

ONTARIO COURT OF JUSTICE

B E T W E E N :

R

— AND —

DAVID R. MORGAN

Before Justice of the Peace M A Cuthbertson
Heard on 13 March 2008
Reasons for Judgment released on 16 June 2008

Charge: s. 130, Highway Traffic Act – Careless Driving

Cases cited:

R v Beauchamp, [1952] O.J. No. 495
R v Ereddia, [2006] O.J. No. 3421
R v Kotar, [1994] O.J. No. 763
R v McIver, [1965] O.J. No. 998
R v Namink, [1979] O.J. No. 317
R v Skorput, [1992] O.J. No. 832
R v Stellato, [1993] O.J. No. 18
R v Wilson, [1970] O.J. No. 1658; 1 C.C.C. (2d) 466

Statutes cited:

Highway Traffic Act, s. 130

R. Murray for the prosecution
The defendant..... appeared on his own behalf

JUSTICE OF THE PEACE CUTHBERTSON:

1: THE BACKGROUND

[1] On 9 October 2007, at about 5:16 PM, approximately 20 southbound vehicles were stopped at a red traffic light on Imperial Rd N in Guelph. The defendant was in this line of vehicles but had stopped his car just prior to the unregulated railway crossing on Imperial Rd N. Immediately in front of his vehicle but about 30 feet across the railway tracks was a van driven by Mr Filewod.

[2] The line of vehicles began to move forward. Mr Morgan with his car in first gear, began to cross the tracks. He looked down the tracks to see if a train was coming. As he was doing this he shifted into second gear and accelerated. When he looked back, the line of vehicles had stopped. He braked hard but hit the rear of Mr Filewod's van.

[3] According to Officer Tolson who investigated the accident, the damage to the van was light (approximately \$2,000) but Mr Morgan's car suffered medium damages (approximately \$4,000). Fortunately, no one was injured.

[4] Mr Morgan was charged with careless driving.

2: THE LAW

[5] Section 130 of the Highway Traffic Act states:

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...

3: ANALYSIS

[6] The prosecution relied on two cases, R v Wilson and R v McIver in support of a conviction.

[7] In R v Stellato, [1993] O.J. No. 18, the Ontario Court of Appeal considered an appeal from a conviction of care and control of a vehicle while impaired. The Court held that even a slight indication of impairment was enough to justify a conviction. Mr Murray submitted that the same principle should apply on a charge of careless driving. While, in my view, this case is distinguishable on its facts from the matter at bar, I will nonetheless analyze the prosecution's position.

[8] In R v Wilson, [1970] O.J. No. 1658, the Ontario Court of Appeal reviewed a conviction of careless driving. Gale CJO, writing for the Court, made the following comments at paragraph 3:

Before leaving the matter, however, I should like to mention that in the course of his reasons for judgment the learned trial Judge had this to say:

...I feel compelled to come to the conclusion in law that inadvertent negligence, however slight it may be, is sufficient for a conviction under this section.

We do not agree with that proposition of law. Each case must of necessity turn on its own facts. Mere inadvertent negligence, whether of the slightest type or not, will not necessarily sustain a conviction for careless driving. In each instance, the Crown must prove beyond a reasonable doubt that the accused either drove his vehicle on a highway without due care and attention, or that he operated it without reasonable consideration for other persons using the highway. One of these two ingredients must be proven to support a conviction under this section.

Based on this decision, the principle in *Stellato* relied upon by the prosecution is not sufficient to justify a conviction on a careless driving charge.

[9] *R v McIver*, [1965] O.J. No. 998, is a case dealing with a charge of careless driving in which the defence elected not to call evidence. The Ontario Court of Appeal considered whether, as noted in paragraph 3, there was 'any evidence upon which the Magistrate could base his finding of guilt.' Porter CJO, at paragraph 5 held:

Upon reading the case stated by the Magistrate, I would conclude that there was evidence from which an inference could be drawn to the effect that the accused was driving carelessly. The juxtaposition of the two vehicles by itself would point to lack of due care and attention on the part of the accused. In addition to this there was evidence described by the Magistrate in the stated case of a number of conditions and surrounding circumstances from which it would appear that unless there were carelessness the collision would not likely have occurred. There was nothing in the evidence from which a contrary conclusion could be drawn. There was no explanation of the cause of the accident. (NB: emphasis added)

[10] In the matter before this court, the defence did elect to call evidence. Mr Morgan, as noted earlier, offered the court an explanation for the events which unfolded.

[11] This court needs to consider additional case law to determine whether the explanation offered creates a reasonable doubt or whether the prosecution has met its burden.

[12] The Ontario Court of Appeal in *R v Beauchamp*, [1952] O.J. No. 495 set out standards for the offence of careless driving. In paragraph 18, the Court held:

*The standard of care and skill to be applied has been long established and is not that of perfection. It is, I think, correctly stated in *Mazengarb*, op cit., at pp. 176-7, as follows:*

"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.

"But the law does insist upon a reasonable amount of skill in the handling of a vehicle which is a potential source of danger to other users of the road. ... The question always is 'What would an ordinary prudent person in the

position of the plaintiff have done in relation to the event complained of?"
(Pollock on Torts uses the term "average man".)

In paragraph 19, the Court stated:

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 this accused, in the light of 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 ordinary prudent drivers would take into consideration. It is a question of fact, depending on the circumstances in each case.

The Court continued in paragraph 21:

There is a further important element that must also be considered, namely, that the conduct must be of such a nature that it can be considered a breach of duty to the public and deserving of punishment.

[13] In *R v Skorput*, [1992] O.J. No. 832, MacDonnell Prov. Div. J offered the following view on careless driving:

If the prosecution's case is that the defendant's driving demonstrated an absence of due care and attention, and the defence is that the defendant was being reasonably careful - i.e. that he was not negligent - any defence evidence which raises a reasonable doubt as to that issue will produce an acquittal.

[14] In *R v Kotar*, [1994] O.J. No. 763, Justice Lenz of the Provincial Division of the Ontario Court of Justice further defined the standards that must be applied. The Court stated in paragraph 4:

In a careless driving case, what the Crown must prove, beyond a reasonable doubt, is that the defendant drove without due care and attention. Careless driving is substantially different for instance, than a fail to stop case, where one only need to prove a failure to stop and the Crown has proven its case. Proving an accident for instance, may not necessarily prove that a defendant was driving without due care and attention unless for instance, Hodges Rule can be applied, and in the circumstances, the accident gives rise to only one logical conclusion and that is, the accused was driving without due care and attention.

In paragraph 6, the Court commented on conditions which might raise a reasonable doubt:

I agree that where the defendant can show, in circumstances that might be reasonably be true, that the defendant was faced with an unexpected, unforeseeable sudden circumstance, and that he reacted as best any reasonable, prudent driver could, that this should raise a reasonable doubt.

[15] In *R v Ereddia*, [2006] O.J. No. 3421, Justice Fairgrieve also commented on the standards for a conviction of careless driving. He stated:

(6) *The offence of "driving carelessly", created by s. 130 of the Highway Traffic Act, is defined as driving on a highway "without due care and attention or without reasonable consideration for other persons using the highway". The law has been clear for decades that in order to make out the offence under s. 130, the driving must be of such a nature that it amounts to a breach of one's duty to the public and is deserving of punishment: see R. v. Beauchamp (1953), 16 C.R. 270 at p. 278 (Ont. C.A.). A driver is not held to a standard of perfection, and a mere error of judgment is not necessarily sufficient to establish the offence: see R. v. Wilson (1971), 1 C.C.C. (2d) 466 (Ont. C.A.). Careless driving, generally speaking, requires proof of a departure from the standard of care that a reasonably prudent driver would have exercised in the circumstances, and normally involves, I would think, conduct that includes other less serious Highway Traffic Act infractions.*

(7) *Mr. Klaiman, counsel for the appellant, also referred in his factum to the pertinent judgment of Killeen Co. Ct. J. in R. v. Namink, [1979] O.J. No. 317 (QL), where, at para. 10, the learned County Court judge stated as follows:*

It is trite to say that this is a quasi-criminal charge, and that to make out a charge under this section the evidence must bespeak conduct deserving punishment in the way of a conviction under this section of our Highway Traffic Act. Mere momentary inattention, or a simple kind of error of judgment, does not bespeak the kind of conduct over which the net of this section is cast."

[16] Mr Morgan's actions must then be measured against the standards articulated in *Beauchamp*, *Skorput*, *Kotar*, *Ereddie* and *Namink*.

[17] Mr Morgan looked down the tracks for a train as he began to move from the stopped position. It was apparent that he did not perceive any potential hazard from the traffic in front of him, as the light had turned green and the line of vehicles was now moving. Rather a possible hazard lay in any oncoming train. By looking down the tracks, he was attempting to verify that he could continue across the tracks safely. Seeing no train, he shifted into second gear. He then turned his gaze back to the traffic in front of him, only to realize it had unexpectedly, stopped. He braked hard to avoid a collision. He was within inches of coming to a full stop when he hit Mr Filewod's van.

[18] Mr Morgan did not act as a perfect driver in this matter. However, in my view, the defendant was fundamentally driving with due care and attention. He was being reasonably careful and acting as any average person might under the circumstances. His actions constituted a moment of inattention to the traffic in front of him, while he looked for a train. He committed an error in judgment when he assumed that the traffic would continue without stopping. He reacted as any reasonable driver would by braking hard when the unforeseen occurred.

[19] Pursuant to *McIver* I am satisfied that Mr Morgan has a reasonable and logical explanation for the accident.

[20] In the language of *Namink*, his actions do 'not bespeak the kind of conduct over which

the net of this section is cast'. They are therefore, not deserving of punishment.

4: DECISION

[21] The prosecution has not proven the essential elements of this offence beyond a reasonable doubt.

[22] The charge is dismissed.

Released: June 16, 2008

Signed: "Justice of the Peace M A Cuthbertson"