Case Name:

R. v. Blier

IN THE MATTER OF The Highway Traffic Act, R.S.O. 1990, c. H.8

Between
Her Majesty the Queen, and
Tina M. Blier, defendant

[2002] O.J. No. 1336

Ontario Court of Justice
Toronto, Ontario
Quon J.P.

Heard: February 11, 2002.
Judgment: April 10, 2002.
(59 paras.)

Charge: S. 148(1), H.T.A. - "fail to share half roadway - meeting vehicle"

Cases Considered or Referred to:

Allen v. Lord, [1928] 4 D.L.R. 62 (Ont. Supreme Crt. (Appellate Div.)), per Mulock, C.J.O., Magee, Hodgins and Grant, JJ.A.
Coke and Luker v. Smith, [1952] 1 D.L.R. 285 (Alta. Supreme Crt. (Appellate Div.)), per O'Connor C.J.A., Frank Ford, W.A. Macdonald, Parlee and Clinton J. Ford JJ.A.
Gauthier Co. v. Canada, [1945] S.C.R. 143 (S.C.C.).
McPhee v. Lalonde, [1946] O.J. No. 86 (O.H.C.), per LeBel J. at Ottawa.
R. v. Miron, [2001] O.J. No. 1610 (O.C.J.), per Greco J.
Primeau v. Renaud, [1978] O.J. No. 682 (O.H.C.), per Henry J.
R. v. Kearney, [1993] B.C.J. No. 575 (B.C.C.A.), per Proudfoot, Gibbs and Hollinrake JJ.A.
R. v. Richards, [1999] O.J. No. 1420 (O.C.A.), per Labrosse, Rosenberg and Feldman JJ.A.

Statutes, Regulations and Rules cited:

Highway Traffic Act, R.S.O. 1990, c. H.8, ss. 33, 41(b), 41(c), 48.3(1), 55.1(9), 75(4), 148, 148(1), 166, 167, 199, and 220.

Authorities and Reference Material Referred to:

Shannon, L.P., Motor Vehicle Offences and the Summary Conviction Court (Toronto, Canada: Canada Law Book Company Ltd., 1964), p. 301.
The Concise Oxford Dictionary, 9th ed. 1995, Oxford University Press Inc., New York: "charge".

Counsel:

C. McPhail, Provincial Prosecutor.
T. Blier, on her own behalf.

QUON J.P.:—

1. INTRODUCTION

¶ 1 In this matter, the defendant Blier was driving eastbound on Gerrard Street East in the City of Toronto and collided with a westbound vehicle. A police officer who investigated the accident charged the defendant for failing to share half the roadway by not turning out to the right, contrary to s. 148(1) of the Highway Traffic Act, R.S.O. 1990, c. H-8 ("H.T.A."). The defendant contends that the unavoidable accident with the westbound vehicle was caused by the actions of a third vehicle.

¶ 2 The defendant maintains that she had to employ an emergency manoeuvre to avoid colliding with a cube van that had suddenly moved into her path. She contends that this van failed to signal its intention of making this movement from its parked position at the curbside. This predicament inevitably caused the defendant to swerve her vehicle to avoid one accident, only to find that she had unfortunately collided with a Wheel-Trans vehicle in the westbound lane.

¶ 3 The first issue to decide in this case is whether the defendant was still in charge of her vehicle immediately preceding the collision. To make that assessment, it has to be determined what "in charge of a vehicle" ultimately encompasses. Does it mean the ability to control the vehicle's movements or does it mean just being in the driver's seat of the vehicle? If the defendant was no longer in charge of her vehicle immediately preceding the collision, then she may not fall under the auspices of s. 148(1), thereby absolving her of the charge that has been laid against her, but only if she had not been driving unlawfully, imprudently or unreasonably prior to the accident. That is the second issue to decide. However, if it is determined that the defendant was still in charge of her vehicle, then the third issue to decide is whether the defendant had a reasonable opportunity upon meeting the Wheel-Trans vehicle to turn out her vehicle to the right of the centre of the roadway before the collision. If there had been a reasonable amount of time or distance for the defendant to complete this required manoeuvre, then the prosecution will have proven its case.

¶ 4 The trial was held on February 11, 2002. The judgment of this court was reserved and adjourned to be given on April 10, 2002. These are my reasons for judgment.

2. FACTS

¶ 5 The defendant was charged for contravening s. 148(1) of the H.T.A. while travelling eastbound on Gerrard Street East west of Greenwood Avenue in Toronto on June 9, 2001 at 11:50 a.m.

¶ 6 Christakis Yinanakou was the driver of the cube van that the defendant states had driven in front of her without signalling. Before it had moved in front of the defendant, the cube van had been parked on the

southside of Gerrard Street East facing eastward. Yinanakou testified that he had put on the van's signal lights and had checked to see that the road was clear before he moved his vehicle into the eastbound lane on Gerrard Street East. He also testified that he heard a bumping noise beside him and that the defendant had either tried to pass him or had been speeding. He also stated the weather was perfect. His van had not been involved in the collision. He also identified the defendant as being the only person in the defendant's car.

¶ 7 Under cross-examination, Yinanakou testified that when he had initiated his signal light, the defendant was still 50 meters away and that is why he drove out from his parked location.

¶ 8 Margaretta McCleary drove the Wheel-Trans bus that had been westbound on Gerrard Street. McCleary testified that when she was travelling westward on Gerrard Street, she had observed the cube van driven by Yinanakou parked on Gerrard Street facing east and the defendant's vehicle travelling eastward on Gerrard Street. She then testified that when the cube van had pulled out in front of the defendant's vehicle, the defendant had to move over to avoid Yinanakou's van. She added that the defendant had moved over onto the Toronto Transit Commission streetcar tracks, and then came right over to McCleary's side of the road. McCleary stated that the driver of the van did not put on his signal indicator. McCleary stated she waited for the impact from the defendant's car, which had been travelling at about 15 to 20 kilometres per hour. She stated that she had not been surprised by the collision. McCleary also opined that driving on the streetcar tracks could cause a car to lose control.

¶ 9 When Officer Greenlaw arrived at the accident scene, she observed a cube van that had not sustained any damage. She also observed the defendant's black Plymouth that showed damage to the left front corner. She then noted that the Wheel-Trans bus had sustained a small dent and scuffing. Greenlaw also testified that the point of impact of the collision occurred at 58.5 meters west of the west curb line of Greenwood Avenue and 6.8 meters north of the south curb of Gerrard Street East. This point was just inside the westbound lane.

¶ 10 The defendant testified that she must have been in the blind spot of the Yinanakou vehicle. She stated that the driver of the vehicle that pulled out in front of her did not signal when it pulled out from the curb. To avoid colliding with the Yinanakou vehicle, the defendant testified that she had to swerve her vehicle, where it ended up on to the other side of the streetcar tracks and collided with the Wheel-Trans vehicle. She also indicated that her reaction of swerving her vehicle was a natural or instinctive reaction to the cube van unexpectedly pulling out in front of her. She further testified that she had no space left on either side of the cube van to drive towards.

3. ISSUES

¶ 11 Was the defendant still in charge of her vehicle immediately before the collision?

¶ 12 Had the defendant been driving lawfully, prudently and reasonably for the conditions and circumstances of that particular road before the accident?

¶ 13 If the defendant was still in charge of her vehicle immediately before the collision, did the defendant have a reasonable opportunity to turn out to the right when meeting the oncoming vehicle?

4. ANALYSIS OF FACTS AND LAW

Whether the defendant was "in charge of a vehicle"

¶ 14 Section 148(1) of the H.T.A. provides:

> 148(1) Every person in charge of a vehicle on a highway meeting another vehicle shall turn out to the right from the centre of the roadway, allowing the other vehicle one-half of the roadway free.

¶ 15 This section requires a person in charge of a vehicle on a highway to turn out to the right of the centre of that highway if it meets an oncoming vehicle and to allow that oncoming vehicle one-half of that roadway free to pass without damage. However, before the defendant is required to turn out to the right upon meeting another vehicle, she must first be "in charge of a vehicle" meeting that other vehicle. Ergo, in the broader sense, does "in charge of a vehicle" within the context of s. 148(1) mean that she has to have actual and complete control of the movements of her vehicle? Alternatively, if a narrow interpretation is appropriate, does it simply mean that the defendant was the person in the driver's seat of the offending vehicle? Logically, in order for a person to fulfil the requirement of turning out to the right, he or she has to have the ability to manoeuvre or control the vehicle's direction or movements. As such, when a person is forced to swerve his or her vehicle to avoid hitting another vehicle, there may be an instant or duration when that person actually loses control of the ability to guide or manoeuvre his or her vehicle out of harm's way. It follows therefore, that the person who lost control of his or her vehicle in that type of situation, would no longer be in charge of his or her vehicle, in the broader sense.

¶ 16 The phrase, in charge of a vehicle, although not specifically defined in the H.T.A., has been synonymously referred to or grouped with such terms as "in care of a vehicle", "in control of a vehicle" or "driving a vehicle', under some sections of that Act. The sections of the H.T.A. that use the phrase "in charge of a vehicle" synonymously with those terms can be found in ss. 41(b), 41(c), 48.3(1), 75(4), 167 or 220 of the H.T.A. However, "in charge of a vehicle" is also used alone in ss. 33, 55.1(9), 148, 166 and 199 of the H.T.A. Since this term is not clearly defined in the H.T.A., it's meaning has to be derived from or established by other sources.

¶ 17 The Concise Oxford Dictionary, 9th ed. 1995, Oxford University Press Inc., New York, defines the word "charge", when used as a noun, to mean "care, custody, or responsible possession". Also contained in the same part is a definition for the term, "in charge", that is expressed as "having command". Thus, from these definitions, having command or responsible possession of a vehicle is more than just being in the driver's seat. It follows then, that the phrase "in charge of a vehicle" is broad enough to include the ability to control the movements of a vehicle.

¶ 18 The Court of Appeal of Ontario considered the phrase "in charge of a motor vehicle" in R. v. Richards, [1999] O.J. No. 1420, as it had been used in s. 33 of the H.T.A. Section 33 refers to the obligation of a person in charge of a vehicle having the requisite license. Feldman J.A., writing for the court, held in paras. 16 and 17, that the term "in charge" must be wider than actual present physical custody and can include circumstances where the person has only recently and temporarily relinquished physical custody. It is clear that the court considered the physical sense of the phrase "in charge of a motor vehicle" from how the section was intended to be used in the context of regulating the activity of driving motor vehicles [emphasis is mine below]:

> In my view, whether or not a person is "in charge" of a motor vehicle is primarily a question of fact. In R. v. Toews (1985), 21 C.C.C. (3d) 24 (S.C.C.) at p. 29, McIntyre J. in considering the term "care or control" in [now] s. 254 of the Criminal Code referred with approval to the decision of Pottier Co. Ct. J. in R. v. Henley, [1963] 3 C.C.C. 360 (N.S. Co.

Ct.) at p. 366:

> The word "care" may also mean custody, charge, safe keeping, preservation, oversight or attention. Where it is used in this sense it becomes a relative term and is of broad comprehension. One has to look at the provision of its use and determine its physical sense from that standpoint.

The same may be said of the term "in charge". I agree with Crown counsel that as used in s. 33, the term must be wider than actual present physical custody and can include circumstances where the person has only recently and temporarily relinquished physical custody.

¶ 19 In a drinking and driving case, Greco J. of the Ontario Court of Justice in R. v. Miron, [2001] O.J. No. 1610 (O.C.J.) at paras. 23 and 24, wrote that a person entering a motor vehicle and then occupies the driver's seat, ordinarily intends to start up the vehicle and "drive it" [emphasis is mine below]:

> It is presumed that a person who occupies the seat ordinarily occupied by the driver has the care or control of the vehicle unless he establishes that he did not occupy that seat for the purpose of setting the vehicle in motion. ...

¶ 20 It is put that the reason the presumption of care or control makes sense in such circumstances, is that it is recognized that almost every time a person enters a motor vehicle and occupies the seat ordinarily occupied by the driver, he does so because he intends to start up the motor vehicle and drive it. The presumption is based on logical reasoning. It is based on well known, common experience.

¶ 21 As a result, I conclude that a "person in charge of a vehicle" for the purposes of s. 148(1) requires a meaning that encompasses the context and intention of that provision. This section conceives of a situation where two vehicles moving toward each other from opposite directions, obligates both drivers upon meeting each other to turn their respective vehicles to the right in order to provide safe passage for the other vehicle. Turning a vehicle requires control or the ability to steer, guide or manoeuvre the vehicle in a particular direction. Simply being in the driver's seat would not permit the driver to fulfil the requirement of turning out to the right unless he or she also had the ability to control or make the vehicle move in a particular direction. Therefore, "in charge of a vehicle" for the purpose of s. 148(1) means that person has to have the ability to control the movements of the vehicle or to drive the vehicle in a manner as intended or to manoeuvre the vehicle in a particular direction.

¶ 22 The evidence from Officer Greenlaw is that the point of impact occurred in the westbound lane for traffic. This point of impact indicates that the collision occurred in the north half of the Gerrard Street roadway and proves the prosecution contention that the defendant did not move to the right of the centre of the roadway, in order to leave half the roadway free for the westbound vehicle.

¶ 23 In her defence, the defendant argues that her vehicle being situated in the path of the westbound Wheel-Trans vehicle was through no fault of her own, but through the negligence of another driver. She contends that the cube van that pulled out in front of her without signalling, had forced her to swerve her vehicle to avoid a collision with that van. The driver of the Wheel-Trans vehicle, Margaretta McCleary, testified that the driver of the van did pull out in front of the defendant without signalling. McCleary also suggested that someone forced to drive on the streetcar tracks would have difficulty driving under control, and therefore, was not surprised by the accident that occurred.

¶ 24 Contrarily, the driver of the van testified that before he signalled and pulled out into eastbound traffic, he checked his mirror and saw that the defendant had been 50 meters from his position. This would place the defendant's vehicle about nine or ten car-lengths away, presuming the average vehicle measures about four or five meters in length. Both the defendant and McCleary, the driver of the Wheel-Trans vehicle, testified that the cube van failed to indicate or signal that it was moving from the curb into the traffic lane. Since the defendant had not been forewarned about the possibility of the cube van being moved into her immediate pathway, she would have had only a portion of that 50 meters to safely stop or slow down, in order to avoid colliding with the cube van.

¶ 25 Christakis Yinanakou, the driver of the cube van, suggested that the defendant might have been speeding. However, the evidence of both Yinanakou and McCleary, and the evidence of damage to the defendant's vehicle and the Wheel-Trans vehicle, are not consistent with Yinanakou's supposition. If the defendant had been driving at an excessive speed as was suggested, then Yinanakou could not have reasonably concluded that it was safe for him to pull out into traffic, especially if the defendant was only 50 meters away from his stationary position. In addition, McCleary testified that when the defendant collided into her, the defendant had only been travelling at a rate of about 15 to 20 kilometres per hour. Officer Greenlaw testified that the Wheel-Trans vehicle only sustained a small dent and scuffing. This is not evidence that shows the defendant had been travelling faster than the posted speed limit for that area.

¶ 26 Now, if the defendant had been driving at about 50 kilometres per hour and had less than the 50 meters of distance to stop, could she have stopped her vehicle in time? By doing some simple calculations, I estimate that someone travelling at 50 kilometres per hour (or 13.89 meters per second) would take 3.6 seconds to travel the full length of 50 meters. Since, the distance between the defendant and the cube van would logically and ultimately be less than the 50 meter distance described by Yinanakou when he first decided to pull out into the defendant's path, taking into account the defendant's reaction time and her realization that the cube van was directly in her path, then the time needed to stop before colliding with the cube van would be less than the possible 3.6 seconds or 50 meters available to stop, before meeting the moving cube van (assuming the defendant was travelling at 50 kilometres per hour). According to the stopping distance charts contained in the textbook, "Motor Vehicle Offences and the Summary Conviction Court", authored by L. Paul Shannon, at p. 301, I estimate that a passenger car travelling at 50 kilometres per hour or 30 miles per hour, would need 88 feet or 27 meters of distance to stop. Therefore, depending upon the moment the defendant reacted to the presence of the cube van, she may not have been able to stop her vehicle from colliding with the cube van unless she had swerved her vehicle.

¶ 27 Yinanakou also suggested that the defendant may have tried to pass his vehicle and that is why the accident occurred. However, the evidence does not support this. McCleary, who was driving the Wheel-Trans vehicle, stated that the defendant had to move her vehicle toward the streetcar tracks to avoid hitting the cube van. Therefore, I find there is no credible evidence that the defendant had been trying to pass the cube van by intentionally entering the westbound lane.

¶ 28 Therefore, on the basis of the Wheel-Trans driver's testimony, who had a view of both the cube van and the defendant's vehicle, and her belief that something was going to occur because of the cube van's unsafe manoeuvre, I find the defendant's evidence that she had to take evasive and sudden action to avoid an accident with the cube van, to be credible and reasonable. I also find that the defendant did not intend to be in nor did she deliberately drive into the westbound lane. As such, I conclude that the defendant was forced to unavoidably proceed or move into the westbound lane by the negligence or improper action of the driver of the cube van.

¶ 29 Although for a few seconds the defendant may have lost the ability to control her vehicle or keep her vehicle in her half of the roadway, because of her reaction and evasive manoeuvre just before the collision with the westbound Wheel-Trans vehicle, the evidence does not clearly indicate that she had lost the control or the ability to manoeuvre her vehicle before meeting the westbound vehicle. Therefore, I find that the defendant was still in charge of her vehicle immediately proceeding the collision. Nevertheless, if the defendant had lost control of her vehicle and the ability to guide its movements because of the actions of the cube van driver or from a road hazard that caused an unavoidable accident, then the defendant would not have been "in charge of a vehicle" and would be exonerated for violating s. 148(1) of the H.T.A., if the evidence also shows that she had been driving lawfully, prudently and reasonably immediately preceding the intervening action or road hazard.

Whether the defendant had been driving lawfully, prudently and reasonably prior to the occurrence of the accident

¶ 30 Factually, there may be situations where a person loses control or is not in charge of his or her motor vehicle because of a road hazard or other intervening cause. These exigencies would include icy roads, potholes, streetcar tracks, or the negligence of another driver or from mechanical failure. Even if the loss of control over the vehicle is caused by a road hazard or some other intervening cause, that person's culpability under s. 148(1) may not be excused, if his or her driving activity prior to the emergency or road hazard contributes to the loss of control.

¶ 31 The requirement of examining the propriety of a person's driving immediately prior to the appearance of the road hazard or other intervening cause is necessary in order to prevent him or her from escaping liability under s. 148(1), especially if that person's driving had been negligent or unlawful and contributes to the cause of the accident.

¶ 32 In the defendant's case, she had not lost control and was still in charge of her vehicle immediately preceding the accident. Although her vehicle had been physically in the westbound lane, she had not intended for it to be there nor did she deliberately drive into that lane. She had been forced by the negligent action of the cube van driver to be there.

¶ 33 In this part of the analysis, I am required to consider whether the defendant had violated any sections of the H.T.A., or that she had been driving imprudently or unreasonably for the conditions or circumstances of the road prior to the intervention of the cube van. Fortunately for the defendant, the evidence did in fact show that she had been driving prudently and reasonably on Gerrard Street East until the cube van pulled out unexpectedly and negligently into her path. To reiterate, the observations and evidence of Margaretta McCleary are objective and credible, and supports the defendant's contentions that the negligent and improper action of the cube van pulling out, had forced the defendant to take evasive action, which led to the defendant's vehicle being in the path of westbound traffic.

¶ 34 Prior to the appearance of the cube van, I also find the defendant had been driving lawfully according to the rules of the road. There is no credible evidence, for example, that she had been travelling at an excessive speed, that she had been driving with undue care and attention, that she had been following at an unsafe distance, that she had failed to wear eyeglasses as required, that she had been using her cellular telephone, or that she had not been travelling within the proper lanes, prior to the appearance of the cube van. Driving unlawfully, for the purposes of deciding whether the defendant's actions contributed to the breach of s. 148(1), would not include instances where a person is driving without insurance or with an expired driver's license. Specifically in this case, the evidence does not indicate that the defendant's vehicle

had been travelling faster than the posted speed limit or that she had been driving without undue care or attention.

¶ 35 As a consequence, if someone had been travelling at a high rate of speed and exceeded the speed limit, and then lost control of his or her vehicle because of a road hazard or emergency, that driver would have contributed to the loss of control over the vehicle, or in other words, negated the possibility of avoiding the road hazard or emergency. Therefore, in order for someone to claim the defence of loss of control or to claim that he or she had not been in charge of vehicle meeting another vehicle, that driver must not be engaged in any unlawful or imprudent driving activity prior to the emergency or appearance of a road hazard.

Whether the defendant had an reasonable opportunity to move her vehicle to the right when meeting the oncoming vehicle

¶ 36 Although McCleary, the driver of the Wheel-Trans vehicle, opined that a person driving a vehicle onto the streetcar tracks could lose control of the vehicle, there is no evidence that the defendant's vehicle had lost manoeuvrability because of the streetcar tracks. However, the defendant contends that she could not avoid colliding with the westbound vehicle after making her emergency manoeuvre. Since I had determined earlier that the defendant still had control of her vehicle immediately before the accident, I must now consider whether she had an reasonable opportunity to move her vehicle to the right of the centre of the roadway upon meeting the westbound Wheel-Trans vehicle and leave half the roadway free. That is, did the defendant have a reasonable opportunity to move her vehicle back to her half of the roadway before the collision with the westbound vehicle?

¶ 37 In determining whether the defendant had a reasonable opportunity to fulfil her obligation to move her vehicle to the right of the centre of the roadway, I considered the following appellate decisions in: Allen v. Lord, [1928] 4 D.L.R. 62 (Ont. Supreme Crt. (Appellate Div.)), Coke and Luker v. Smith, [1952] 1 D.L.R. 285 (Alta. Supreme Crt. (Appellate Div.)), Gauthier Co. v. Canada, [1945] S.C.R. 143 (S.C.C.), R. v. Kearney, [1993] B.C.J. No. 575 (B.C.C.A.), McPhee v. Lalonde, [1946] O.J. No. 86 (Ont. Supreme Crt. (H.C.J.)), and Primeau v. Renaud, [1978] O.J. No. 682 (Ont. Supreme Crt. (H.C.J.)),

¶ 38 In Allen v Lord, Mulock, C.J.O. for the Ontario Court of Appeal, held that highways are not divided into right or wrong sides and that drivers must act reasonably in regard to the rights of others, depending on the circumstances, when travelling on any part of the highway:

> Highways are not, by law, divided into right and wrong sides. Subject always to legislation regulating the user of highways, one is entitled to travel along any part of a highway, provided that in the exercise of such right he has due regard for the rights of others. In other words, he must act reasonably. What is reasonable depends upon all the attendant circumstances. If one acts unreasonably and thereby injures another, he is guilty of negligence.

¶ 39 In Coke and Luker v. Smith, the Alberta Court of Appeal discussed the legal position of drivers when passing one another from opposite directions. It held at pp. 289-290 that each driver is entitled to rely on the other driver performing his duty as proscribed by the statute that governs driving on highways:

> In the course of his remarks, Kellock J., who gave the reasons for the majority of the Court, at pp. 53-4 D.L.R., pp. 149.50 S.C.R., sets out the legal position of drivers of motor vehicles when passing one another on a highway in opposite directions:

> The driver of a vehicle meeting another vehicle on a highway is entitled to rely on the performance by the approaching vehicle of the duty cast upon it by the statute referred to [that is, s. 39(7) of the Highway Traffic Act, R.S.O. 1937, c. 288, which is similar to the corresponding section of the Alberta Act already quoted], and is in its turn bound by a similar duty. A breach of this duty occasioning damage will establish a prima facie case of negligence on the part of the driver of the offending vehicle, casting upon the latter the onus of explanation.

¶ 40 The Supreme Court of Canada in Gauthier Co. v. Canada, considered the duty of drivers of vehicles meeting on a highway and held that the one that breaches his statutory duty or common law duty to drive appropriately that results in an accident will have negligence inferred upon him or her [emphasis is mine below]:

> The driver of a vehicle meeting another vehicle on a highway is entitled to rely on the performance by the approaching vehicle of the duty cast upon it by the statute referred to, and is in his turn bound by a similar duty. A breach of this duty occasioning damage will establish a prima facie case of negligence on the part of the driver of the offending vehicle, casting upon the latter the onus of explanation. I shall return later to the nature of this onus. Apart from the existence of the duty imposed by statute, there would appear to be a similar duty at common law. Chaplin v. Hawes [(1828) 3 C. & P. 554]; Beven, 4th Edition, 138, 139 and 686; Gibb, "Collisions on Land", 4th Edition, 118. The mere fact of an accident taking place on a highway may not give rise to any inference of negligence on the part of the operator of either vehicle concerned, but whether or not in any particular case that will be so, is dependant upon the circumstances. Halliwell v. Venables [(1930) 99 L.J., K.B. 353]; McGowan v. Stott [(1923) 99 L.J., K.B. 357]; Ellor v. Selfridge [(1930) 46 T.L.R. 236]. Apart from the statute applicable in the case at bar, I am of opinion that the principle of the cases just referred to applies in the present instance, the carrier being, in the words of Lord Greene in Laurie v. Raglan Building Co. Ltd. [[1941] 3 All E.R. 332, [1942] 1 K.B. 152], "in a position where it has [had] no right to be" at the time it met the appellant's ambulance. This fact resulting in the damage to the appellant's vehicle, amounts prima facie to negligence on the part of the operator of the carrier. Counsel for the respondent at the trial would appear to have acted upon the view which I have above expressed, as evidence was called in defence. In my opinion, he was right in so doing.
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> ...
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> Turning to the evidence adduced in defence, it was established that the presence of the carrier on the south side of the road at the time of the collision was due to a skid, the rear end of the carrier going around to the driver's left, taking the whole vehicle across the road so that, at the time it was run into by the ambulance on its left side, it was across the south half of the highway. Skidding of a vehicle on a highway by itself is a "neutral fact", equally consistent with negligence or no negligence.

¶ 41 The British Columbia Court of Appeal in R. v. Kearney, considered the situation where an accused's truck had suddenly swerved across the centre solid line colliding head-on with another vehicle. The truck had been certified mechanically sound. The trial judge found that there was no evidence to establish

inadvertence on the part of the accused and dismissed the charge of careless driving. The Court of Appeal however agreed with the summary conviction appeal judge's finding that overturned the trial judge, that once it was established that the accused's truck crossed the solid line of the highway, it would be evidence of driving without due care and attention and a prima facie case would have been established. At para. 7 the Court of Appeal referred to the ruling made by Hogarth J., the summary conviction appeal judge. Hogarth J. had held that:

> Once it was found that the respondent passed over the centre line of the highway there was a marked deviation from what you would expect of a reasonable and prudent driver under the circumstances, and that was evidence of driving without due care and attention. Once it was found that the respondent passed over the centre line of the highway there was a marked deviation from what you would expect of a reasonable and prudent driver under the circumstances, and that was evidence of driving without due care and attention.

¶ 42 In the absence of some explanation consistent with some other cause, inconsistent with driving without due care and attention, a prima facie case had been made out and the accused was guilty of the offence.

¶ 43 In McPhee v. Lalonde, the Ontario High Court had to determine whether the defendant driver involved in an accident had a reasonable amount of time or distance to avoid the accident. LeBel J. for the court found at paras. 11-13 that it could not be fairly and reasonably inferred from the evidence that the defendant could have avoided the accident or that he had enough time to avoid it:

> In finding that Dr. Lalonde had at least 200 feet to make up his mind to pull to the right kerb and stop, the jury by their answers imply that he could have done so and thus avoided the accident. But if he had sufficient time to actually decide what to do in the emergency which confronted him, which I doubt he must be taken to have decided to keep to a straight course until the very last moment. In my opinion an unfortunate driver caught in the position in which Dr. Lalonde found himself, does not relish, the thought of being crashed into headlong even though his car might be standing still at the moment of impact. It might seem natural for such a person to decide that by keeping his vehicle in motion he might by some manoeuvre avoid a collision, and also to conclude that if the driver of the oncoming car had failed to see the headlights of his car while it was in motion, such driver could hardly be expected to catch sight of them if they were stationary.
> But the two vehicles were each moving at twenty miles per hour or a little better when, according to the jury, they were 200 feet apart. That means that they were approaching each other at the rate of at least 60 feet per second. Even if some allowance is made for a little greater speed than 20 miles per hour on the part of the plaintiffs car and for a slight slackening in speed on the part of the defendant's car, there was accorded the defendant an interval of but about three seconds at most to bring his car to a stop. If one allowed him but a fraction of a second to react to the dander and to get his brakes into operation, it seems clear that he could not have brought his car to a stop in time to avoid the collision. In my opinion the jury's finding that Dr. Lalonde could have stopped and thus avoided the collision is not supported by the evidence.
> In concluding that the defendant was wrong in turning to his left, the jury's quarrel is again with the exercise of Dr. Lalonde's judgment. The length of time he had to make a decision, being but about three seconds on the only evidence before the jury, I am of the opinion there were no facts from which it might fairly and reasonably be inferred that Dr. Lalonde

> did wrong in the sense which creates legal liability in the light of the authorities from which I have quoted, It is true that if the defendant had not turned left there would have been no accident, but the crux of the situation seems to clearly lie in the presence of the plaintiffs car on the wrong side of the road and on the failure of the plaintiff's driver to observe the defendant's car until the last moment. Dr. Lalonde could not then foresee that the plaintiffs car would suddenly veer to its right and he was justified in making the move he did in an effort to avoid a collision. If he were not so justified then he must be excused because he was then in the agony of collision, or in the very short interval of time which precedes it.

¶ 44 In Primeau v. Renaud, Henry J. for the Ontario High Court held at para. 11 that in an emergency, a standard of perfection is not required in avoiding an accident. In the particular facts of that case, Henry J. found that there was not enough time for the defendant, when confronted with an emergency, to avoid the collision with another vehicle [emphasis is mine below]:

> The question then, is whether Mr. Primeau negligently failed to avoid the accident when he saw that it was imminent. He had not, as I have found, by any negligent conduct on his part, rendered himself unable to do so. He was driving prudently on his own side of the road, and was entitled to assume that the Menard vehicle would leave the southbound lane free. On all the evidence I find that he was suddenly confronted with the Menard vehicle crossing the centre line and moving into his path. Instead of turning aside to avoid the collision he applied his brakes. In the circumstances I cannot find that he was negligent in so doing. In such an emergency a standard of perfection cannot be required. Indeed I am unable to find that evasive action on his part once he was confronted with the situation, would have avoided the collision. I am not satisfied that there was time to do so.

¶ 45 From these appellate decisions, it is clear that a person driving on a highway must act reasonably in regards to other drivers, and is also entitled to expect that other drivers will perform their duties as proscribed by provincial motor vehicle legislation regulating driving on highways. There is a presumption that a person is negligent if he or she is in breach of a proscribed duty that results in an accident. One of these particular duties is to share half the roadway with oncoming vehicles. If a vehicle crosses the centre of the road into oncoming traffic, there is a rebuttable presumption that the driver crossing the centre line was driving with undue care and attention. The offending driver however is allowed to show that there was another cause of the accident that is inconsistent with driving with undue care and attention. Consideration is also given to whether there had been a reasonable amount of time or distance to avoid an accident. In addition, a standard of perfection is not required of someone who attempts to avoid an accident.

¶ 46 In the present case, the defendant contends that once she made her emergency manoeuvre to avoid colliding with the cube van, she had no other place to move her vehicle. She testified there was no room for her vehicle to move out of the way of the Wheel-Trans vehicle because of the location of the cube van beside or near her vehicle. McCleary testified that the collision between her and the defendant was unavoidable, and that McCleary just waited for the collision. There is no evidence that the defendant had enough distance between her vehicle and the McCleary vehicle, or that there was enough time for the defendant to turn out to the right to avoid the McCleary vehicle. Therefore, neither McCleary nor the defendant had a reasonable distance of separation or time to move out of each other's way.

5. CONCLUSION

¶ 47 To begin, the offence contained in s. 148(1) of the H.T.A. is not one of absolute liability, but one of

strict liability. As such, the defendant in this case can exonerate herself by showing due diligence or that she had exercised reasonable care in avoiding committing the offence.

¶ 48 Section 148(1) contains a three-stage analysis. It has to be first determined whether the defendant had been in charge of a vehicle, secondly whether the defendant had been driving lawfully, prudently and reasonably prior to the accident, and thirdly whether there had been a reasonable opportunity for the defendant to turn out to the right upon meeting the westbound Wheel-Trans vehicle.

¶ 49 From the context and the purpose of s. 148(1) in regulating the driving of vehicles on highways, "in charge of a vehicle' requires more than just proving the defendant was in the driver's seat of her vehicle. Since the ability to turn out a vehicle to the right requires the ability to manoeuvre or steer the vehicle, the driver of that vehicle must have the ability to control or guide the movements of that vehicle as a precursor. Hence, "in charge of a vehicle" in a broad sense, means the ability to manoeuvre or control a vehicle's movements.

¶ 50 If a person loses the ability to control his or her vehicle because of the actions of a negligent driver or from a road hazard, then he or she would not have been "in charge of a vehicle" and would be exonerated for violating s. 148(1), if the evidence also shows that he or she had been driving lawfully, prudently and reasonably, immediately preceding the road hazard or other intervening cause.

¶ 51 In the present case, I found the testimony of the driver of the Wheel-Trans vehicle who had a view of both the defendant and the cube van to be objective and credible, and supports the defendant's contention that the cube van caused the defendant to swerve and unavoidably collide with the Wheel-Trans vehicle. The cube van had pulled out in front of the defendant's path improperly and unsafely. This was the proximate cause of the accident that occurred subsequently between the defendant and the westbound vehicle. The defendant did not intend to be in nor did she deliberately drive into the westbound lane. As such, I find the defendant was forced to proceed or move into the westbound lane as a result of the negligence or improper action of the cube van's driver.

¶ 52 Just before the collision with the westbound Wheel-Trans vehicle, the evidence is not clear whether the defendant had actually lost control of the ability to manoeuvre her vehicle before meeting the westbound vehicle. Therefore, I find that the defendant was still in charge of her vehicle immediately proceeding the collision.

¶ 53 There may be situations where a person has lost control or is not in charge of his or her motor vehicle because of road hazards such as icy roads, potholes, or streetcar tracks, or the negligence of another driver or mechanical failure, but still not be excused from violating s. 148(1) because of his or her actions prior to the emergency or road hazard. As long as the driver of the vehicle had been driving lawfully, that is not driving excessively fast or imprudently for the particular road conditions at the time of the accident, and driving with the necessary care and attention, then the negligent action of another driver, or the intervening action of another vehicle causing an emergency, or some other road hazard leading or causing the unavoidable accident would exonerate the driver.

¶ 54 I do not find in this case that the defendant had been driving without reasonable care or imprudently for the particular conditions or circumstances of the road that she was on before the accident. I also find it was not unreasonable for the defendant to swerve her vehicle to avoid colliding with the cube van. The defendant had also been driving prudently and lawfully according to the rules of the road, that is, she had not been travelling at an excessive speed, she had been driving with care and attention, she had been following at

a safe distance, she had not contravened any conditions associated with driving such as the need to wear eyeglasses, she had not been using her cellular telephone, and she had been travelling within the proper lanes, prior to the appearance of the cube van. Driving unlawfully, for the purposes of deciding whether the defendant's actions contributed to the breach of s. 148(1), would not include instances where a person is driving without insurance or with an expired driver's license.

¶ 55 Moreover, if someone had been travelling at a high rate of speed and exceeded the speed limit, and then lost control of his or her vehicle because of a road hazard or emergency, that driver would have contributed to the loss of control or negated the possibility of avoiding the road hazard or emergency safely. Therefore, in order to claim the loss of control or claim not to be in charge of vehicle meeting another vehicle, that driver must not have been engaged in prior unlawful or imprudent conduct.

¶ 56 It is clear that a person driving on a highway must act reasonably in regards to other drivers and is entitled to expect that other drivers will also perform their duties as proscribed by provincial motor vehicle legislation that regulates driving on highways. There is a presumption that a person is negligent if he or she is in breach of a proscribed duty that results in an accident. One of these particular duties is to share half the roadway with oncoming vehicles. If a vehicle crosses the centre of the road into oncoming traffic, there is a rebuttable presumption that the driver crossing the centre line was driving with undue care and attention. The offending driver however is allowed to show that there was another cause of the accident that is inconsistent with driving with undue care and attention. Consideration is also given to whether there had been a reasonable amount of time or distance to avoid an accident and that a standard of perfection is not required of someone trying to avoid an accident.

¶ 57 After the defendant made her emergency manoeuvre to avoid colliding with the cube van, she had no other place to move her vehicle. There was no room for her vehicle to move out of the way of the Wheel-Trans vehicle because of the location of the cube van beside or near her vehicle. Neither the driver of the Wheel-Trans vehicle nor the defendant had a reasonable separation of distance or time to move out of each other's way. Therefore, the defendant did not have a reasonable opportunity to turn out her vehicle to the right to allow half the roadway free for the Wheel-Trans vehicle.

¶ 58 In conclusion, the defendant still had control of her vehicle after her evasive manoeuvre to avoid the cube van. Prior to the emergency manoeuvre, the defendant was neither driving with excessive speed nor with undue care or attention. The cube van's intervention had caused the defendant to transgress into the westbound lane. However, there was not enough distance or time between the defendant's vehicle and the Wheel-Trans vehicle for the defendant to move her vehicle to the right and back into her half of the roadway before colliding with the Wheel-Trans vehicle. The accident was unavoidable and not the fault of the defendant.

6. DISPOSITION

¶ 59 Therefore, based upon the findings of this court, the charge against the defendant Tina Blier, of failing to share half roadway when meeting another vehicle under s. 148(1) of the Highway Traffic Act, R.S.O. 1990, c. H-8, is dismissed.

QUON J.P.

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