been an accident. When a tractor trailer pulls across a traveled highway they need to do so in safety. Mr. Kinch's lack of care was in not responding in time to the movement of the tractor trailer especially given his knowledge of how long it would take him to slow his dump truck down. Even if he did slow down his decision to gear up again at such high speeds was not what a prudent and ordinary driver would have done. Notwithstanding this, there may still have been an accident.

This has been a difficult case for me. My finding then is narrow. I am not in a position to assess the civil responsibility. Mr. Kinch's responsibility is for not slowing down sooner. I am not convinced, however, that even if he had slowed down sooner there would not still have been an accident in all the circumstances.

[31] Her Honour then invited Crown Counsel and the Respondent's agent to make submissions as to the legal implications of her findings of fact. The agent said if Her Honour had a doubt that no matter what Mr. Kinch could have done as a prudent driver an accident could not have been avoided, then the benefit of the doubt had to go to the Respondent and he must be acquitted. He reminded Her Honour of the comments in *Beauchamp* regarding drivers who are placed in emergent situations not being bound by a standard of perfection.

[32] Crown Counsel submitted that an accident was not the test for careless driving. Regardless of whether or not there was an accident, the Respondent's driving had to be examined against the standard for careless driving.

[33] Her Honour concluded:

...

Well, careless isn't just a word, of course, careless is defined in the *Highway Traffic Act*. The question is whether he drove with a lack of care and as I commented in my reasons to this point, his lack of care was not in responding in time to the movement of the tractor trailer, especially given his knowledge of how long it would take him to slow his dump truck down.

However, given the evidence of the witnesses that I can consider, and I have excluded Mr. Taylor from this, the evidence at the end of the day is that Mr. Kinch would notice the drop of speed in the tractor trailer when he was either 100 or

possibly 200 feet behind that tractor trailer without signals on. As I found, he did not slow down initially.

However, even if he had slowed down at that point, I'm not sure that with a tractor trailer making this jack knife maneuver across the highway that Mr. Kinch, even if he'd slowed at 100 feet or 200 feet, that he could have avoided the accident. In particular, his own unchallenged evidence was – and as elicited by Mr. Leger (Crown Counsel) at the trial – was that at 200 feet, which is the best evidence I have of a distance, traveling at 80 or 90 kilometers an hour he couldn't have stopped his dump truck. That may lead to the issue of whether he was simply following this tractor trailer too closely or whether, in fact, if the tractor trailer wasn't signaling.

Mr. Henderson and Ms. Osborne may have had some advantage in the sense that they were further back from the whole situation. Mr. Henderson driving – I'm going to take judicial notice of – a minivan could be stopped faster than a dump truck could be. In all the circumstances, I have to give that benefit of doubt to Mr. Kinch, notwithstanding how difficult the whole situation is for everyone. (emphasis added)

Analysis

The application to transfer the trial to the Provincial Offences Court

[34] The following excerpt from the Respondent's factum set out the bases for this submission:

Did the Crown act arbitrarily by bringing this matter directly before a Provincial Court Judge in the total absence of a statutory enactment which allows or provides for such a practice?

The de-streaming of this matter is not what the Legislation intended.

[The trial judge] erred in simply accepting jurisdiction over the charge. Simply expressing her concerns for inconvenience to witnesses and spectators, unfamiliarity with the sittings, schedules and time lines of the Provincial Offences Court, fails to deal with the real issue raised in the Respondent's application – the Crown's abuse of process.

The de-streaming remains unanswered.

The Respondent simply seeks an answer to this question from the Honourable Court for clarity should the situation arise again in the future.

[35] The Respondent's agent filed an application the juridical day before the date set for a one-day trial with 7 Crown witnesses, to transfer the trial to the Provincial Offences Court. The application purports to rely on the "application and submissions of the Agent for the Applicant." Submissions are not evidence. There was no affidavit and no evidentiary basis presented in support of the application. The material filed included excerpts from three Provincial Statutes, and three cases dealing with Provincial legislation other than the *Highway Traffic Act*. Her Honour would have been well within her jurisdiction to refuse to hear the application presented in such a manner. Her decision to hear the motion, but not to permit the calling of *viva voce* evidence, was appropriate, given the manner and timing of the application.

[36] The Respondent's statutory submission can be summarized as follows: since the *Environmental Protection Act* (s. 185) and the *Occupational Health and Safety Act* (s. 68) provide for notice by the prosecution to the clerk of the court that requires a provincial court judge to preside over the trial, there must be an order or some authority to commence a prosecution under the *Highway Traffic Act* before a Provincial Court Judge. I disagree.

[37] The fact there is no similar section in the HTA does not mean all HTA trials must be held before a justice of the peace. Pursuant to s. 38(1) of the

Courts of Justice Act, a provincial judge has the power and authority of two or more justices of the peace. Pursuant to s. 38(2), the Ontario Court of Justice shall perform any function assigned to it by or under the *Provincial Offences Act*. Pursuant to s. 39(2), a justice of the peace may preside over the Ontario Court of Justice in a proceeding under the *Provincial Offences Act*. It does not say a justice of the peace must preside.

[38] In the absence of any statutory prohibition, the Crown has the right to select whether to proceed with a charge under the *Highway Traffic Act* and the *Provincial Offences Act* before a justice of the peace or a provincial court judge, subject to the right of the Regional Senior Justice or his/her designate to assign cases. *Courts of Justice Act*, s. 76 It is similar to the Crown's election whether to proceed summarily or by indictment on *Criminal Code* charges, which has been upheld: *R. v. Smythe* (1971), 3 C.C.C. (2d) 366 (S.C.C.). Before the merger of the Supreme Court of Ontario and the District Court, the Crown Attorney's discretion as to which court to prefer an indictment in was upheld as well: *Szpyt v. The Queen* (1981), 58 C.C.C. (2d) 204 (S.C.C.).

[39] Prosecutorial discretion is an essential feature of our criminal justice system: *R. v. Regan* (2002), 161 C.C.C. (3d) 97 (S.C.C.); *R. v. Baere* (1988), 45 C.C.C. (3d) 57 (S.C.C.); *Krieger v. Law Society of Alberta* (2002), 168 C.C.C.

(3d) 97 (S.C.C.) Absent some evidence of *mala fides*, an improper purpose, or that the decision would undermine the right to a fair trial, the discretion should not be interfered with. Counsel should be cautious in making bald assertions of *mala fides* in the absence of evidence. There is absolutely no evidence on this record of any *mala fides*.

[40] Assuming the reason for the election was that the case involved a fatality, it does not reflect *mala fides*. Rather, it is a prudent decision, given the nature of the prosecution. It is a common practice for careless driving trials to be heard by provincial court judges, as illustrated by some of the cases relied upon on the substantive issues: *R. v. Malleck-Lacroix* (1991), 35 M.V.R.(2d) 46 (Ont. Ct. J.); *R. v. Ashton* [1985] O.J. No. 1795 (Ont. Dist. Ct.); *R. v. Globocki* (1991), 26 M.V.R. (2d) 179 (Ont. Ct. J.) .

[41] While not referred to the written submissions, in the course of argument, what is perhaps the underlying rationale for the submission emerged. If the trial is heard by a provincial court judge, any appeal must be heard in the Superior Court of Justice where agents are not permitted to appear. It was argued that the costs and time of an appeal to the Superior Court would be higher than an appeal from the decision of a justice of the peace to the Ontario Court of Justice.

[42] Again, there is absolutely no evidentiary foundation for the submission that the costs or time would be greater. There is no presumption that agents charge less than counsel. Even if the rates are lower, the benefits of being represented by counsel, even if at a higher rate, are significant. Counsel are legally trained, have insurance coverage, and are subject to the discipline of the Law Society.

[43] While it is not necessary to determine on this record, there may be an issue as to whether or not the trial judge had jurisdiction to “transfer” the trial to the Provincial Offences Court. Matters of scheduling and assigning cases are within the jurisdiction of the Chief Justice or the Regional Senior Justice, unless those functions have been delegated: *Courts of Justice Act*, s. 76.

[44] There is no merit to the Respondent’s arguments regarding transferring the charge.

The Directed Verdict Application

[45] Assuming this ground is appropriately raised when defence evidence was called, there was sufficient evidence on the issue of the identity of the dump truck driver to dismiss the directed verdict motion. While the trial judge may have overstated Ms. Osborne’s belief the person she saw sliding out of the driver’s seat of the dump truck, and the man she comforted and gave his name as Bill

Kinch, was the same person, there was some evidence upon which a properly instructed jury, acting reasonably, could have concluded the Respondent was the dump truck driver. In addition, to Ms. Osborne's evidence, he was being treated in close proximity to the dump truck. There was evidence the other driver was in the cab of his truck, and there was no evidence anyone other than the two drivers were involved in the accident. No one else appeared to have been the driver.

Did the trial judge err in law in acquitting the Respondent, given her findings of fact?

[46] This appeal is brought pursuant to s. 121 of the *Provincial Offences Act*, which does not enumerate the grounds upon which an appeal from an acquittal can succeed. As noted by the author's of *The 2003 Annotated Ontario Provincial Offences Act*, in general the prosecution can obtain appellate relief only where it is demonstrated that the verdict would not necessarily have been the same had the trial been properly conducted: *Vezeau v. The Queen* (1976), 28 C.C.C. (3d) 81 (S.C.C.); *R. v. Morin* (1987), 44 C.C.C. (3d) 193 (S.C.C.). The Crown has to demonstrate that the verdict would not inevitably have been the same, absent the error: *R. v. Power* (1994), 89 C.C.C. (3d) 1 (S.C.C.).

[47] The Crown contends the trial judge correctly stated the law relating to careless driving, made factual findings which established the offence, yet

acquitted on the basis of having a doubt about an irrelevant fact – whether the accident was avoidable. The Crown phrased the issue as follows:

Did the trial judge err in acquitting the Respondent based on a reasonable doubt that an accident may not have been avoided, notwithstanding her finding that the Respondent failed to exercise due care and attention and was imprudent in the operation of his vehicle?

Careless Driving Law

[48] Section 130 of the *Highway Traffic Act* provides:

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 ...

[49] A charge of careless driving may be proven by evidence the accused either drove the vehicle on a highway without due care and attention, or operated it without reasonable consideration for other persons using the highway. One of the two ingredients must be proven to support a conviction. Mere inadvertent negligence, whether of the slightest type or not, will not necessarily sustain a conviction: *R. v. Wilson* (1970), 1 C.C.C.(3d) 466 (Ont. C.A.).

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

- The evidence must be such as to prove beyond a reasonable doubt that the accused drove without due care and attention or without reasonable consideration 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 the 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.

[51] In cases involving accidents, the *gravamen* of the offence is whether the prosecution established the accused was driving carelessly, and not the consequences of the driving: *R. v. Pyszko* [1998] O.J. No. 1218 (Ont. Ct. J.).

[52] Where an accident has occurred, the fact that serious injury or death has resulted is not, except in unusual cases, relevant to an assessment of whether there has been a departure from the standard of care which would justify a finding of careless driving: *R. v. Globocki* (1991), 26 M.V.R. (2d) 179 (Ont. Ct. J.-Prov. Div.). The Crown had to show a sufficient departure from the standard of a prudent and reasonable driver to make the driving “deserving of punishment.” In acquitting the accused who had struck a pedestrian in *Globocki*, the trial judge noted:

A driver is entitled to make reasonable assumptions about the behavior 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.

[53] Finally, Keenan J. sitting on appeal in *R. v. Ashton* [1985] O.J. No. 1795 (Ont. Dist. Ct.) rejected the Appellant/Crown’s submission that a fact in support of a finding of careless driving was that the Respondent was driving a motorcycle which killed one human being and seriously injured another. The position reflected a fundamental misconception of the principles of liability. It was the

wrongful act or omission of the offender which rendered him or her liable, not the unhappy result.

[54] Despite agreeing with the Crown on the appeal that the “avoidability” of the accident was not determinative, from the trial transcript, the Respondent’s factum and written submission, the Respondent’s approach to the case is “who caused the accident?” The agent who represented the Respondent at trial took this position when Her Honour sought input as to the legal implications of her findings of fact. In the concluding paragraph of his factum, the Respondent notes:

... At best, the evidence only possibly shows, a moment’s inattention, when the dump truck did not slow simultaneously with the Henderson van. The Respondent was not bound to a standard of perfection when [the] tractor trailer turned, not in safety, across the south and north bound lanes from its stopped position on the west shoulder of the highway. The timing of the turn, show a total disregard of the other legal users of the highway, namely the Respondent and the occupant’s of the Henderson van, and *it is the unsafe turn which causes the accident.*(emphasis added)

[55] The Respondent also focussed on s. 142 of the *Highway Traffic Act* dealing with the responsibilities of the other driver turning right into a private driveway.

[56] These approaches erroneously focus on civil liability – who caused the accident, rather than the applicable law of careless driving. No doubt, the actions of the tractor trailer driver had to be examined to determine if his driving at the

critical moment was in disregard of the safety of himself and other users of the road. However, the answer to that question is not necessarily determinative if the prosecution had established the Respondent was driving without due care or attention, or without proper consideration for other users of the road. There is no law which precludes quasi criminal findings of guilt against both drivers in an accident.

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

[58] The Respondent's position ignores the trial judge's initial findings of fact, specifically her rejection of portions of his evidence. She found he did not slow down when he should have, and sped up when he should not have done so. These findings were open to Her Honour on the evidence. It cannot be concluded the findings were unsupportable.

[59] The Respondent argues the trial judge misapprehended the evidence as to when the Respondent and Mr. Henderson started to slow down their vehicles.

[60] Contrary to the Respondent's position in par. 25 of his factum, the evidence is that Mr. Henderson started to slow down his vehicle when the tractor trailer pulled into the southbound lanes (Transcript – September 30/02 – p. 29, l. 5 – 15). Ms. Osborne said it was at a later time. However, Henderson was the driver of the mini-van, and it was open to the trial judge to act on his evidence. Her finding of fact in that regard is unassailable. The trial judge found beyond a reasonable doubt the Respondent did not start to slow down until about 20 – 25 meters before the accident, a finding which was supportable on the evidence. She rejected the Respondent's evidence that he had slowed down earlier.

[61] It was also argued that the trial judge held the Respondent to too high a standard because he was a truck driver. I disagree. The test from *Beauchamp* when an accident has occurred is whether the accused *in light of the existing circumstances of which he knew or should have known*, failed to use the care and attention or give to other users of the highway the consideration that a driver of ordinary care would have used or given in the circumstances. The *circumstances* the Respondent knew were that he was driving a fully loaded dump truck, which was very heavy and would require a lengthy time to bring to a stop. That is not applying a higher standard to a truck driver. In addition, Her Honour, relying on the observations of others, concluded he either saw what the

other driver was about to do, or should have known. Again, that is not a higher standard for a truck driver.

[62] The key determination is whether Her Honour acquitted because she had a reasonable doubt that the accident would inevitably have happened regardless of the Respondent's driving, or whether she had a reasonable doubt he drove carelessly. The above authorities make it clear that if the finding was based on the former, her verdict was wrong in law. If it was the latter, it is unassailable.

[63] A significant component in the trial judge's initial conclusions were the observations, beliefs and reactions of Henderson and Osborne in contrast to those of the Respondent.

[64] I agree with the Crown that at the conclusion of the first portion of the Reasons, the trial judge had made findings of fact which supported a finding of guilt – that he had “not responded in time to the movement of the tractor trailer, especially given his knowledge of how long it would take him to slow down.” While not repeated at the end of the first portion, she had also found his speeding up was imprudent. A significant component in Her Honour's initial conclusions were the observations and reactions of Henderson and Osborne in contrast to those of the Respondent.

[65] Crown Counsel and the agent addressed Her Honour's inquiry on the basis that the only issue was what was the effect of a finding she was not satisfied the accident could have been avoided, regardless of the Respondent's manner of driving. The first portion of the concluding comments again address that issue, and would support the Crown's position on appeal.

[66] However, the last paragraph of the final reasons raise different issues. Her Honour finds Mr. Henderson and Ms. Osborne may have had some advantage being further back from the tractor trailer whose actions precipitated the situation. This is a significant qualification, since Her Honour had used the observations of Henderson and Osborne, and the actions of Henderson, as the standard of a prudent driver. They both could see the tractor trailer driver was going to turn. Henderson knew he should slow down when the tractor trailer went into the southbound lane. They did not believe the tractor trailer driver had reached his destination.

[67] The final qualification on the facts, that Henderson and Osborne "may have had some advantage in the sense they were further from the whole situation," had a very significant impact on the trial judge's previous findings of fact. Her Honour re-examined the propriety of using their observations, beliefs and reactions as the standard of prudent driving. Having concluded they may

have been in an advantageous position to the Respondent, she found it was inappropriate to use them as the standard. In the result, the trial judge changed her previous findings

[68] While it is unusual to do so, Her Honour in the course of her judgment changed her views of the case and found the Respondent not guilty because she had a doubt he drove carelessly and not because the accident was unavoidable. I am not satisfied Her Honour acquitted on an improper basis.

[69] Even if the final paragraph is not as clear as I have found, and is ambiguous or open to two interpretations, the following passage from *R. v. Morrissey* (1995), 97 C.C.C.(3d) 193 (Ont.C.A.) supports the same conclusion:

Even if the passage set out above was ambiguous and could bear either the interpretation I place on it or the interpretation advanced on behalf of the appellant, I would adopt my interpretation. Trial judges are presumed to know the law: *R. v. Burns* (1994), 89 C.C.C. (3d) 193 at pp. 199-200, sub nom. *R. v. B. (R.H.)*. That presumption must apply with particular force to legal principles as elementary as the presumption of innocence. Where a phrase in a trial judge's reasons is open to two interpretations, the one which is consistent with the trial judge's presumed knowledge of the applicable law must be preferred over one which suggests an erroneous application of the law: *R. v. Smith* (1989), 95 A.R. 304 (C.A.) at pp. 312-13; affirmed [1990] 1 S.C.R. 991.

[70] The trial judge is presumed to know the law. She had correctly stated it in regards to the effect of an accident in careless driving trials. While her comments at the end of the first portion of her judgment are open to an

interpretation that there was some uncertainty in that area, Crown Counsel correctly stated the law.

[71] It is clear Her Honour had not completed her reasons when she sought further input from Crown Counsel and the agent. The Crown has not persuaded me that Her Honour misapplied the law to her amended findings of fact.

[72] In his factum, the Respondent sought his costs on the appeal. This is not an appropriate case for costs.

Conclusion

[73] The appeal is dismissed.

DATE: January 26, 2004

DURNO RSJ.

COURT FILE NO.: 108/03
DATE: 20040126

**SUPERIOR COURT OF JUSTICE -
ONTARIO**

**RE: HER MAJESTY THE QUEEN
v. WILLIAM KINCH**

BEFORE: DURNO RSJ.

**COUNSEL: DAVID HAY, for the
Appellant/Crown**

**AMY ROBERN, for the
Respondent**

ENDORSEMENT

DURNO RSJ.

DATE: January 26, 2004