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R. v. MacKinnon

Between
Her Majesty the Queen, and
Lloyd William MacKinnon

[1998] N.S.J. No. 404
DRS 98-18512
No. 792737

Nova Scotia Provincial Court
Ingonish, Nova Scotia
Ross Prov. Ct. J.

Heard: September 4, 1998.
Judgment: September 15, 1998.
(6 pp.)

Motor vehicles — Offences — Evidence and proof — Standard of proof — Careless driving.

Trial of a motor vehicle offence. MacKinnon was travelling northbound in his truck at night when he crossed the centre line to avoid a vehicle parked on the right side of the road. Two pedestrians were walking along the left shoulder of the road. MacKinnon's vehicle struck one of the pedestrians. He was charged with careless driving.

HELD: Accused acquitted. The evidence did not prove beyond a reasonable doubt that MacKinnon had driven in a careless manner. The opportunity to see the pedestrians would have spanned only a few seconds. The fact that he had driven through an area lit by a street light into a dark area may have affected his perception.

Statutes, Regulations and Rules Cited:

Motor Vehicle Act, s. 100(2).

Counsel:

Andre Arseneau, for the prosecution.
Vince Gillis, for the defence.

¶ 1 **ROSS PROV. CT. J.**:— At approximately 8:00 p.m. on February 16, 1998, Jennifer Fraser and her friend Kerry MacKinnon left the Brewer house at Sugarloaf, Victoria County, Nova Scotia, and proceeded on foot northward along the Cabot Trail to a neighbour's house. They walked on the left side of the highway, adjacent the lane for oncoming traffic, as was proper. Sugarloaf is a sparsely populated area. The road is a typical secondary highway; paved, with two lanes, and a gravel shoulder. The speed limit is eighty (80) kilometers per hour in that area.

¶ 2 Kerry MacKinnon walked alongside and to the left of Jennifer Fraser, who was thus closest to the pavement. It was dark, clear and cold. There was snow on the ground, and on the road's shoulder, but not on the pavement portion.

¶ 3 The defendant, Lloyd William MacKinnon, was, at that time, proceeding northward along the Cabot Trail in his vehicle. At the driveway to the Brewer residence he encountered a truck parked on the right side of the road underneath a street light. He described it as being half on the road, meaning half on the paved portion. The two girls, who also saw the truck there, placed it more fully on the shoulder. In any case, Mr. MacKinnon perceived a need to cross over the center line of the highway to get by this truck safely. There was no oncoming traffic on this straight stretch of road. He thought he should give the truck a wide berth as there might be people around it. He went by to the left of the truck, at about seventy (70) kilometers per hour, and as he did he looked about for people in the vicinity. It is possible, too, that he was distracted momentarily by something or someone in the Brewer yard.

¶ 4 For whatever reason, Mr. MacKinnon did not notice the two pedestrians walking on the left side of the highway, the side he was now closest to himself as he went past the parked truck. Although there was a street light at the Brewer driveway, the girls were not within the area illuminated by it. The girls noticed Mr. MacKinnon's headlights but paid little heed. They had no reason to suspect they were in danger. Although wearing mostly darkish clothing, Ms. Fraser's black jacket did have a white stripe on the back. In addition, it seems highly likely that their figures would present as dark outlines against the snowy background. Mr. MacKinnon, however, failed to notice them during the few moments they were in his headlights.

¶ 5 This spelled misfortune for Ms. Fraser, who was struck in the hip by the MacKinnon vehicle at a point about seventy-five (75) meters beyond the parked truck. At the time of impact, Ms. Fraser, who was in sneakers, was walking on the paved portion of the highway, but close to the shoulder. The collision drove her into her companion, Kerry MacKinnon, and then a few feet further still.

¶ 6 Mr. MacKinnon was aware only that he had struck something, not that it was a person. Nevertheless he stopped immediately, out of concern, thinking he may have hit an animal. When he turned the car around and came back, he saw Ms. Fraser off to the side. She had been knocked out momentarily but was conscious when Mr. MacKinnon returned and, with Kerry MacKinnon, assisted her to a nearby residence.

¶ 7 I adopt this statement of the law from R. v. Beauchamp (1953) 106 C.C.C. 6 (Ont. C.A.) as did Judge Batiot in R. v. Creaser (1994) 131 N.S.R. (2d) 302.

> "The offence of careless driving is of a quasi-criminal nature. It is something which goes beyond mere error in judgement. It indicates a measure of indifference, a want of care for the matter in hand and an indifferent regard for the rights of others."

It is such conduct which being more than mere inadvertence is sufficiently blameworthy to warrant a penal sanction.

¶ 8 Whether impugned driving is careless and imprudent is a question of fact to be decided case by case. It would be unwise, if not impossible, to circumscribe what might constitute careless and imprudent driving. However, it is helpful to consider the matter as it was by the Supreme Court of Canada in R. v. Hundal (1993) 19 C.R.(4th) 169, that is to position careless driving under the Motor Vehicle Act within a continuum of culpability which begins with mere civil negligence, proceeds to careless driving under provincial statutes, then further ascends in seriousness to dangerous driving under the Criminal Code.

¶ 9 In the instant case, the driving, in my view, falls close to the threshold between civil negligence and careless driving. In judging on which side of the line it falls, I have considered that the driving for which the defendant is charged occupies a very short interval of time. Mr. MacKinnon was inattentive for but a few moments. As well, Mr. MacKinnon's lapse was unintentional, not the foreseeable result of reckless conduct or deliberate risk taking. His was not a course of conduct that would lead a reasonable observer to fear that harm might result. He took the wheel of his vehicle that evening for no other purpose than to drive himself home. He was not intoxicated, overly tired, ill of health or otherwise unfit to drive. His vehicle was apparently in good working order. He was not in a rush. He was in a normal frame of mind. He was travelling in an area where, at that time particularly, one would not frequently encounter pedestrians, though it would not be surprising to do so. He proceeded within the permitted speed limit safely and uneventfully until reaching the Brewer residence at

Sugarloaf. There he saw the parked truck. At that point he made a manoeuvre designed to minimize the risk of collision with the truck or anyone who might be around it. While completing this manoeuvre, he became inattentive to what was ahead of him on the highway. In this span of two or three seconds his attention lapsed. He failed to see the two girls walking on the road. He thus did not pull back into the right lane as quickly as he ought to have and the collision with Ms. Fraser was the result.

¶ 10 I see no fault in giving the parked vehicle a wide berth, given that there was no traffic oncoming. Possibly, Mr. MacKinnon should have slowed down more than he did. Likely, he should not have proceeded as far as he did in the "wrong" lane.

¶ 11 Telling is the fact that Mr. MacKinnon was unaware what he had struck. The girls would undoubtedly have been within the ambit of his car's headlights, which are there precisely to give the driver information about what is in the vehicle's path. Mr. MacKinnon did not simply miss seeing them until it was too late to avoid a collision - he did not notice them at all. Nevertheless, the opportunity to see them would have spanned only two or three seconds. The fact he drove through an area lit by a street light into a dark area may have affected his perception of the scene.

¶ 12 It is not the function of this Court to decide whether any act, omission, or course of conduct constitutes civil negligence.

¶ 13 Having considered all the evidence, and applying the law to the facts which are set out above, I am not convinced on the criminal burden of proof that the defendant's driving on this occasion is careless and imprudent as contemplated by the Motor Vehicle Act. Put another way, the evidence does not prove beyond a reasonable doubt that Mr. MacKinnon did "unlawfully fail to operate a motor vehicle on the highway in a careful and prudent manner having regard to all the circumstances", as was alleged.

¶ 14 In the result, Mr. MacKinnon is found not guilty.

ROSS PROV. CT. J.

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