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R. v. Foucault

Between
Her Majesty the Queen, and
Kimberley Foucault

[1994] O.J. No. 3267
DRS 95-13099

Ontario Courtof Justice(Provincial Division)
Offences Court- Kitchener, Ontario
Mills Prov. J.

Oral judgment: December 14, 1994.
(8 pp.)

Motor vehicles — Regulation of vehicles and traffic — Careless driving — What constitutes — Evidence and proof.

The accused was charged with careless driving. While driving his vehicle at an excessive speed, the rear of the accused's vehicle went over the centre line in his lane of travel. On observing the accused's driving, the complainant, who was travelling in the opposite direction, took evasive action by taking his foot off the accelerator and pulling to the right side of the roadway. Seeing the accused's vehicle go back over to the right of the roadway in her lane of travel, the complainant felt that the situation was under control. The accused's vehicle came over once again into the complainant's lane of travel violently and a collision occurred. The accused admitted that the accident occurred in the complainant's lane of travel.

HELD: The accused was guilty. While speed alone was not sufficient for there to be a conviction for careless driving, the Crown had established that the accused's excessive speed, coupled with her negligent driving, was the cause of the accident which occurred.

Statutes, Regulations and Rules Cited:

Highway Traffic Act, ss. 130, 148(1).

Counsel:

M. Murdoch, for the Crown.
T.C. Flannery, for the defendant.

¶ 1 **MILLS PROV. J.** (orally):— Careless driving is, of course, an offence of strict liability, as delineated in the Sault Ste. Marie case. The burden of proof rests with the Crown as in criminal offences. The leading case, with respect to careless, to which neither Crown counsel nor defense counsel referred, is Regina versus McIver which clearly enunciates the Crown need only prove the accused committed the prohibited act and the accused will be convicted unless she can show there was not negligence on her part.

¶ 2 I have reviewed all of the evidence carefully and will not go into great detail to summarise same. The facts are established as follows: On the date of the incident the weather was clear and sunny, the roads dry. The Heinbach vehicle is travelling in an easterly direction on Regional Road 52 approaching a curve, the Foucault

vehicle travelling in a westerly direction. The speed limit or advisory limit at this curve is 70 kilometers per hour. The driver and occupants of the Heinbach vehicle observe the Foucault vehicle some distance away. All of these witnesses testified the vehicle was, in their opinion, speeding and that the rear of the Foucault vehicle was over the centre line in their lane of travel. Mr. Heinbach takes evasive action by taking his foot off the accelerator and going to the right side of the roadway. This is corroborated by Mr. Scaffer, who told the Court Jeff motioned to the right. Mr. Heinbach felt, upon seeing the Foucault vehicle go back over to the right of the roadway in her lane of travel, that the situation was under control. He then, however, observes the Foucault vehicle come over once again into his lane of travel, violently, and impact occurs.

¶ 3 Clearly, the impact occurred in the eastbound lane or on the south side of the road. The defendant concurs that the accident did occur in Mr. Heinbach's lane of travel and that she was, in fact, out of control. She alleges that she had observed the Heinbach vehicle cross the centre lane very slightly, prior to the accident, and reacted to this manoeuver.

¶ 4 I must reject this evidence. All Crown witnesses were clear that Mr. Heinbach was clearly in the centre of his lane of travel. Even Mr. LeBlanc noticed nothing out of the ordinary as it related to the Honda. Further, even if the Honda had been as slightly over the centre line as the defendant states, had she been driving the posted speed limit, and I am satisfied by the evidence she was well in excess of that, she would have been able to keep the vehicle in full control. Mr. House, the mechanic who examined both vehicles involved, found no compelling mechanical reason that would affect the vehicle's control.

¶ 5 I must also reject the proposition that Miss Foucault put forth that she lost control as a result of going into the gravel portion of the roadway. Constable Driedger ascertained that the gravel had not been disturbed, nor did he find evidence of gravel on the paved portion of the roadway, as there well should have been had this been the case. Also, Miss Foucault's evidence certainly did not rebut that of the prosecution witnesses on the issue of her speed. She estimated she was travelling 81 or 82 kilometers, but earlier advised she did not look at her speedometer, therefore could not have known her speed.

¶ 6 Speed alone is not sufficient for there to be a conviction for careless driving. However, I am satisfied that there was excessive speed, and that Miss Foucault's actions and reactions were not those of a reasonable and prudent driver. Accordingly, there will be a conviction for the offence of careless driving.

¶ 7 MR. FLANNERY: Thank you Your Worship.

¶ 8 **THE COURT**: And with respect to the other charge, does the Crown have any comments on the Section 148 matter?

¶ 9 MR. MURDOCH: Yes, ma'am, thank you. Could that matter be marked as conditionally stayed pursuant to Kienapple?

¶ 10 **THE COURT**: That is exactly what I was going to do with that. So ordered as stayed.

¶ 11 MR. MURDOCH: I don't think it can be lost on Your Worship that there are a number of very interested parties here, and clearly, I was just handed a package of material which I am told amount to victim impact statements. What I am asking is that we not proceed to deal with sentencing today. The consequences are such, and the volume of materials that I may want to present to Court as such that I would ask the Court to fix another date for sentencing.

¶ 12 **THE COURT**: All right. That could be problematic and that is why I had come back with my decision today.

¶ 13 MR. MURDOCH: I understand that Your Worship. I am certainly prepared, and I daresay that I think that most of the interested parties would be prepared to travel, as need be, to Cambridge or has indicated to attend for sentencing on that date.

¶ 14 **THE COURT**: Unfortunately, Cambridge is not in the picture either. It is either Hamilton or Brantford.

¶ 15 MR. MURDOCH: I beg your pardon. I think for some reason I was assuming Cambridge ma'am. The fact of the matter is, I won't purport to speak for my friend and the accused, but the family - I didn't introduce the family of the deceased in this matter, Warren Lavery. Warren's mother and father are sitting just to my right, as Your Honour looks out of the Court. They are certainly prepared to travel as need be. I am in the Court's hands. For that matter, if the schedule was such that scheduling couldn't take place until the middle or later part of January, while that is unfortunate with the holiday season, et cetera, that also may not be avoidable, and it will give me an opportunity to deal with the victim impact information and presented, perhaps in advance to both my friend and the Court, and also to consider if there is any applicable case law that should be brought out.

¶ 16 **THE COURT**: And I assume we are going to have to come up with a date for that because, despite the fact that I do not have my January schedule as to where I will be, but we can set a date and then we will go from there. Let us set upon a date that is agreeable to both then and it should be sometime in January. Counsel, would it be a problem for you to attend in Brantford?

¶ 17 MR. FLANNERY: I could either attend or arrange for an agent to attend and speak to sentence.

¶ 18 **THE COURT**: All right. I believe I am there on the 29th of this month. Let us just take a couple of minutes now.

¶ 19 MR. MURDOCH: It occurs to me, as we are talking here, that my suggestion about something out of the jurisdiction may have been hasty and this is a Kitchener case and should probably be done here.

¶ 20 **THE COURT**: Yes.

¶ 21 MR. MURDOCH: I realise I am backtracking, but ....

¶ 22 **THE COURT**: How much time are you going to require to review the victim impact statements?

¶ 23 MR. MURDOCH: I anticipate I have got perhaps 50 or 60 pages of what appears to be generally typed materials of, no, I am sorry it may not be all typed, but there is a great deal here. I mean I think clearly I need into the new year with other commitments between now and then that ....

¶ 24 **THE COURT**: Let us take two minutes because I know I am scheduled here one day next month and I will just go and check that out as to when that is.

¶ 25 CLERK OF THE COURT: All rise. Court will recess until recalled.

RECESS (4:36 p.m.)

UPON RESUMING (4:38 p.m.)

¶ 26 **THE COURT**: January the 10th, Mr. Murdoch, that is a Tuesday.

¶ 27 MR. MURDOCH: I am quite certain I have a district Court matter that day involving a young man who was extremely badly injured. In fact, I have a neurosurgeon testifying that day as my witness.

¶ 28 **THE COURT**: I do not know what else to suggest. That is the only day that I know that I am scheduled to be here in Kitchener in the entire month of January.

¶ 29 MR. MURDOCH: I wonder if, this being a provincial offences matter, I wonder if we might simply adjourn it to a date, perhaps Friday of this week. The accused can be represented by an agent, of course, and perhaps by then both or all of Your Worship's schedule, Mr. Flannery's, and mine can be considered and an appropriate date can be selected.

¶ 30 **THE COURT**: All right, does that sound reasonable?

¶ 31 MR. FLANNERY: That's fine. That's agreeable.

¶ 32 **THE COURT**: So that would be the 16th of December, is that agreeable?

¶ 33 MR. FLANNERY: Yes, Friday the 16th.

¶ 34 **THE COURT**: And I assume at 3:00 p.m. in Number Eight Court upstairs to set a date for sentencing?

¶ 35 MR. MURDOCH: I was sort of contemplating 10:30 a.m. but I am in Your Worship's hands.

¶ 36 **THE COURT**: All right, 10:30 a.m. is fine as well. Is that good for you Mr. Flannery?

¶ 37 MR. FLANNERY: That's fine.

¶ 38 **THE COURT**: All right, 10:30 a.m. on December 16th to set a date for sentencing. Madam Clerk, if you could endorse the information in a similar way, the 16th December, 1994 at 10:30 a.m. in Number Eight Court to set a date for sentencing.

¶ 39 MR. FLANNERY: Your Worship, I just wanted to be clear. I know in the past when we have appeared as Miss Foucault's agent, just to simply set dates, the Crown has indicated they didn't find that particularly to their liking. I just want to make sure on the record that it is not necessary that she attend on Friday, but rather it is just to set a date, but she will be there for the sentencing, and is that correct?

¶ 40 **THE COURT**: That should be fine. Thank you. That completes the ....

¶ 41 MR. MURDOCH: I believe it does, ma'am. Thank you.

¶ 42 CLERK OF THE COURT: All rise. Court is now adjourned.

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