

Her Majesty the Queen v. Danijela Roza

Ontario Court of Justice, Burlington Provincial Offences Court, File #16313104

D. M. MacDonald, J.P.

Heard: January 4, 2011; May 24, 2011

Judgment: October 13, 2011

Prosecutor for the Crown: J. Stewart

Agents for the Defence: L. Carter; F. Alfano

Charge: Careless Driving, s. 130 of the *Highway Traffic Act of Ontario*, on September 25, 2009, on Kingsway Drive at Wynten Way, Oakville, Halton County, Ontario.

D.M. MacDonald, J.P., (Orally):

.....

CASES CITED OR CONSIDERED

- *Bader v. Bader* [1951] UKCA
- *Miller v. Minister of Pensions* [1947] 2 All ER 372, KBD
- *R. v. Beauchamp*, [1953] O.R. 422-434
- *R. v. Kotar*, [1994] O.J. No. 763 Ont. Prov. Ct.
- *R. v. McIver*, [1965] O.J. No. 998, ONCA
- *R. v. Namink*, [1979] O.J. No. 317
- *R. v. Therrien*, [1991] Doc. 5606, Ont. Gen. Div.

THE TRIAL

1. The first day of the trial took place on January 4, 2011. The trial continued on May 24, 2011. The first witness for the prosecution was Vanessa Elsohemy. She testified that she had been a pedestrian on September 25, 2009, and that a motor vehicle struck her as she was attempting to cross at the intersection of Kingsway Drive and Winterbourne Drive in the town of Oakville, Halton County. She testified that she had been walking quickly southbound on the sidewalk on the west side of Winterbourne Drive, stopped at the stop sign, looked both ways then she proceeded across Kingsway Drive. She testified that she had crossed approximately three-quarters of Kingsway Drive when she was struck by a motor vehicle coming from her left. She testified that she was injured as a result of the collision and that she had required treatment in a local hospital for a broken collarbone, scratches, bruises and a cut on her head that required staples to close. She testified that

she was carrying a cell phone and may have been listening to music as she was walking, but was not using earphones at the time of the collision. Nor did she recall advising the police when she was interviewed at the hospital shortly after the collision that she may have been wearing earphones. She testified that at the time of the collision the weather was nice, the traffic was moderate, the time was approximately 4:45 p.m. and it had not yet started to become dark. She described the neighbourhood where the incident took place as a residential area.

2. The second prosecution witness, Cecil Braithwaite, testified that he had been driving a motor vehicle southbound on Winterbourne Drive on September 25, 2009. He had stopped at a stop sign at the intersection of Kingsway Drive, was the first motor vehicle at the intersection, and had been waiting for the traffic to clear so that he could turn right (westbound). He observed a female pedestrian walking at a very fast pace toward Kingsway Drive. She passed his motor vehicle on the sidewalk, stopped at the stop sign, and then she started to cross Kingsway Drive. He testified that the defendant's black BMW motor vehicle had been proceeding northbound on Wynten Way (which turns into Winterbourne Drive north of Kingsway Drive). The defendant made what he described as a sharp left turn (westbound) onto Kingsway Drive and struck the pedestrian (Ms. Elsohemy) in the eastbound lane of Kingsway Drive. He testified that Ms. Elsohemy had almost completely crossed Kingsway Drive when the defendant's motor vehicle struck her. He estimated that the defendant was travelling at approximately 15 to 20 kilometres per hour as she made the left turn from Wynten Way onto Kingsway Drive. He had not observed the defendant's motor vehicle stopped at the stop sign at the intersection and had only noticed it when it was in the process of making the left turn. He observed the defendant exit her motor vehicle after the collision with the pedestrian and identified her in court as the driver on the date of the collision.
3. The third prosecution witness, Dorota Jakubowska, testified that she was driving a motor vehicle on September 25, 2009, and was the second in line at the stop sign located at the intersection of Winterbourne Drive and Kingsway Drive on the north side of the intersection. She testified that her motor vehicle was behind Mr. Braithwaite's motor vehicle at the stop sign. She observed a black BMW motor vehicle travelling northbound on Wynten Way make a left turn at the intersection onto Kingsway Drive, and then strike a lady who had been walking southbound on Winterbourne Drive. She described the collision as taking place about a third or half-way across the intersection. She was not certain as to whether or not the black BMW had been moved prior to police arriving at the scene of the collision. She identified the defendant as the person who had been driving the black BMW on the date of the collision. Although Mr. Braithwaite's motor vehicle was in front of her, the motor vehicle did not obstruct her view of the collision between the defendant's motor vehicle and the pedestrian.
4. The fourth prosecution witness was Halton Regional Police constable D. Grozelle. He testified that he had previously made notes and had completed a Motor Vehicle Accident Report regarding the matter before the Court. As the officer's notes had not been disclosed to the prosecution or the defence prior to the first trial date, the trial was adjourned to May 24, 2011. On the second day of the trial, Officer Grozelle testified that

he had been dispatched on September 25, 2009, to attend at the scene of a single motor vehicle and pedestrian collision at the intersection of Winterbourne Drive and Kingsway Drive in Oakville, Halton County. He described the intersection as being located in a residential area, with a speed limit of 50 km. per hour on the local streets. He testified that the weather was sunny, clear and warm, but that the sun was setting and it was dark within an hour of his arrival on the scene. On his arrival at the scene at approximately 5:55 p.m., ambulance and fire department attendants were treating a female who was lying on her back approximately 10 metres west of Winterbourne Drive on Kingsway Drive. A black four-door motor vehicle was facing westbound and a female who appeared to be visibly upset was standing outside of the motor vehicle. This female identified herself to the officer as being the driver of the motor vehicle and produced the following documents to the officer: a valid Ontario driver's licence with a digitalized photograph; the ownership papers for the motor vehicle; and the insurance papers for the motor vehicle. The officer was re-sworn for purposes of a *voir dire* hearing and at the conclusion of this *voir dire* hearing, I determined that any statements that may have been made by the defendant to the officer on September 25, 2009, were given voluntarily. Officer Grozelle testified that an interview with the defendant took place outside of the defendant's motor vehicle on the street and that a statement taken under caution resulted from this interview. The street had been closed to vehicular traffic as a result of the collision. At the time of the interview, the defendant's motor vehicle was facing westbound in the eastbound lanes of Kingsway Drive. He described the defendant's motor vehicle as a 2001 black BMW model 325. He testified that the defendant had advised him that she had checked to be certain that there was no traffic at the intersection prior to making her left turn from Winterbourne Drive onto Kingsway Drive. After determining that no other motor vehicles were approaching the intersection, she made her turn, then heard and felt a bump, heard screaming, immediately stopped her motor vehicle and left her motor vehicle at the spot where the collision had taken place. She instructed her two young sons who were in the motor vehicle to call "911" for assistance and then exited her motor vehicle to attend to a female lying in the street until medical assistance arrived. She speculated that the female lying on the ground may have been listening to music as she observed wires and earpieces lying beside the female. After assisting with traffic control, the officer attended at a local hospital, where he interviewed the female (Vanessa Elsohemy) who had been struck by the defendant's motor vehicle. He indicated that following this interview, he attended at the defendant's residence at approximately 9:45 p.m. and charged the defendant with the offence of careless driving under s. 130 of the *Highway Traffic Act of Ontario*, R.S.O, 1990, c. H.8, as amended. A Part I Information was filed at the Provincial Offences Court in Burlington, Halton County, on September 28, 2009, according to the date stamp on this document.

5. The next scheduled witness for the prosecution was to have been Officer K. Rye, a detective constable from the Halton Regional police department. However, on the second day of this trial, the defence advised the Court that there was no need for this officer to testify. The defence agreed that the officer's *curriculum vitae* (Exhibit 1) and a report prepared by Officer Rye (Exhibit 2) could be admitted in lieu of the officer's testimony at the trial. Officer Rye described himself in his report as being a "Level 3 Technical

Collision Investigator”. Several excerpts from Officer Rye’s report (noted by him as Occurrence #09/143726) are noted below:

- a) Page 1 – “...The writer examined the view of the intersection that would have been available to both parties and saw that, while the pedestrian would have had a clear and unobstructed view of the surrounding area, the driver of the BMW would have been turning left and facing the setting sun, which was low in the eastern (*sic*) sky. This would have created a significant impediment to visibility, which should have directly impacted on her driving behavior at that moment.”...
- b) Page 2 – “...On examining the position of the BMW, the writer saw that the driver had stopped the vehicle on the west side of the intersection, immediately to the west of the eastbound stop line in the eastbound left turn lane, effectively facing the wrong way on Kingsway. There were no visible tire marks or skid marks on the roadway, which was dry and appeared to be in a good state of repair. The vehicle appeared to be well maintained and the windows to the front and sides of the driver were clear, clean and free of defects and obstructions. The writer was advised by Cst. Vatcher that: ‘the driver had indicated her vision was obscured by the setting sun, that her speed at the time of the collision had been no more than 20Kmh and that she had stopped her car immediately following the collision with the pedestrian’.”...
- c) Page 2 – “There was no other roadway evidence, nor were there any independent witnesses.”...
- d) Page 6 – “...The writer then considered the actions of the pedestrian, having regard to the suggestion that she had been running across Kingsway when the collision occurred. Given the higher speed of a pedestrian when running, as opposed to one who was walking, a motorist would have less opportunity to react to such a person crossing their path.”...
- e) Page 7 – “...Using the upper range of pedestrian velocity, the writer established that the minimum length of time from the pedestrian stepping from the curb to colliding with the vehicle was 2.70 seconds. This figure is a minimum and assumes that the pedestrian was moving at a constant velocity. Had she started from a standstill at the curb, this time would increase to allow for acceleration up to her maximum velocity of 3.00 m/s.”...
- f) Page 10 – “...As with the calculation for the pedestrian velocity, these figures make no allowance for the vehicle accelerating from a standstill at the Wynten Way stop sign, but assume a constant velocity. When consideration is given to the additional time required for the vehicle to accelerate from a standstill, this greatly increases the opportunity for the driver to have either stopped the vehicle or avoided the pedestrian. Indeed, when using the speed given by the driver of 20 Kmh, it can be seen that the vehicle would have been 15.01 metres from the area of impact when the pedestrian stepped from what was the opposite curb and would have require (*sic*) no more than 1.89 metres to stop. If the vehicle speed is taken at 30 Kmh, the stopping distance would have been 4.26 metres – well within the 22.51 metres available. The writer does not believe the vehicle had been travelling any faster than these speeds due to two factors; the driver was able to stop the vehicle in a very short distance following the collision without leaving any marks on the road and the distance the vehicle had travelled from the stop line on Wynten Way was no more than 21.50 metres. This

distance cannot be accurately stated as the writer is unable to accurately trace the path of the vehicle throughout the turning movement. Once again, though, the figure quoted is a maximum distance to afford the maximum benefit to the driver. The writer is aware that none of the above time/distance calculations make any allowance for the reaction time of the driver. This is the time taken from the moment a driver first perceives a need to react to an unexpected situation, to the moment that driver engages in an actual activity in response to that situation. Following extensive research, this figure is commonly accepted as being 1.5 seconds for an average driver during daylight hours¹.”...

- g) Page 11 – “...In addition to the above, the writer has also noted that the BMW was on the wrong side of the road when the collision occurred and, regardless of the actions of the pedestrian at that time, having crossed the double yellow lines dividing east- and westbound lanes, she would have been justified in considering herself safe from vehicles being driven from the east.”...
- h) Page 12 – “...The injured pedestrian was crossing Kingsway from the north curb and was headed directly across the road. At this location, no crosswalk is available for persons wishing to cross Kingsway. By her admission, she was running.”...
- i) Page 12 – “...As the pedestrian crossed the eastbound left turn lane, almost reaching the eastbound through lane, the BMW struck her, causing her to fall into the roadway and sustain injuries to her head and pelvis. Other than the small patch of blood on the roadway, there was no evidence to indicate harsh braking, suggesting a low speed collision. At the time of the collision, the sun was low in the sky to the west and could possibly have impeded the vision of any westbound motorists. The writer could find no other evidence of visual obstruction or any physical feature that could be considered a contributory factor in this collision. Using time/distance calculations and allowing the maximum benefit to the BMW driver, the writer has established that there was sufficient time and distance available to the driver to have seen the pedestrian leave the north curb and to have either stopped her vehicle or taken the appropriate evasive action.”...
- j) Page 13 – “...The collision occurred when the pedestrian was more than halfway across Kingsway and had passed the double yellow lane dividing lines. At this position, any pedestrian would be satisfied that any potential danger would be from vehicles approaching from the west – the opposite direction to the approaching BMW, which was effectively on the wrong side of the road. The driver has stated that her vision was impeded by the setting sun. Without a clear view of the roadway ahead, the driver should not have been proceeding. Given the above, it is the opinion of the writer that this was an avoidable collision and that, despite the pedestrian crossing without the benefit of an established crosswalk, the BMW was being operated on the wrong side of the road by a driver whose vision was impeded and who had sufficient opportunity to perceive the danger to the pedestrian and to take the appropriate action to avoid contact. As such it is also the opinion of the writer that the driver of the BMW should be held responsible for this collision and be subject to a charge of Careless Driving under section 130 of the Highway Traffic Act.”...

¹ Rivers, R.W.: *Technical Traffic Accident Investigators’ Handbook – A Level 3 Reference, Training and Investigation Manual* (2nd ed.), and Rivers new *EVIDENCE MANUAL* (2006).

6. At the conclusion of the prosecutor's case, the defendant's agent, Mr. Alfano, advised the Court that no evidence would be presented.

THE LAW

7. Section 130 of the *Highway Traffic Act*, R.S.O, 1990, c. H.8, as amended, states:

130. 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 and on conviction is liable to a fine of not less than \$400 and not more than \$2,000 or to imprisonment for a term of not more than six months, or to both, and in addition his or her licence or permit may be suspended for a period of not more than two years. 2009, c. 5, s. 41.

SUBMISSIONS

8. As part of his submissions, one of the defendant's agents, Mr. Alfano, provided a copy of the Ontario Court of Appeal decision of *R. v. Beauchamp*, [1953] O.R. 422-434 to the Court. He argued that this decision sets out the standard of care that must be breached prior to a finding of guilt on a charge of careless driving. In this decision, Mr. Justice MacKay delivered the judgement for the Ontario Court of Appeal and his decision included the following regarding a charge of careless driving:

"...Motor vehicles are now in general use as a common means of transportation and pleasure. If too high a standard of care and skill were demanded, those people who are not capable of attaining such a standard would be deprived of the privilege of driving motor vehicles, and their use would be confined to experts, and even persons who might become experts might well be prevented from qualifying as such by experience. 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." ...

Mr. Justice MacKay added the following observation:

"...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. The further step must be taken even if it is found that the conduct of the accused falls below the standard set out in the preceding paragraphs.”...

9. Mr. Alfano argued that momentary inattention is not enough for the Court to find a defendant guilty of the offence of careless driving and the prosecution must prove their case beyond a reasonable doubt. He argued that even though a driver proceeding at a normal speed should be able to see a pedestrian, if a collision takes place, this may not necessarily be categorized as careless driving under the *Highway Traffic Act*. A police officer can exercise discretion, and if an officer determines that a charge should be laid, it could be for a lesser offence such as turning not in safety. He argued that the report prepared by the reconstruction officer (Exhibit 2) only contained this officer’s opinions as to what may have taken place at the time of the collision between the defendant’s motor vehicle and the pedestrian. In the Ontario case of *R. v. Namink*, [1979] O.J. No. 317, County Court Justice Killeen overturned a lower court decision that had determined that Mr. Namink was guilty of the offence of careless driving. In this case, the lower court had not accepted the defendant’s argument that his motor vehicle must have skidded and spun sideways as a result of hitting a patch of ice on the roadway, resulting in a collision with another motor vehicle. In his appeal decision, Mr. Justice Killeen noted the following:

“...Both the accused, as his passenger, who testified, said that this sudden loss of control was unexpected, unanticipated, and happened so quickly that, in effect, there was no possibility of evasive action, which would have prevented the collision which did ensue.”...

“...With all due deference to the learned trial judge, I think that the direction of his mind to this one issue of ice or no ice was somewhat of a displacement of his duty to consider the totality of the evidence, as it related to the charge before the court. The presence of ice on this charge would not be the sole and conclusive determinant of guilt or innocence, as it seems to me. Was, therefore, the accused guilty of careless driving? That is the question. Was the accused guilty of conduct from which the court could infer, beyond a reasonable doubt that the accused was driving without due care and attention, or without reasonable consideration for other users of the highway.”...

“...Here I see no evidence of the kind of conduct aimed at this section. At best, and I put it that way ‘at best’ there was momentary inattention here, and mere momentary inattention is not enough to justify a conviction under this section. There is no evidence of speed here, no evidence of risk taking in the passing movement, and whether the effective cause of this accident was momentary inattention or sudden slippage on an icy patch, which could not be anticipated, the criteria for conviction under this section cannot, in law, be made out. In other words, the evidence here is so fragile that a conviction on that evidence cannot be supported in law.”...

10. The prosecutor argued that in the absence of evidence to the contrary, the court could make a finding of guilt, based on the detailed evidence provided by the injured pedestrian and two independent witnesses. In addition, the court could consider the testimony of the police officer that laid the charge of careless driving, after interviewing the defendant, the independent

witnesses and the injured pedestrian. The court could also consider the accepted report (Exhibit 2) prepared by a police technical collision investigator who was not required by the defence to testify at the trial. The prosecutor argued the court could make a finding that the prohibited act of careless driving was committed unless the defendant could show that this collision took place without negligence or fault on her part or unless the defendant could successfully provide a due diligence defence. The evidence provided during the trial indicated that the pedestrian was walking southbound, had proceed approximately three-quarters of the distance across a road at an intersection when she was hit by a motor vehicle being driven by the defendant on the wrong side of the road. A reasonable driver, having stopped at a stop sign at an intersection, has a duty not to proceed unless it is safe to do so. Evidence was presented during the trial that perhaps the defendant's vision was obstructed due to the setting sun, but there was no other explanation provided by witnesses during the trial as to why the defendant was driving her motor vehicle westbound in the eastbound traffic lanes of Kingsway Drive or why the defendant did not see the pedestrian crossing at the intersection.

AUTHORITES

11. *R. v. McIver*, [1965] O.J. No. 998, ONCA, 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..."

In discussing the charge of careless driving in *The Law of Traffic Offences (third edition)*, [Scott Hutchison, David Rose, Phil Downes, 2009, Carswell, at p.164], the authors provided the following commentary regarding the *R. v. McIver* decision:

"...It is sometimes said in traffic court that in the case of a motor vehicle collision, the prosecutor need only make out a prima facie case of careless driving to secure a conviction. McIvor is often used in support of this proposition. In our view, this is erroneous and misleading (ref. R. v. Kotar, [1994] O.J. No. 763 Ont. Prov. Ct.). If the prosecutor is to prove the charge, it must still, even in the absence of defence evidence, make out an act of careless driving beyond a reasonable doubt..."

REASONABLE DOUBT

12. Lord Denning in the criminal case of *Miller v. Minister of Pensions* [1947] 2 All ER 372, KBD, spoke about proving a case beyond a reasonable doubt:

"the...degree of cogency...required in a criminal case before an accused person is found guilty...is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable', the case is proved, but nothing short of that will suffice".

13. The question of "reasonable doubt" was also addressed by Lord Denning in the case of *Bader v. Bader* [1951] at pg. 35 (UKCA). In his opinion, reasonable doubt should be considered as follows:

"...I do not understand how a court can be satisfied that a charge has been proved (and the statute requires that the court shall be satisfied before pronouncing a decree) if, at the end of the case, it has; a reasonable doubt in its mind whether the case has been proved. To be satisfied and at the same time to have a reasonable doubt seems to me to be an impossible state of mind..."

DECISION

14. As was the situation in *R. v. McIver*, the defence at this trial chose not to offer any evidence to the court. The female pedestrian who was struck by the defendant's motor vehicle described what she could remember regarding her actions prior to the collision. Two independent witnesses testified that they had observed the female pedestrian walking southbound across Kingsway Drive. The driver of the motor vehicle that was first in line at the stop sign at the intersection of Winterbourne Drive and Kingsway Drive testified that the pedestrian was walking quickly, but was not running, reinforcing similar testimony given by the pedestrian. Mr. Braithwaite observed the collision that took place when the defendant's motor vehicle struck the pedestrian in the eastbound lanes of Kingsway Drive, while the defendant was driving in a westbound direction. The second independent witness provided similar evidence in her testimony. The defendant's motor vehicle was still in the wrong lane of traffic when she was being interviewed by police following the collision. The technical report (Exhibit 2) outlined one possible cause for the collision, namely that the defendant had made a left turn from Wynten Way onto Kingsway Drive where her vision may have been obstructed by the setting sun, causing her to turn into the wrong lane of traffic, then collide with the female pedestrian that she could not see.

15. I noted in Officer Rye's technical report (Exhibit 2) that Officer Rye indicated that the sun was setting in the east (page 1), but this was corrected later in his report to show the sun was setting in the west (page 12). I can take judicial notice that on this day, the sun would have appeared to be setting in the west in the town of Oakville. Similarly in Officer Rye's report, he wrote that there were no independent witnesses to this collision (page 2), but based on the

evidence heard during this trial, it is clear that there were at least two independent witnesses. Officer Rye wrote in his report that he had been advised that the female pedestrian may have been running across Kingsway Drive at the time of the collision. This information was contradicted by the female pedestrian and the two independent witnesses during the trial, when they testified that the female pedestrian was walking quickly, but was not running. I will give more weight to the testimony of the two independent witnesses who provided evidence on what they actually saw on the date of the collision, to that of Officer Rye, who has been provided second-hand information from another source, believing that there were no independent witnesses present at the scene of the collision.

16. Having set out some areas of concern in Officer Rye’s technical report, I still find that his conclusions at the end of his report establish a very persuasive argument – that the defendant should not have made a left turn into the wrong lane of traffic on Kingsway Drive, and that the defendant should have seen the pedestrian walking across Kingsway Drive prior to colliding with her. I also agree that the female pedestrian should not have been expected any interference from westbound traffic once she had proceeded into the eastbound lanes of Kingsway Drive. No due diligence defence was provided to establish, on a balance of probabilities, why defendant was in the wrong traffic lane or why she did not see the female pedestrian. Officer Rye’s report also indicated that if the defendant stopped at the stop sign prior to making her turn and if the female pedestrian had stopped at the curb prior to proceeding across the street, the time available for the driver to stop her motor vehicle or alternatively avoid hitting the pedestrian would be increased. Based on the statement provided by the defendant to the police and the testimony given by witnesses at the trial is persuasive evidence that both of these factors seem to have taken place. The identity of the defendant was established by Officer Grozelle, who testified that the defendant had provided a valid Ontario driver’s licence with a digitalized photograph to him during an interview that took place shortly after the collision.

17. Unlike the facts set out in one of the cases presented by the defence (*R. v. Namink*), no explanation for the collision was presented by the defence. On a warm, sunny day in September in Oakville, there was no “patch of ice” theory provided to the court, as to why the defendant was driving westbound in the eastbound lanes of Kingsway Drive.

18. Similarly, I cannot simply discount the defendant’s behavior as being similar to that of momentary inattention as appeared to be the situation in the other case cited by the defence (*R. v. Beauchamp*), where a driver slightly bumped a motor vehicle, when he had failed to notice that this motor vehicle had moved into the path of a bus that he was backing up very slowly onto a street from a parking garage, perhaps because of a loose mirror on the fender of the bus. However, I do believe that the test in the case that is before this court, in the words set out in *Beauchamp*: “...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.”...

19. There are several cases cited in *The Law of Traffic Offences (third edition)*, at page 180, where it was apparent that all of the following facts were involved: a motor vehicle collision had

taken place; there was no evidence that the defendant attempted to avoid the collision; and there was no evidence of a fortuitous intervening event. The authors included the case of *R. v. Therrien*, [1991] Doc. 5606, Ont. Gen. Div., as an example:

“...the defendant was driving on a ‘nice day’, turned to look at a park, and then rear ended another vehicle. There were no skid marks. According to Houston, J., it was obvious that the defendant was driving without due care and attention, and the conviction for careless driving was upheld.”...

20. The court is satisfied, beyond a reasonable doubt, that the defendant was operating a motor vehicle on the date in question in the jurisdiction of Halton County, and that she was doing so without due care and attention or without reasonable consideration for other persons using the highway. The facts of this case are similar to those set out above in *Therrien*: a motor vehicle collision took place; there was no evidence that the defendant attempted to avoid the collision; and there was no evidence of a fortuitous intervening event. In addition, no explanation was provided to the court during the trial as to why the defendant did not see the pedestrian or why she struck the female pedestrian with her motor vehicle.

21. I therefore find the defendant guilty of the offence of careless driving and a conviction will be registered against her.

Released: October 13, 2011

Signed: “Justice of the Peace Dan M. MacDonald”