** Unedited **

Indexed as:

R. v. May

Between
Her Majesty the Queen, Informant, and
Anthony May, Accused

[1990] M.J. No. 667
DRS 91-03157

Also reported at:
2 C.R. (4th) 393
29 M.V.R. (2d) 312

Manitoba Provincial Court
Criminal Division
Giesbrecht Prov. Ct. J.

December 17, 1990

Criminal law — Dangerous driving causing death — Driver falling asleep — No advance warning — Elements of offence — Mens rea.

Trial on charge of dangerous driving causing death. In the course of his employment, the accused was driving his truck in the middle of the afternoon. Without warning he fell asleep and caused an accident which killed three persons in another car. Prior to the accident he was driving at a normal speed and in a normal manner and showed no sign of fatigue. There was expert evidence that a person could fall asleep without prior awareness that he was going to fall asleep and that the driver could inadvertently fall asleep.

HELD: Acquittal entered. Crown had to prove beyond a doubt that the accused had the necessary mens rea. Evidence of falling asleep by itself was not sufficient to convict a person of dangerous driving, no matter how tragic the accident.

Matthew Britton, for the Crown.
Jake Jazen, for the Defence.

GIESBRECHT PROV. CT. J.:— On a pleasant summer afternoon last year, George Tudruk, Stephen Young and Wesley Grant Wilson were heading west on highway no. 1 when an east bound semi-trailer truck crossed over the dividing line, hitting the pickup truck head on, and killing the three men. The driver of the semi, Anthony May, had fallen asleep at the wheel. May stands charged with dangerous driving causing

death.

Anthony May was in the employ of Borland Construction on August 21, 1989. His job consisted of hauling road material to work sites in a Borland truck. The day of the accident was a normal working day in all respects. Borland Construction had a contract with the town of Deloraine. Asphalt was being hauled from the company's pit west of Brandon to Deloraine. Anthony May was one of the drivers assigned that task that day.

The normal working day began between 5 and 6 a.m. May would have been on the road to Deloraine with a load of asphalt at some time around 6 a.m. on August 21st, although the exact time is not known.

Joseph Johnson was in charge of Borland trucks at that time. Mr. Johnson estimated that the return trip to and from Deloraine, including loading and unloading time was approximately three hours. That did not include waiting time, when the drivers would have to wait to load or unload. Mr. Johnson testified that on August 21st Anthony May had completed his second round trip when the accident occurred.

Another Borland driver, Shane Stogran testified that he was assigned the identical task as May on August 21st. May was following Stogran at a safe distance from Deloraine, and the two drivers were driving to their fuelling up point just west of Brandon when the accident took place.

Stogran testified that the day was not unusual in any way. Normally the drivers were on duty for 14 to 15 hours on working days in the summer, although the number of hours varied depending on weather conditions, and in particular depending on rain. Much of the drivers' time was spent waiting in their trucks. Sometimes the drivers would assist road crews while they were waiting, but their union contract, as noted by Joseph Johnson, did not require them to do that. But according to Stogran the work day was normal. The weather was good. Visibility was excellent, and from the photographs tendered as Exhibit No. 1 it is clear that the highway was exceptionally straight and flat, at the accident point. Traffic was moderately heavy, but not exceptionally so for that portion of highway no. 1. (It is accepted as normal in our age for vehicles to hurtle towards one another at speeds of 100 kmh separated by a painted line.) In summary, the evidence advanced by the Crown showed August 21st, 1989, to be a normal working day for Anthony May. Although he would have been into his 10th hour of work when the accident occurred, the normal road construction working day is 14 to 15 hours, so there was nothing unusual about the number of hours he had worked prior to the accident or the demands that were placed on him. August 21st was a work day for Anthony May like any other.

There was no evidence of excessive speed or erratic driving by May prior to the accident. Mr. Stogran testified that May had been following him from Deloraine, driving at a normal highway speed, and in a normal manner prior to the accident. Stogran estimated his speed at 55 to 60 mph. According to Stogran, May was not gaining on him, and appeared to be staying about the same distance behind him at all times. In short, until the accident took place the evidence is that Mr. May was driving at a normal speed and in a normal manner.

Similarly, there was no evidence that May showed any signs of fatigue prior to the accident. He did not pull over to the side of the road to rest. He did not tell anyone that he was tired. Until the accident took place, he did not do anything that would indicate fatigue. The accident did not take place late at night, or in the very early morning hours. It took place at approximately 3:30 p.m. That was well into the working day, but not near the end. The time of the accident is not unusual in any way.

There was no evidence that Mr. May had consumed alcohol. In fact there is evidence that he had not consumed alcohol prior to the accident. The investigating officer, Constable Bardal, did not detect symptoms

of alcohol when he spoke to May at the accident scene, but as part of his investigation he specifically requested Constable Cynthia Conway of the RCMP to go to the hospital where May had been taken and investigate for signs of alcohol use. Constable Conway did that. She had Mr. May blow into her face four times, and Constable Conway could detect no hint of alcohol. In her opinion grounds did not exist for use of the ALERT, as there was no suspicion of alcohol consumption.

The Crown did advance very strong grounds for believing that Anthony May fell asleep immediately prior to the accident, and that his falling asleep caused the accident. Anthony May admitted as much to Constable Bardal, Joseph Johnson, and Herman Van Den Ham, a driver who stopped at the accident scene to offer assistance. But the Crown's case concerning mens rea consists exclusively of that evidence of falling asleep. Anthony May fell asleep at the wheel on August 21, 1989, and caused the death of three people. The question for this court to determine is whether or not he is guilty of dangerous driving causing death.

The Crown must prove beyond a reasonable doubt that Anthony May had the necessary mens rea in order to obtain conviction. Proof of inadvertence is not enough - there must be some element of advertence. (R. v. Prince (1970) 11 CRNS 193 (Man. C.A.)). Is falling asleep that necessary advertence?

A recent "falling asleep" case is R. v. Verma (1980) 28 A.R. 233 (QB). In Verma it was held that falling asleep by itself is not sufficient to sustain a conviction for dangerous driving. Purvis, J. states at p. 240 paragraph 33 "It is my view that, in order to sustain a conviction for dangerous driving in the circumstances described in the evidence of the case before me, it is necessary to find in that evidence some indication of actual or constructive warning of the fatigue experienced by the driver." Verma was acquitted, as no such evidence was found. In the case before this court, there is no evidence that Anthony May knew, or should have known of his fatigue before he actually fell asleep at the wheel.

The Crown contends that the Court is entitled to draw an inference from the fact that Anthony May fell asleep at the wheel - the inference being that Anthony May must have known sometime before actually falling asleep that he was becoming tired. This would provide the necessary indication of actual or constructive warning of fatigue necessary to sustain a conviction. In support, the Crown relies on R. v. Zavitz (1972) 1 OR 628 (C.A.) and R. v. Longhurst (1940) 75 CCC 356 (Ont. CC).

There are significant factual differences between Zavitz and this case. Zavitz was awakened by his father at 5:20 a.m. and informed that he had been called to work by his employer. He hastily ate a breakfast and got into his car to go to work. The accident occurred at 6:00 a.m. Zavitz had fallen asleep and crashed into an oncoming vehicle. When questioned by the investigating police officer at 8:30 a.m. Zavitz said "That he was on his way to work and was tired". (p.631) Zavitz later tried to qualify that statement, but the statement was admitted into evidence. At p. 632 Schroeder, J.A. stated:

> "The learned trial judge concluded upon consideration of all of the evidence that the appellant was knowingly driving when he was tired, and that such conduct constituted advertent negligence on his part. He expressed the opinion that having regard to the distance between the point when the first untoward veering of the appellant's vehicle was observed and the point of impact, this was not a case of mere momentary inattention on the appellant's part".

No such conclusion can be drawn in this case. The accident did not take place in the early morning hours. Mr. May was not roused from his bed unexpectedly at an early hour. Mr. May gave no statement to the police, or to anyone else for that matter, indicating that he knew he was tired some time before actually

falling asleep. So the facts in Zavitz are markedly different from the facts in the present case.

Nevertheless the case is important. It is a decision of the Ontario Court of Appeal, and if it says that evidence of falling asleep by itself is all that is required to establish the necessary mens rea it would have to be regarded as very persuasive to this case. But I do not think that the Court of Appeal goes that far in Zavitz. Schroeder J. states at p. 634:

> "The facts adduced by the Crown made out a clear prima facie case against the appellant which he endeavoured to meet by evidence that he had fallen asleep while operating his motor car. As I view it, not only does such evidence fail to establish an absence of fault on his part, but, on the contrary, and viewed in its proper light, it is rather confirmatory of the strong prima facie case presented by the Crown".

The prima facie case adduced by the Crown in Zavitz included a statement by Zavitz that he was tired on the morning of the accident, that is before he actually fell asleep he knew that he was tired, and obviously should have stopped driving. The Crown's case in Zavitz also included the other indicia of fatigue noted above. The Crown's case against Anthony May does not include such evidence. It consists solely of the evidence of falling asleep. So I do not think that Zavitz goes as far as is suggested by the Crown. I can find no reference to Zavitz in Verma.

But Longhurst does stand for the proposition that failing asleep by itself is sufficient to establish dangerous driving mens rea. In Longhurst the evidence was remarkably similar to the evidence in this case. Longhurst testified that he suddenly went to sleep while driving. No other evidence indicating actual or constructive warning of fatigue was tendered. McFaddin, Co. Ct. J. concluded that falling asleep by itself is enough to sustain a conviction for dangerous driving. He states at p. 359:

> Longhurst admits that he suddenly fell asleep. There was no medical evidence or in fact any evidence or expert opinion submitted to me that a man will unconsciously go to sleep. It is not like a faint, a heart attack, or a fit where a person loses consciousness almost instantaneously. I cannot conceive that a man will go to sleep in an instant. Drowsiness certainly precedes sleep, and Longhurst must have known that he was sleepy. It is a long drive from Leamington to St. Thomas, some 94 miles. These men had been up all night and sleep would come naturally. A careful driver should have anticipated he was likely to go to sleep and should have taken precautions against doing so. He could have turned off the highway into a gateway or lane and gone to sleep as did his passengers in the rear seat, or he could have stopped the car, got out, walked around and got rid of his drowsiness. There are several things he could have done. He could have stopped at a filling station along the highway and slept there in safety".

McFaddin Co. Ct .J. goes on to quote Donovan J. in Lajimodiere v. Pritchard and Duff (1938) 1 D.L.R. 781 as follows:

> "Sleep does not fall suddenly on a person without preliminary drowsiness. The driver's persistence in driving while in a sleepy condition was negligence and the cause of the accident".
> Longhurst is also not considered in Verma.

In Konowalchuk v. Korpasho, (1954) 14 WWR 385 (QB) a civil case, Manitoba's legendary jurist, E.K.

Williams C.J.Q.B. found Longhurst to be bad law. He states at p. 394:

> "Nor have I overlooked the decision of McFadden, C.C.J. in Rex v. Longhurst (1949) 75 CCC 356 (Ont.) where he held that a driver who falls asleep at the wheel of a car in motion owing to his great fatigue as a result of which his car goes into a ditch is guilty of driving recklessly or in a manner dangerous to the public within the meaning of sec. 285(6) of the Criminal Code, RSC, 1927, ch. 36, as it read in 1940 [1938, ch. 44, sec. 16]. With great respect I think this case was not well decided and that the decision was influenced by a misreading of the judgment of Donovan, J. in Lajimodiere v. Pritchard and Duff, supra. I should say, too, that I prefer the reasoning of Sidney Smith, J.A., dissenting, to that of the majority of the court in Girling v. Howden.

The Court of Appeal overturned Williams C.J.Q.B. (Konowalchuk v. Korpasho (1955) 15 WRR 661 (Man.C.A.)), but not on this point. It should also be noted that the Konowalchuk case is a civil and not a criminal case. The words of Williams C.J.Q.B. are obiter dictum. But the opinion about the Longhurst, case is expressed very clearly, and it is expressed by Williams C.J.Q.B. It must therefore be regarded as very persuasive authority in Manitoba for the proposition that evidence of falling asleep by itself is not enough to prove dangerous driving mens rea.

There exists, then, conflicting case law in situations where the Crown has only evidence of the driver falling asleep at the wheel. Verma and Longhurst are diametrically opposed.

Another recent decision on point, actually decided after most of the May case was completed is R. v. Mason vol. No. X issue No. 27, p. 3 B.C. Recent Decisions, a decision of the British Columbia Court of Appeal. In that case a driver fell asleep and crossed the centre line, colliding head on with another vehicle. However, in the Mason case there was evidence that the driving occurred late at night, the driver was in an exhausted state, and the driver had a blood alcohol reading of 50 mg. So the Mason case does not resolve the Verma - Longhurst dilemma.

The Crown Attorney in this case also submits that the fact that Anthony May was a professional truck driver, operating a heavy vehicle, also distinguishes the present case from Verma, for example, which involved an ordinary automobile. The submission is an interesting one, and rather compelling, but the Crown offers no case law in support of the submission that a professional truck driver should be convicted in circumstances where a car driver might not be so convicted. The Crown is also unable to point to any statutory recognition of the difference between the two types of drivers for the purpose of dangerous driving. That submission must be dismissed.

The tragic consequences of this accident are not relevant when deciding whether or not the accused is guilty of dangerous driving. The three men who died were truly in the wrong place at the wrong time. If they had arrived only a moment earlier or later there may have been no accident, or someone else may have been the victim of Mr. May's driving. So Fate intervened in a deadly way that afternoon. But Mr. May's culpability would be the same if the victims were different, or if there were no victims at all. His driving was either dangerous driving or not dangerous driving depending, not on the results of the accident, but on whether or not the mens rea necessary for the commission of the offence of dangerous driving has been established by the Crown.

Dr. David Koulack was called by the defence as an expert witness to deal with two points. The first is this:

Is it possible to fall asleep in the middle of the day without prior awareness?

Is it possible to fall asleep in the middle of the day without prior awareness?
The second point has to do with the accuracy of perceptual reports on awakening.

Dr. Koulack is a professor in the Department of Psychology at the University of Manitoba, and has been in that position since 1977. He has been associated with the University of Manitoba since 1968. Dr. Koulack's Curriculum Vitae, filed as exhibit 1 for the defence, describes an impressive publication record, and academic history. I accepted Dr. Koulack's credentials without hesitation, and found him to be an expert.

In Dr. Koulack's opinion, it is possible for a person driving a vehicle in mid-afternoon to fall asleep without prior awareness that he was going to fall asleep. There are two periods of vulnerability, according to Dr. Koulack. One is in the early morning, and one between two and five o'clock in the afternoon. People are vulnerable to sleepiness at that time, and actually at risk of falling asleep. People between eighteen and twenty-nine years of age may fall asleep more rapidly than older people.

But Dr. Koulack did not say that a person was likely to fall asleep without first feeling sleepy. Dr. Koulack testified that a person could fall asleep without prior awareness that he was going to fall asleep. He explained that the more of a sleep deficit a person has, the more that person is likely to fall asleep during these windows of vulnerability. The more boring or monotonous a job, the more likely again that person is to fall asleep. Disturbances of sleep can build up a sleep deficit. A person may not be aware that he is suffering sleep disturbances, and so may not realize that he is at risk of falling asleep. It is a universal experience that we all feel sleepy at times, and we ride out these periods of sleepiness without falling asleep. Therefore, it follows that simply feeling sleepy would not be a warning that we are actually going to fall asleep.

Dr. Koulack acknowledged that if a person had in fact fallen asleep at the wheel on a prior occasion, that of course would signal to the person in future situations where he felt sleepy at the wheel, that he should immediately stop driving. But a person who normally experiences sleepiness, and has always been able to continue driving without falling asleep would not expect that sleep would actually descend on him while he was driving.

Under questioning by the Crown, Dr. Koulack acknowledged that a person who felt wide awake would not suddenly fall asleep, unless that person suffered from narcolepsy. A person not suffering from such a sleep disorder would have a feeling of sleepiness for a period of time before falling asleep. But again, the doctor's main point was that the person experiencing the feeling of sleepiness might not realize that he was at risk of falling asleep. In plain terms, a driver under certain circumstances could inadvertently slip into sleep. The circumstances giving rise to this condition could well have existed in the case of Anthony May.

At the very least, none of the conditions that would normally alert a driver to the possibility that he would be overcome by sleep if he continued driving, such as driving for long periods of time, driving late at night or in the early morning hours, or driving after consuming alcohol, were shown to have existed in the May case.

On the second point, Dr. Koulack gave his opinion that a person immediately upon awakening after a short period of sleep was not as good at performing tasks, perceiving events, making judgments, and reporting on events as he would have been had he not fallen asleep. Again, a universal experience is awakening in a strange place, and being disoriented. The Crown took no issue with Dr. Koulack's evidence on the second point.

In general, the evidence given by Dr. Koulack tends to support the criticism of Longhurst expressed by Williams CJQB.

It is my opinion from an analysis of the relevant case law, in conjunction with the evidence tendered of Dr. Koulack, that evidence of falling asleep by itself is not sufficient to convict a person of dangerous driving, no matter how tragic the accident. If there had been some evidence that Anthony May knew or should have known that he was in danger of nodding off, and he did nothing about it, or that through the use of alcohol, or by working for an unreasonable period of time, he had placed himself in a situation where fatigue was very likely to occur, the result may have been different. But in this case there is no evidence of any of those things. Anthony May is acquitted.

GIESBRECHT PROV. CT. J.

DRS/DRS