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# R. v. Desrosiers

Between
Her Majesty the Queen, and
Yoland Desrosiers

[1998] O.J. No. 6185

**Ontario Court of Justice (Provincial Division)**
**Haileybury, Ontario**
**Sinai J.P.**

Heard: December 1, 1997, May 28 and November 3, 1998.
Oral judgment: November 3, 1998.
(61 paras.)

*Charges: Sec. 130 Highway Traffic Act - Careless Driving — Sec. 148(1) Highway Traffic Act - Fail to Share Roadway*

**Counsel:**

John Benson, for the Crown.
Peter Doucet, for the accused.

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¶ 1 **SINAI J.P.** (orally):— Mr. Yoland Desrosiers of Englehart has been charged with careless driving, contrary to Section 130 of the Ontario Highway Traffic Act, and also with Section 148(1) of the Ontario Highway Traffic Act. To these two charges the defendant pleaded not guilty.

¶ 2 The charge of careless driving, Section 130 states that, "Every person is guilty of the offence of driving carelessly who drives a vehicle or street car on a highway without due care and attention or without reasonable consideration for other persons using the highway."

¶ 3 Section 148(1) deals with the passing of meeting vehicles. "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 the roadway free."

¶ 4 On both of the charges we know that the defendant is first the driver on the careless driving charge, and the person in charge of the vehicle on the Section 148(1) charge. We know that on both charges he is on a highway, as defined in the Highway Traffic Act. The highway includes a common or public highway or any part intended for the use of the general public for the passage of vehicles. We know that it was in a motor vehicle, as defined in the Highway Traffic Act. A motor vehicle, any vehicle includes an automobile or in this instance a truck or logging truck is also a motor vehicle.

¶ 5 Highway 560 is in Tyrrell township, Northeast region of the Province of Ontario. There is no dispute as to the date being the 19th day of December, 1995.

¶ 6 First, we'll deal with the charge of careless driving. Was the defendant, Mr. Desrosiers, driving in a careless manner? It is a requirement and an obligation that the defendant operates a vehicle in a manner of reasonable consideration and there was due care and attention, not only for himself, but for other interested lawful abiding users of the highway, who may be affected as a result of his driving in a matter not appropriate, as indicated in the section. The act of careless driving must be proven beyond a reasonable doubt. The burden is on the prosecution. Momentary inattention or a simple error of judgment is not in itself a manner of careless driving. The offence is committed by the absence of thought, care or attention. There is no defence of mens rea. The only requirement is that the prohibited act or absent from the normal care was committed. A defence of careless driving, as given by the defendant, must prove that the act of careless driving was done without negligence of fault by his part. The standard of driving is a considerably shifting one that depends on the driver, his condition, his driving skills, the road, the visibility, traffic conditions, speed, weather conditions, and other conditions that may and could exist, or may be reasonably expected.

¶ 7 Also on occasion, it's relevant to consider the conditions of the vehicle, the ages and the size of the unit, the braking capacity, the windshield wipers, et cetera, if they are relevant, depending on weather and conditions.

¶ 8 It is an obligation on the part of the prosecutor to produce sufficient evidence of pertinent facts so that the court is able to assess the conduct of the defendant against the standard of what is reasonably prudent, what a prudent driver would have done or would not have done in the given situation.

¶ 9 Due care is what you give to other persons using the highway with you or in other vehicles when using the highway. A driver of ordinary care would have done care only to the circumstances action of an average careful person. He has to take into consideration all of the variables, what he would be expected to do or not do in like circumstances. Careless driving is the departure of the standard of care due in these circumstances.

¶ 10 The allegation in this situation of the prosecution is that the defendant, when driving in this accident, was in an accident with a sanding truck. This occurred when the defendant crossed over the centre line or the defendant's vehicle crossed over the centre line of the roadway and collided with the sanding truck that was being operated on the south side of the roadway. It is alleged that the sanding truck was on its proper side, in its own side of the centre line. The defendant was westbound and the sanding truck was eastbound.

¶ 11 And then the court heard from the first witness of the prosecution, Mr. Roger Wilfred Roy, who is a truck driver, owner and operator. He was operating his own truck on this highway, number 560, loaded with tree length logs and travelling east towards Englehart. He was on this roadway having left the Chapleau area at 5:00 a.m. We know that he saw the driving of the defendant's vehicle. He knew the conditions of the road. Sometimes he stayed on the road and "sometimes you have to drive in the middle of the road", he told the court. But at the same time, we know that cars and trucks are able to meet and pass each other, otherwise it would be a disastrous highway if the vehicles were not driven properly. We also know that on this road there's a lot of meeting and passing of vehicles, and logging trucks.

¶ 12 He had a trailer, 48 feet long, loaded, and probably the tree lengths were extended out of the back a few feet. Because of the load and the pulling of the trailer, we do know that the driver driving on this road requires a lot of good driving skills, also consideration for others using the road, a proper attitude, caution, adaptation for road conditions, weather and driving conditions. This is a Northern Ontario highway driving

at the maximum experience.

¶ 13 We also know that to assist in the day to day operation of trucking, and working to all, and to the protection and safety as an added bonus, radios and C.B.'s are installed for personal needs. It's to help in the overall dependability of driving, survival, depending on the conditions and the variables that are associated with being in a vehicle driving and working on highway number 560.

¶ 14 We know that this highway is not all paved, not always marked with paint on the centre line or on the edges. On this day we know the road was snow covered and icy.

¶ 15 We also are told that Mr. Roy came up behind the sanding truck that was also proceeding east, travelling at a speed of maybe ten miles per hour, to 15 miles per hour, putting sand on the road. On a narrow portion of the road in the area of Duncan Lake, he tells us that he found that travelling loaded, he attained speeds of 60 - 70 to 80 kilometres per hour. The road is an 80 kilometre highway. We were told that when he got to the sander, he was travelling at 25 to 30 kilometres per hour. He also tells us that the sander was in the middle of the road, straddling the two lanes, which confirms the speed of the sander at 25 to 30 kilometres per hour.

¶ 16 He also tells us that to pass, the sander had moved to his lane and signalled Mr. Roy to pass. Prior to that, as indicated, he told the court that the sander was in the middle of the road.

¶ 17 Mr. Roy travelled another three or four miles when he saw the defendant's vehicle. We know the defendant was travelling at a speed of approximately 60 to 70 kilometres per hour on an 80 kilometre road. At the time he was empty, there was no logs on his trailer travelling down a hill. We know that the trucks have a variable of speed going down hill and uphill. There is sometimes a difference of speeds, substantially depending on the road conditions. Mr. Roy tells us as he was going uphill, that he told the defendant by his radio that the sanding truck was on the road and he had just passed it. After he passed the defendant's vehicle, he travelled only a mile or two east when he heard the request for help.

¶ 18 We do know that we are able to calculate at this time, taking into consideration times and miles that Mr. Roy travelled, and at the speed he was travelling, that in all likelihood not too much had changed with the road conditions after he had passed over them. The speed of Mr. Roy's vehicle, the speed of the sander and the travelling speed of the defendant indicated that in all likelihood with the lapsed time that the road conditions had not changed from the ice snow covered.

¶ 19 We know that speed in itself is not an indication of careless driving. It should be brought into the calculation of variables toward driving with undue care and attention, and knowing the approximate speed and the exact distance travelled, the time element. We know that the travelled distance to the communication to Mr. Roy that the speed was in all likelihood under the posted speed limit. And also that the speed limit of the two trucks, Mr. Roy and the defendant, was travelling at was reasonable and safe for each driver's particular conditions that day.

¶ 20 We know that speed has been brought into the calculation of careless driving. The charge of careless driving has to be relevant just prior, a factor that was uncontrollable or caused the uncontrolled situation. Speed well before has no relevance, a person could be travelling at a very high rate of speed for hours, slowed down well before the speed limit and was then involved in an accident. If he was travelling within the required speed limit, a few minutes speed is not a relevant factor, as long as he is abiding by all of the rules of the road when the accident occurred.

¶ 21 We are told that the truckers have safety on their minds when working. We are told that these are the reasons that they install radios in their vehicles. To maximize the safety elements, you have to talk and listen to people. We know that both drivers tried to communicate with the driver of the sander and for what reason, we will never know, they were unable to do so, either because of choice or mechanical problems. We do not know if the driver of the sander decided to drive without his radio, or his radio off, or decided not to use it for communication purposes that day. It would have been in all likelihood helpful in the investigation of this accident, to find out if the radio in the sander was in operation, or it could have been operated or was turned off.

¶ 22 We then heard from the prosecution's witness, Constable Boyle, who was part of the investigation team at the scene. He is a member of the Ontario Provincial Police working out of the Elk Lake detachment. He was made aware of the accident at approximately 8:30 a.m., the morning of the accident of December 19, 1995. He tells us the weather was clear and cold, maybe 20 below and windy. He describes highway 560 as the pavement goes from pavement to gravel. The road as it is has hills and curves, it narrows and it widens. He indicated it was 60 kilometres to the accident scene from Elk Lake. We were told that the road was not in very good condition icy all the way throughout his lane of travel westbound. He did not have any difficulty maintaining the cruiser on the surface of the roadway or in the appropriate lane of travel. He arrived at the accident scene at approximately 9:15 a.m. When there, he found a sanding truck broken in three pieces on various parts of the highway, and he found an empty logging truck in the north ditch facing westbound.

¶ 23 We were then giving the statement of Mr. Desrosiers, the only eye witness able to describe how, in his words, the accident occurred. He states, "I was westbound on highway number 560 going to West Tree to get a log of logs. Around a curve in the highway I saw Hawk putting sand on the yellow line. He was coming towards me. I pulled my truck to the right and touched the brakes to slow down. I felt the trailer start to move and looked out my mirror and saw my trailer start to slide out. I know an accident was going to happen, but I couldn't do anything about it. After we hit, my truck ended up in the north ditch and I think I was doing about 70 kilometres per hour around the "S" curve."

¶ 24 The officer was requested by the court to explain to the court how the accident happened and where it occurred relevant to the roadway. The statement given to the court ... the statement of the defendant is not clear as to where the accident occurred. We know that putting sand on the yellow line could indicate a number of variables as to where the eastbound vehicle was on the roadway.

¶ 25 We're only able to get one measurement from the officer, 56 metres. The distance is from some point on the roadway to a guide post. He tells the court he picked up the measurement just to the right side of the centre line. I looked at that and said, "Right side going east or right side going west? I do not know." That remark has not helped immediately, but then he gives an opinion that it was as the vehicle probably started to slide. Then in question, he was asked at that point where the two tire tracks commenced and he said, "crossing over the centre line of the highway." We now know that the westbound vehicle prior to the mark is travelling on the north side of the east line westbound.

¶ 26 In photograph one and two you cannot see the yellow line. In photograph two it is a little faint, but the officer does agree that you can see it if you are certainly looking for it. And then in photograph number one, when asked as to the clarification of the line he said, "I believe". An hesitation that is right in there and once again you can only barely see the yellow line. And then the officer agrees that it's not clear at all. The officer points out to the court traces of the yellow line. The officer informs the court that he is unable to determine the point of impact. It appeared to him, but not determined or accurate, to be near the centre line

of the road. The officer was unable to say that within the definition, and certainly as indicated on the police report, as to where it occurred. He also indicated to the court it was determined that most of the debris was in the westbound lane of travel. The officer was specific that where the collision occurred, he could not determine.

¶ 27 The officer then states, "I was of the belief from what he did, that the collision took place at the centre line or in the eastbound lane very close to the centre line." This is a description that is not accurate or proven. There was a statement that he said without certainty that the accident did not occur in the westbound lane of travel. But now we have no way of determining where the accident occurred, there is no area of impact, no point of impact.

¶ 28 We have exhibit number 28 with a number of measurements, but these measurements were never given to the court, they were never explained as to the measurements of the highway, measurements of the roadway. The measurements just show that the line that was snow covered and hardly visible was in the centre of the roadway. It was never clarified to the court, but it was entered as an exhibit. There is no indication that the lanes were clearly marked and that the defendant did not travel in the marked lane of travel.

¶ 29 We are later condition of the defendant's vehicle was good, as were the tires. This was determined visually, but was not a problem to the investigating officer.

¶ 30 We then heard from Constable David Allin who arrived at the accident scene at 10:30 a.m. He took photographs showing the sanding pattern that runs basically down the centre of the roadway to the accident. He tells us that the yellow line would indicate the centre of the road. And we do know that the only way to determine the centre of the road is to measure it. In the photographs the officer guesses that the line is a solid single line and will admit that the photographs are not very clear, and the line is not clear because of the road conditions being snow covered.

¶ 31 We then get a description of exhibit number 15, the tread marks that were likely coming from the at the overall mechanical rear of the sanding truck. The officer failed to observe at the scene a tread pattern, tire marks leading to the scene of the collision, where they were on the roadway, that is where they were the left, the right, side tires of the sanding truck, where they were in reference of the centre of the road, with or without the visibility of the centre line or the travelled portion, or centre of the portion of the roadway.

¶ 32 We are advised in exhibit number 17 that because there is very little damage to the right side of the sanding unit, that we are provided with an opinion as a result of his observation and understanding that the collision happened to the left front corner of the sander.

¶ 33 This part of the testimony does not give any facts towards the charge of careless driving or to fail to share the roadway. We do not have the general area of impact. And we do not have anything as to where it happened in reference to the roadway, the centre line, or the travelled portion of the roadway. In exhibit 18, we get an opinion and approximate measurements as to the distance and damage to the trailer.

¶ 34 In exhibit 20, we are given testimony consistent with the trailer having come into contact with something else, other than the sanding truck. He's asked if there is an indication of contact between the trailer and the guide posts also to the south side of the roadway. The court is told of some blue paint observed on metal, and then the marking the picket at the end of the post. Then we are given an opinion and remark as to how damage to a mud flap occurred and to the reason the paint was where it was. We have no

forensics as to the match and identification of the paint. It is the officer's belief that the paint was similar because it was blue paint, but he cannot tell the court it's a match of paint.

¶ 35 He then on exhibit 21 gives an opinion and remark from an observation made after the fact, that concludes that the trailer would be across the road completely. We are then told of the damage to the trailer. We do not have any communicated measurements for the support of the damage, or no communicated measurements of the distance to the guide rail post, to the roadway, or to the centre line, to the area of impact to the ditches, to the shoulders, or to the travelled portion, or the start of the curve.

¶ 36 In photograph number four, the officer is not positive that he took the photograph. He tells the court he believes it is what he took. When asked as to the distance east, he indicates it's not very far, but he didn't give any exact measurements. Again we are faced without an accurate explanation to a question. There was no definition as to "'not very far". There is a lot of variables as to that in anyone's mind.

¶ 37 In exhibit 26, he tells of a close up photograph. Again, in everyone's mind what is a definite close up could be a variable. The officer was not able to say exactly which part of and where in the roadway shows the centre line or if it is, because it is only partly visible.

¶ 38 Asked as to the visibility of the yellow line, he indicated it's accurately depicted to best of his knowledge.

¶ 39 We are told that the officer has taken two pages of measurements. The court was never given these measurements as to where, to what, or where was measured, or why they were measured. There are some measurements on exhibit number 28 and, we believe, this is the prepared diagram not to scale, hand drawn and the diagram shows the approximate with the vehicles, very similar likeness to the accident scene. He tells the court he always make a diagram without measurements and then photocopies and transfers some, not all, of the similar measurements to another diagram for the investigating officers to be able to understand. It is apparent that the officer knew the measurements and he knew what he had and what he had given to the officer, but we were never favoured with the explanation. Of what we were able to understand, it would have been extremely helpful if he would have given his diagram measurements to the court for accuracy and with an explanation of where it was, where to where, and what to what.

¶ 40 In cross-examination, the officer informs the court that he does not know if the accident scene was contaminated before he got there to do his investigation.

¶ 41 Then the officer is questioned as to the sand on the roadway, and he tells the court that the majority of the sand is near the centre, some spread to the north, very little or no sand to the south side at all. We do not know if this is the centre line, or the centre of the roadway, or the travelled portion. We are told that the distributed sand is more to the north from the centre than to the south.

¶ 42 We are told again that the tires of the defendant's vehicle had good tread, that he was not driving a vehicle that could be classed as not safe. The officer did not make a detailed inspection of the vehicle, but he made a visual one. He didn't notice anything that was mechanically unfit or clearly wrong with the defendant's vehicle.

¶ 43 The officer agrees that the tractor trailer unit took the north ditch prior to the collision, because there was no damage to the defendant's tractor unit.

¶ 44 We know that the defendant did take some action to avoid and the trailer was still across the lane at the time of impact, because there was a collision. We do not know if it was on the east or west lane of travel. We also do not know if the trailer did or did not follow the tractor into the north ditch.

¶ 45 The officer goes into weight transfer. Why he did not go all the way and explain it all in detail as to the variables and speed of the trailer sliding or braking, we do not know. There is an indication that there was a possibility of a weight transfer, but it was never explained to the court.

¶ 46 The officer was asked if the tractor unit was driven into the north ditch before the accident occurred, and he agrees and tells that the trailer may have gone over a lot of debris. But obviously the tire marks in the snow bank on the north side, show that at least the trailer went into the north around the general area of the point of impact.

¶ 47 We then heard from Mr. Mancuso from Aliston Equipment, who is employed with the manufacturing firm building, as he indicates, salters for the Ministry of Transport. He calls them hopper salters. He tells us it's a form of body that sits on the frame of a truck loaded with salt, computerized or manual system of spreader, the purpose of deicing the road. He tells the court he did not examine the sander or the accident scene after the accident. He only saw the photographs.

¶ 48 We note that the expertise of this witness is in the manufacturing of salters. And then the court has now changed the definition to sanders. We do know that the unit was sanding and that salting, or did it have a mix, we do not know. The officer did not examine if there was mix in the truck, but we know there was some sand.

¶ 49 He is of the opinion that the sander will work if everything is in proper order, and it will not work if it is blocked. He did indicate that this sander was equipped with an electronic system. He did not examine the unit, and does not know if it was altered or if it did not have a manual system. We are told that this sander has a single spinner. The material which is being carried will come out only on the left hand side right at the front of the rear axle wheels. We are told you can moderate the spinner speed, there is an inside dial, but that if you have ice conditions and the road is all ice, the spinner will not be activated otherwise the salt will roll into the ditch and will not stay on the road. Here he kept mixing up his expertise of salt and sand. We do know that the spinner runs clockwise and it's on the left side and the material is then distributed directly under the wheels. By looking at the photographs, he gives an opinion as to the pattern and the roadway and the centre line. But since the unit was never examined he doesn't know if it was modified or working properly. Then he thinks the pattern is affected because of speed and he cannot tell the exact speed of the sanding unit. Then the witness is confused with salt and sand. He can't see salt on ice. And he's indicated that the surface of the road affects the pattern and it also depends on the salt, or the wet or dry sand. Then he explains the special chute for the override, the pour out pattern, and indicates that it could plug up. He indicates it was made for sand, but then he clarifies that he is familiar with it being for salt.

¶ 50 Then we heard from the defendant, Mr. Desrosiers, the only witness to the accident that occurred on the morning of December 19th, 1995. The driver of the westbound vehicle on highway 560. We find he is a French speaking gentleman, who can express freely in English, but without precision. A man 33 years of age in the trucking business all his life. His father was a trucker before him. He was driving a 1994 Western Star, his own. He was driving a logging truck from West Tree to Elk Lake. He drives 12 to 15 hours a day, five days a week, 40 weeks a year.

¶ 51 The night before he had a good sleep. He went to bed between the hours of ten and 10:30. He was

up around six and left around 6:30. He had a safe truck to drive. He knew it was a two hour drive to where he was going to pick up his load. He describes the highway as a road that has gravel and cold mix, sometime one lane, sometime two lane. He describes the accident scene as a two lane, cold mix, but can pass if the approaching vehicle stays on his own side of the road of travel. He was travelling at 60 to 70 kilometres per hour. He indicates that the road was pure ice on his side with was no salt or sand.

¶ 52 He knew of the sander on the road, Mr. Roy told him. The truckers communicate on the radio system to let others who can hear them know where they are. As indicated, he told them it was to let them know of their positions. He indicated that he spoke on his radio at Duncan Lake, that's where he was told of the sander. He was informed that the sander was close to stopped, or was stopped on the road. And from there he tried to contact the operator of the sander by c.b. radio. He tried two times.

¶ 53 Where the accident occurred, the snow bank to the guard rail posts is 16 to 20 feet. He indicates that the road is wide enough to pass if both vehicles are on their own lane of travel. When he arrived at the beginning of the curve, he noticed the sand truck that was in full middle of the road. "I was entering the curve. He was entering the curve. He wasn't moving at all, he was staying exactly where he was", referring to the sanding truck. "I advanced more and the sanding truck moved." He didn't, in his opinion, move at all. "And I turned towards the ditch and I hit the brakes. There was enough of his vehicle onto my lane that I figured the only way to actually get by him was to either go through the ditch or into the ditch." When he turned into the ditch and braked, the trailer started to swing. He tried to get it straight by, as he indicated, hitting the fuel which he tried to bring the trailer back into his lane, and then he drove the truck unit into the north ditch. He indicates that the trailer hit the sander between the first and second air lifts. The reason he braked was to avoid the accident.

¶ 54 When he was in the ditch, the trailer wheels locked up. He indicated that if the trailer had not locked up, the trailer would have followed the tractor into the ditch and he would have been able to go by. And all this time the sander stayed in the middle of the road.

¶ 55 He tells the court that before the police arrived, there were other truckers and people in pick ups on the road. He told the officer that he saw the sander in the middle of the road putting sand on the yellow line. He indicated that there would have been room to pass if the sander was on his own lane. He indicated that his trailer and tractor was always in his own lane and that his vehicle was under control before the accident and before seeing the sander.

¶ 56 The cause of his loss of control was the braking, trying to stop, because he was faced with a truck, as he indicated, in full middle of the road. The defendant tells the court that he couldn't see the yellow line, it was snow covered. The yellow line is in the middle of the road and that's where the truck was. The photographs that were given in court, there's a variable as to what the defendant saw, because of the lighting, because of the time, because of contamination. There was time lapse which would affect the lighting, the visibility. How many hours after were the photographs taken? We do not know. We know that the defendant is French speaking and he indicated "applying sand to the yellow line", when he couldn't see the yellow line. The yellow line is in the middle of the road and that's where the truck was. He told the officer that he was applying sand on the yellow line in the full middle of the road. We would guess that the yellow line to him is in the middle of the road. And then we also know that by proper measurement, the yellow line is sometimes in the middle of the road.

¶ 57 We are told that by announcing your location it's not an idea of going faster or quicker down a highway, it's to let others know that there is somebody coming on the highway or where they are, or for

others coming towards you. A person doesn't use the radio to make it to his advantage to make his trip faster. He indicates to the court that you can't work that way. The reason for the radio is for the safety purposes.

¶ 58 Mr. Desrosiers' memory was that the sanding truck was coming the other way, that it was right in the middle of the road and both sets of wheels were on either side of the yellow line and the yellow line is going straight down the middle with the sander square in the middle of the road. The sander never moved from that position. The only reason the brakes were put on was because he saw Mr. Clement in the middle of the road.

¶ 59 The court has not established beyond a doubt that the defendant was driving carelessly. The defendant was faced with a situation. What would a reasonable and prudent man in this situation have done? He would have done exactly as the defendant, hit the brakes. He was put into an emergency situation, faced with an unexpected situation, it was never anticipated. Prior to the occurrence, he was driving with care and attention.

¶ 60 The area of impact was not determined. Measurements of the roadway and the travel point in the centre line of the roadway were never given to the court. Therefore, the court was unable to determine if the defendant failed to share the roadway. Therefore on charges one and two, careless driving and fail to share the roadway, we find the defendant not guilty.

¶ 61 This court is adjourned.

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