

ONTARIO COURT OF JUSTICE

IN THE MATTER OF an appeal under subsection 135(1) of the
Provincial Offences Act, R.S.O. 1990, c. P.33, as amended;

B E T W E E N :

HER MAJESTY THE QUEEN
Respondent

— AND —

TERRY WOLDENGA
Appellant

Before Justice Paul H. Reinhardt
Heard on 20 November 2008
Reasons for Judgment released on 11 February 2009

Shirley King for the prosecution
Matthew R. Riddell for the defendant

On appeal from a conviction by Justice of the Peace C. Longe on 28 March 2008.

REINHARDT J.:

[1] Mr. Terry Woldenga was convicted of:

On or about 27 March 2007 at 7:28 p.m., at Bayview Avenue, in the City of Toronto, did commit the offence of Careless Driving, contrary to the *Highway Traffic Act*, section 130.

[2] Section 130 of the *Highway Traffic Act* reads:

Careless driving

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 \$200 and not more than \$1,000 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.

R.S.O. 1990, c. H.8, s. 130.

1: The Evidence

[3] Cathleen Kilner was the only eye witness called by the Prosecutor to testify as to the driving that gave rise to the charges before the court. She testified as follows:

Q. Okay, and just tell the Court what happened that day.

A. I stopped very, very suddenly because the car in front of me stopped very, very suddenly and I was hit from behind.

Q. Before coming to a stop, do you remember the approximate speed that you were travelling?

A. I don't know, maybe 35, 40, not very fast.

Q. What was the traffic like that day?

A. Pretty heavy.

Q. What time of day was it?

A. Early evening, so just past rush hour, maybe 6:30.

Q. What area of Bayview?

A. Just south of the 401, just past the second stop light.

Q. Do you know what municipality that area is located in?

A. City of Toronto, I believe.

Q. What were the weather conditions like?

A. It was a sunny day, it was dry.

Q. You said a vehicle had to stop in front of you, abruptly?

A. Yes.

Q. Before having to stop abruptly, do you know the approximate distance between your vehicle and the one in front of you?

A. Not really, no. I can take a guess....

Q. No, that's fine. And what happened after you were hit from behind?

A. It pushed me into the car in front of me.

Q. Okay, and before you were hit from behind, do you know how long you were stopped?

A. Not very long, maybe two or three seconds.

Q. Okay, and when you were hit, where was the damage to your vehicle?

A. Both the front was damaged, the rear was damaged and the right rear passenger pillar was twisted.

Q. Before being impacted from behind, did you see any vehicles approaching?

A. Yes, actually when I stopped I looked in my rear view mirror to

Q. And what did you see?

A. I saw a black car hit me.

Q. Can you just describe what you saw?

A. I stopped, I looked in my rear view mirror because I was glad that I could stop with my rear view mirror and thought he's not going to be able to stop, and was hit.

Q. Is there anything unusual that you might be able to tell us, about the vehicle before it hit you, that came from the rear?

A. No.

Q. No? And what happened after the accident?

A. We all pulled our cars over, we all got out. We all looked at each other and exchanged information and waited for the tow truck and the police officer.

(Transcript, 27 March 2008, pp. 8, 9)

[4] Ms. Kilner also testified that she was not injured, and in cross-examination had this to say, at page 12, line 6:

Q. Okay, now why did you have to all of a sudden come to a sudden stop, as you described?

A. Because somebody a few car lengths ahead, turned suddenly into their driveway, we all stopped suddenly.

(Transcript of Evidence, 27 March 2008, p. 12)

[5] Ms. Kilner further elaborated at the end of page 12 and on page 13:

Q. Q. Now, were you looking at this vehicle making a turn when it made a turn into the driveway?

A. No, I wasn't. I couldn't see it, I just saw it once I'd stopped, and I could see the car going into its driveway.

Q. And that was just before the collision?

A. And that was just before the collision?

A. Correct.

Q. But weren't you looking in your rear view mirror just before the collision?

A. It wasn't just before the collision that I saw the car going in. I got hit, I saw the car.

Q. Okay, so then it was well before, is what you're saying?

A. Yeah, because it was a couple of seconds I guess, before I looked at my rear view mirror, yes.

[6] Mr Woldenga testified on his own behalf. He stated as follows:

Q. What happened at that time, sir?

A. I was going southbound on Bayview Avenue. I was coming home from the gym. We stopped at, I believe it was a stop light at Fifeshire, which is the second set of lights south of the 401. I was one of maybe six cars – I was six cars back from the lights, something to that effect. Coming back from the gym I actually had a protein shake and the light turned green, we proceeded to start moving

southbound on Bayview. I went to go put the drink in the consol, and I looked up and everybody had come to an abrupt stop, at which point I did apply the brakes, the anti-lock braking system I recall did engage and I wasn't able to stop completely in time.

Q. Sir, when you indicated you put your brakes on, did you put on the brakes before or after impact with the vehicle in front of you?

A. Well before.

Q. And when you put your protein shake down, at approximately how many seconds did it take you to put it down and look back up?

A. What felt from – from one to two seconds.

Q. And, what caused the vehicle in front of you to stop, did you know?

A. I later found out after we all got out and I checked with everybody to make sure they're okay, I found out that quite a few cars up, somebody had made a sudden right hand turn into a driveway.

Q. Could you see a car making a right hand turn into a driveway?

A. I could not.

Q. And why couldn't you see it?

A. It was approximately six cars ahead of me.

Q. And how fast were you going at this time, sir?

A. I would say, in my estimate no more than thirty kilometres an hour.

Q. And how do you know that you're going at 30 kilometres an hour?

A. Because we were only 200 metres south of the set of lights that were just – had just turned green. So we hadn't accelerated to the posted sixty kilometres an hour. And at this point I did apply the brakes. The car did manage to slow down, but just didn't slow down enough.

(Transcript of Evidence, 28 March 2008, pp. 14, 15)

[7] Mr. Woldenga was cross-examined by the prosecutor, and further elaborated:

Q. How far was the vehicle in front of you before you put the shake down?

A. I'm guessing one to two car lengths.

Q. And you're saying you were going 30 kilometres per hour approximately?

A. That's correct.

Q. Now, you're saying you applied your brakes well before the impact?

A. Well, as soon as I looked up and I saw that the witness – the car in front of me had stopped, I applied immediately, from that point.

Q. What was the distance between your vehicle and the one in front of you at that time?

A. At that time one to one and a half car lengths.

Q. So you're saying that – that the space between the vehicles didn't change?

A. Not that I recall, no.

Q. How could it not change if you had not started slowing down and that vehicle

was stopped, but as you were travelling together at 30 kilometres per hour you're one to two car lengths?

A. The – the distance from when I put my shake down to look up, was still about one – one and a half – it was originally – probably between one to two car lengths and then I – obviously when I looked up it was one to one and a half car lengths, which I applied the brakes.

Q. That really doesn't make much sense, sir?

A. Sorry, it's...

Q. If you say it in a way that sounds like it actually is in a chronological order.

A. Okay, so we left the set of lights. I recall seeing a car in front of me. I was probably about two car lengths back and then I took, like I said, I took a sip of the shake, I put it down, I looked up and I was one car length and in which case I – I saw the brake lights and I applied the brakes immediately and it just – the ABS just wouldn't let me stop in time. I could feel the motion of what ABS does.

(Transcript of Evidence, 28 March 2008, pp. 16, 17)

2: The Case Law

[8] The Ontario Court of Appeal has set out quite clearly what the essential elements of the offence of careless driving are in the case of **R. v. Beauchamp** [1952] O.J. No 495, para. 19, Justice Frederick George Mackay, states:

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.

[9] More recently, this was elaborated on by Justice Gordon Killeen, of the County Court, in his oral judgment of 24 September, 1979, in **R. v. Namink** [1979] O.J. No. 317, where he states at paragraph 10:

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 of 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.

[10] In 2005, Justice Joseph Bovard of this court was dealing with a traffic accident in

which the accused bumped into the rear bumper of the car ahead. He had this to say in **R. v. Messina** [2005] O.J. No. 4663, para. 25:

In the case at bar, there is sufficient evidence to prove beyond a reasonable doubt that Mr. Messina hit Ms. Walker, but I find that the accident was of such a minor kind that the evidence of his driving did not amount to careless driving. It is better characterized as a very minor bump on the rear bumper of Ms. Walker's car that only caused \$400.00 worth of damage. There was so little damage that a charge of failure to report the accident could not be proved. There was no other evidence of Mr. Messina's driving. Therefore, I do not think that the evidence supports a finding that Mr. Messina drove "without due care and attention or without reasonable consideration for others" in the sense intended by s. 130. As noted above, "The standard of care and skill to be applied has been long established and is not that of perfection." I do not think that when the Legislature passed s. 130 of the Highway Traffic Act it was intended to include the way Mr. Messina drove on this occasion.

3: The Judgment

[11] In his judgment, Justice of the Peace Longe directed himself on the law as follows, starting at page 30 of the transcript of 28 march 2008:

One to two seconds is considered momentary, but one to two seconds taking your eyes of what you should be looking at as a driver in the City can cause a great deal of damage and that is what appears to have happened in this case. It might have been appropriate if the defendant wanted to have a sip of shake to pull his vehicle off the street and do so. It was clear that the weather was dry; it was clear, based on the evidence, and sunny. And the only alternative that this Court has is to say that the Crown have established a prima facie case, and there's no reason, based on the evidence provided by the Crown civilian witness, and there's been no evidence to contradict that from the defence or the defendant before this Court. The Court will reiterate, it is one of the defendant's Exhibits, in **Regina v. Wilson**, in the third paragraph on page two, "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." The question is Careless Driving and what it constitutes and as we reiterating the factors, without due care and attention and reasonable consideration for others on the highway, persons using the highway, the nature of the offence, defendant didn't pay any attention and if he did pay attention then we probably would not have been sitting here today.

There are four vehicles involved in this accident and to establish where four vehicles are involved it has to be considered not minor. It's not a small element. It's very important and it falls under the realm of Careless Driving.

As indicated earlier by this Court, the Crown have established a prima facie case. Defendant's evidence did not raise any reasonable doubt in the Court's mind, and therefore the defendant is found guilty of Careless Driving.

4: Analysis

[12] Justice of the Peace Longe seems to understand the Ontario Court of Appeal’s decision in **R. v. Wilson** [1970] O.J. No. 1658 as supporting the proposition that “inadvertent negligence” on the part of a driver is sufficient to make out the offence of Careless Driving. With respect, that is not the law. Chief Justice George Gale was saying that inadvertent negligence was not, on its own, sufficient to prove the offence of Careless Driving. In his reasons, Chief Justice Gale states:

1 GALE, C.J.O.: — The appellant was convicted upon a trial de novo before the Judge of the County Court of the County of Halton of the offence of careless driving contrary to s. 60 [rep. & sub. 1968-69, c. 45, s. 45] of the *Highway Traffic Act*, R.S.O. 1960, c. 172. He now appeals on the ground that the learned trial Judge erred in law in registering the conviction.

2 It is our view that the sole issue in this case was whether or not the Crown had proved beyond a reasonable doubt that the accused drove his vehicle on a highway without due care and attention. We are satisfied that there was evidence upon which the learned Judge could make a finding that the accused had done so, and that therefore his finding in that respect was correct. The appeal will therefore be dismissed.

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.

[13] In my view, Justice of the Peace Longe misdirected himself on the elements of what constitutes Careless Driving, in his reference to Chief Justice Gale’s judgment in **R. v. Wilson**. Moreover, when he states in the following paragraph, at page 31 of the transcript, line 13, he compounds the error:

There are four vehicles involved in this accident and to establish where four vehicles are involved it has to be considered not minor. It’s not a small element. It’s very important and it falls under the realm of Careless Driving.

[14] By this reasoning, a serious accident, as a result of inadvertent negligence, converts inadvertent negligence, which is not considered to be Careless Driving, into Careless Driving. This is not the law, and would have the unfortunate result of importing a tort concept of the “thin skull” into the meaning of “due care and attention or without reasonable consideration for other persons using the highway” in the quasi-criminal context of Section 130 of the *Highway Traffic Act*. In my view, a jurist cannot, in assessing the conduct of the

accused, work backwards from the result of that conduct where it has not been proven that the result of the conduct was reasonably foreseeable. In this case, the momentary lack of attention by Mr. Woldenga, would not have resulted in an accident, without the intervention of an unforeseeable event, the sudden stop of the car ahead of him due to a sudden turn into a driveway by a car some distance ahead.

[15] Finally, in my view Justice of the Peace Longe also erred in not explaining why he concluded, as he stated, at page 31, line 20, that the:

Defendant's evidence did not raise any reasonable doubt in the Court's mind, and therefore the defendant is found guilty of Careless Driving.

[16] This statement, coming as it does on the heels of his earlier reference to **Wilson**, requires more clarity from the Court, as to why the Crown has proven its case. Without clear findings of fact that show a lack of due care and attention or a lack of reasonable consideration for other persons using the highway, the offence is not made out. Furthermore, the Justice of the Peace makes no mention of the reasoning required by the line of cases often referenced by the Supreme Court of Canada's decision in **R. v. W.(D.) [D.W.]** [1991] S.C.J. No. 26, and without an explanation of the reasoning that the Justice of the Peace adopted to conclude that the defence arguments, the defendant's testimony and the evidence taken as a whole did not create a reasonable doubt, in my view, the reasons of the Justice of the Peace are deficient, and the conviction cannot stand.

[17] As a result, the appeal is allowed, the conviction set aside, and an acquittal entered. Any fine paid by Mr. Woldenga should be returned to him.

Released: 11 February 2009

Signed: "Justice Paul H. Reinhardt"