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R. v. Tetrault

Between
Her Majesty the Queen, and
Antoinette Tetrault

[2001] O.J. No. 5043
File No. 0500/00

Ontario Superior Court of Justice
Toronto, Ontario
Wren J.

December 14, 2001.
(75 paras.)

Counsel:

A. Pilla, for the Crown.
P. Metzler, for the accused.

¶ 1 **WREN J.**:— The accused stands charged with criminal negligence in the operation of a motor vehicle causing death, and with failing to remain at the scene of the accident.

Re: COUNT 1

THE FACTS:

¶ 2 On May 8, 1999 at approximately 2:30 am the accused woman driving a light coloured Chevrolet Malibu sedan, pulled out of the driveway of the Steak Queen fast food restaurant on the south side of Lawrence Avenue East about 66 feet east of the intersection of Lawrence Avenue and Victoria Park Avenue in Scarborough. She proceeded Easterly at about 40 KPH in the curb lane, then moved to and crossed the centre lane at a north-easterly angle and then entered the left lane at virtually a 90 degree angle at a position just past the end of the concrete median about 153 feet east of the intersection, where the deceased, Christopher Sebastian, driving a sports motorcycle, collided with the accused's vehicle, striking the driver's door. He was propelled off the bike upwards onto the roof of the car and then to the ground, sustaining fatal injury.

¶ 3 Depending on a determination of conflicting evidence, the accused was either intending to make a U-turn around the end of the concrete median to go west on Lawrence and north on Victoria Park, or she intended to reach the left lane and proceed a short distance to Pharmacy Avenue intending to turn left and proceed north on Pharmacy, but as a result of panic, she turned at an abrupt 90 degree angle across the left lane. The weather was warm and clear. The area was dry and well lit. Traffic was light at that time of the night. The posted speed limit was 60 KPH.

¶ 4 The accused testified that prior to entering the roadway, she looked to her right and saw vehicles on the incline to the west approaching the intersection. She observed that the traffic signal for north and southbound traffic had turned amber so that the east-west signal was still red but would shortly turn green. I accept her evidence because it is in keeping or not manifestly inconsistent with the evidence in general as to the manner in which that group of vehicles approached the intersection from the west with the deceased's bike in the lead

having to stop for the red signal. She estimated that she had sufficient time to complete her intended manoeuvre. The distance she would be required to travel to the point of impact was about 87 feet. If her true intention was to perform a U-turn, another 10 to 12 feet would be required to pass by the centre median.

¶ 5 The traffic approaching from the west was made up of four motor vehicles and two sports motorcycles that had travelled more or less in a group north on the Don Valley Parkway and had turned onto Lawrence Avenue East. Not surprisingly, the evidence of the drivers varies, but the general thrust is that they were exceeding the 60K limit on Lawrence Avenue, but given the light traffic at that time of night, they did not consider it to be speeding. Nelson Ooms, one of that group of drivers, having checked his speedometer more than once, described the group speed as varying between 80 to 90 KPH along Lawrence, with the bikes accelerating ahead from stops and then cruising at that speed. The four motor vehicles would attain the same speed more slowly and maintain the same cruising speed at a distance behind the bikes. He estimated that when the bikes pulled away from the first stoplight west of Victoria Park that they opened a distance of 500 feet between them and the four motor vehicles. His evidence was helpful given that he was also the owner of a sports bike and familiar with their performance and the particular skills required to drive them. His evidence of speeds and acceleration was supported by other evidence, in particular the evidence of Greg Palmer who observed the last seconds prior to the collision from the vantage point of his apartment balcony that overlooked the scene, and as well by the inferences to be drawn from the force of the impact.

¶ 6 The evidence of all the drivers in general and the evidence of the other motorcyclist, Robert Lucente in particular, would establish that the deceased was the first to reach the intersection of Victoria Park and Lawrence where he stopped for the red traffic signal. Mr. Lucente had slowed to anticipate a signal light change to green and did not need to stop. The four motor vehicles were a distance behind the motorbikes and also arrived at the intersection facing a green traffic signal.

¶ 7 The distance from the western limit of the intersection to the end of the concrete median and the approximate point of impact is about 250 feet. There was no evidence offered of that distance and the distance travelled by the accused. I was left to determine them by using the scale of measurement on the exhibit of the drawing of the area of the accident. The unit of measurement represented 10 metres.

¶ 8 Mr. Lucente recalled seeing the accused pulling out onto Lawrence Avenue when he was accelerating in the intersection positioned in the extension of the curb lane. As he got closer to the accused's vehicle he moved to the centre lane, intending to pass her. He saw from the turn of the front wheels that she was moving into the centre lane in front of him so he flashed his high beam within about 10 feet of her car and turned back into the curb lane and passed her to the right. He stated that he saw that his friend, the deceased, was positioned parallel to him in the left lane or some 20 feet ahead. He must be mistaken on this point because if that had been the deceased's position at that moment then the collision would not likely have occurred at all. Mr. Sebastian would most likely have passed by the accused's car, as did Mr. Lucente. Mr. Lucente must also be mistaken in placing Mr. Sebastian's motorcycle slightly ahead of his own within the intersection. This position would be most unlikely, given Mr. Sebastian's start from a standing stop as against Mr. Lucente's slow-down geared to enter the intersection on the green signal. The start from a stopped position is also more consistent with Mr. Sebastian's probable speed before impact, indicative of an effort to catch up to Mr. Lucente, who by most accounts was a considerable distance ahead.

¶ 9 Again not surprisingly, the accounts of the witnesses as the movement of the vehicles around them in the seconds before the collision occurred varied considerably. For instance, Mr. Comber, who was a passenger in Mr. Ooms' vehicle stated that the bikes accelerated through the intersection and may have reached a speed of 80 KPH, and he may have been right about this, but he said that the brake light on the deceased's bike did not come on and this is totally inconsistent with the brake skid mark made by that bike. However, by trying to coordinate that evidence as best I can and as consistently with the physical evidence as I can relate it, some conclusions may be reasonably inferred.

¶ 10 Some of the drivers thought they saw the accused dart out of a driveway to the east of the Steak Queen driveway virtually straight across the 3 eastbound lanes. This is at total variance both as to speed and direction with the evidence of Mr. Lucente and that of Mr. Palmer. Palmer was the occupant of an apartment overlooking

the scene. He had stayed up late that night and, alerted by a sound he was familiar with, i.e., the loud revving of engines of accelerating motorcycles, he stepped out onto the balcony to see what was happening. He described the speed of the accused's vehicle as neither too fast nor too slow. More importantly, he was familiar with the area and knew that the accused could not have pulled out of the second driveway. It had no connection to the Steak Queen premises.

¶ 11 The lead vehicle in the centre lane was a Ford 4-Runner. It had arrived close to the accused's vehicle as it crossed into and out of the centre lane. The driver, Mr. Rosakis, was able to avoid any collision by simply releasing his foot from the accelerator pedal. The evidence of Mr. Kyriazis, the driver of the lead vehicle in the left lane following Mr. Sebastian, was that he could see the accused's vehicle crossing from the centre to the left lane but that her vision of Mr. Sebastian and his vision of her may have been obscured by the Ford 4-Runner in the centre lane. He added that the bike was moving faster than Mr. Kyriazis' vehicle at that point and was pulling away from him and about 30 feet ahead of him. Mr. Kyriazis had estimated his own speed at the time to be 60 to 65 K. Mr. Kyriazis was able to stop, as he said, with a fair bit of brake pressure but in plenty of time, his vehicle leaving no skid marks. He described the manoeuvre of the accused's vehicle as "not a U-turn but an improper left turn" and that there was a misjudgment by the driver of speed of other vehicles and of time, i.e., that the driver thought she had time to make it.

¶ 12 The deceased did apply his brakes before the collision and left a skid mark of 5.4 metres, about 18.5 feet, commencing west of the end of the median and ending just past the end.

¶ 13 P.C. O'Donovan was unable to determine the point of impact with exactitude, but from the bike's skid mark and the position of the four scuff marks left by the accused's tires as her vehicle was moved sideways from the force of the collision, and knowing the point of impact on the driver's door of the car, then the point of impact must have been very close to the point where the bike's skid mark ends. P.C, O'Donovan also testified that his associate who was an expert in determining things like speed from an examination of "crush" damage to the vehicles was unable to do so in this instance because the point of impact on the accused's vehicle was at a more vulnerable area of her car than other areas. Why this could not have been factored into the calculation was, for some reason that was not made clear.

¶ 14 However, from the known physical facts it is apparent that the impact was one of considerable force. The front forks of the bike and the handlebars and instrument cluster were bent or pushed back; the gas tank was dented inward from the pressure of the deceased's knees. The front wheel of the bike pushed into the driver's door to a depth of .29 of a metre, or 12 inches, pushing the driver's seat onto the centre console.

¶ 15 P.C. O'Donovan noted that the bike's tachometer indicator was stuck after impact at almost the red line at 11,800 RPM and the bike was found to be in third gear. He indicated that the manufacture provided that the speed range in third gear would be between 60 to 120K and that with the tachometer indicator stuck at nearly the red line that would indicate at least a midrange speed of 90 KPH. However, he was not prepared to offer the conclusion that the tachometer needle was stuck solely as a result of the impact. At most, he was prepared to acknowledge that it was a possibility.

¶ 16 However, from that evidence and the evidence of Mr. Ooms, and Mr. Comber regarding speeds as well as that of Mr. Palmer of the loud noise of accelerating engine revs, I would think that there was a good probability that the tachometer stuck at or near the red line point as a result of the impact. P.C. O'Donovan did admit, as other witnesses familiar with the problems associated with motorcycles had noted, that it was more difficult for drivers of cars to see or notice motorcycles in oncoming traffic, especially at night when their headlights may not be readily noticed because of being centred in the wider expanse of two car headlights behind the bike.

¶ 17 Although they had been together for the evening and into those early morning hours in the Yorkville area spending time with friends, they were separated often enough so that Mr. Lucente hadn't noticed how much drinking Mr. Sebastian did. He had noted some. The deceased was found to have a blood alcohol level of 102 milligrams of alcohol in 100 millilitres of blood. Mr. Sebastian apparently showed no visible signs of impairment as he drove on the Don Valley Parkway and along Lawrence Avenue. However, both of the forensic

toxicologists who testified were in agreement that one's ability to operate a motorbike, to process information and to respond to sudden and unexpected events would definitely be impaired at that level of alcohol concentration. In fact their evidence indicates that there is some impairment in those respects beginning at a concentration of 50 milligrams.

¶ 18 Whether or not his impairment was a factor, or to what degree if any, contributing to the collision taking place is something I am unable to determine satisfactorily from the evidence. Nor would it be a factor towards the determination of the accused's negligence. With the accused's vehicle completely astride the left lane and the evidence that his and her view of each other may have been obstructed by the Ford 4-runner, he might not have been able to respond in time in any event, although the evidence leading to an inference of high speed was troubling.

¶ 19 That Mr. Sebastian was not a stranger to speeding, is attested by his driving record which shows that between June 1996 and February 1999 he was convicted of:

Speeding at 65 KMH in a 50 KMH zone.

Speeding at 89 KMH in a 60 KMH zone.

Speeding at 65 KMH in a 50 KMH zone.

Speeding at 78 KMH in a 60 KMH zone.

Speeding at 70 KMH in a 60 KMH zone.

Speeding at 89 KMH in a 60 KMH zone.

¶ 20 Clearly, the only purpose for which this evidence of speeding convictions can be used is simply to counter any impression that the deceased was the sort of person who took particular care to avoid speeding. It cannot be used as evidence of a proclivity to speed nor, especially, as evidence that he may have been speeding on this occasion. However, from all of the evidence the reasonable inference is that he was speeding on this occasion, most probably in the range of 80 to 90 KPH at the point when he applied his brakes.

¶ 21 For the purpose of the first count in the indictment it is clear that the accused, whether or not she was attempting a U-turn or panicked and turned abruptly at the flashing of Mr. Lucente's high beam and the realization of impending danger, she was negligent in crossing three lanes of roadway and ending up with her vehicle at a right angle astride the third lane in the face of approaching traffic. Having a regard to the general description of the path her vehicle took from the various conflicting descriptions of the other drivers, and to the direction one would expect her to travel, i.e., north to Highway 401, then west to Highway 400, to her home near Barrie, the reasonable inference would be that she intended to make a U-turn. However, although I am not entirely convinced, her evidence, supported in part by Mr. Kyriazis' description of the appearance of a left turn, that she intended to drive easterly in the third lane to make a left turn at Pharmacy and turned at an abrupt right angle into the third lane in panic, could reasonably be true. The issue then is to determine upon the evidence to what degree she was negligent.

¶ 22 Towards the determination of that issue it is not enough to examine the evidence of the driving and the collision alone. The evidence indicates that she spent an unusual day and that her physical condition, the state of her emotions and the possibility that she too might have been impaired by alcohol consumption must be examined and taken into account.

¶ 23 The accused lives with her husband near Barrie, Ontario. She worked in Toronto and drove daily to and from work. She had been experiencing considerable pain from ingrown toenails on both of her big toes and had made an early afternoon appointment at a Chiropodist's clinic to have them removed. The procedure was described as a relatively minor procedure akin to having a tooth pulled. It required a pinprick injection of a conservative quantity of novocaine hydrochloride freezing that kept the toe numb for about two hours except for

ability to feel pressure. The evidence disclosed that the accused had a history of mood swings, anxiety attacks and, on occasion, panic attacks. She had volunteered the information of panic attacks during her initial assessment and it was noted. During this procedure she experienced what would appear to have been a severe anxiety attack if not a panic attack. At the very sight of the hypodermic needle she began to scream and yell profanities, requiring one of the chiropodists to hold her legs while the other administered the anesthetic. Her reaction was more severe and unusual than the chiropodists had ever witnessed. They found it abnormal and very strange. She gradually calmed down after the injections had taken effect and apologized for her conduct.

¶ 24 She was the patient of Ms. Frizzell who performed the actual removal at which Ms. Zschape assisted. Both indicated that the literature given to the patients and their oral advice warned that they should not drive nor use public transportation for an hour and a half after the procedure, and should wear open toed footwear to accommodate the large and cumbersome bandage that is initially applied to the toe and replaced by a bandage of modest size after three days. The patients are also advised in writing and orally to arrange for someone to drive them away after the procedure.

¶ 25 It was Ms. Zschape's opinion that patients should not drive for 3 days afterwards principally because the size of the bandage might interfere with the amount of pressure that may be required of the big toe in operating foot pedals. The accused's car was equipped with an automatic transmission, so that it had an accelerator pedal and a brake pedal. However, the evidence of Ms. Frizzell was that once the anesthetic wore off the patient should be capable to drive a car. I preferred her opinion because it was more in keeping with the literature and the oral advice both of which warned against driving during the 1 1/2 hour post procedure period. Both chiropodists indicated that the moderate pain and throbbing after the freezing wore off was readily assuaged by taking ordinary analgesics such as aspirin or Tylenol. That was the extent of the advice conveyed to Ms. Tetrault.

¶ 26 The accused followed this advice in that she had arranged with a long time friend, Cheryl Sinclair, to meet her at the clinic and drive her back to Ms. Sinclair's apartment in Ms. Tetrault's car. She had brought with her opened-toed sandals, which she wore throughout that day and night. In preparation for this day she had arranged with Ms. Sinclair to make it a "girls' night out". They would visit and party and she would stay overnight at Ms. Sinclair's.

¶ 27 After driving back to Ms. Sinclair's, they walked to a nearby tavern, Carlos Murphy's, where Ms. Sinclair drank white wine, her usual drink, and the accused had two Grand Marnier liqueurs between 2:30 and 4:30 pm. While there and as well later in the evening Ms. Tetrault kept her legs elevated on the bench as she had been advised. They then returned to the apartment. Ms. Tetrault, during this time and for the rest of the day and night walked with care in a manner best described as "duck's walk". At the apartment she took one Tylenol-3 offered to her by Ms. Sinclair and had an hour's nap. It is beyond dispute that the consumption of these drinks and the Tylenol-3 would not have figured at all in any assessment of the accused's condition of sobriety at 2:30 am.

¶ 28 They then ate a delivered take out dinner. After dinner, around 7 pm or shortly thereafter they returned to Carlos Murphy's. They wanted to continue their girls' night out and, additionally, Ms. Sinclair, who was an avid Toronto Maple Leafs fan, wanted to watch a televised playoff game that night. They remained there watching the game, socializing and drinking. The type and quantity of drinks are the subject of considerably conflicting evidence. They were joined unexpectedly halfway through the evening by a Mr. Kent, a boyfriend of Ms. Sinclair's, and his companion Mr. Ivany.

¶ 29 After the hockey game, at about 10:30 pm, the foursome took a cab to a nightspot called Rio's where there was a band. They had some more to drink there and Ms. Tetrault danced to the music. Ms. Sinclair described the accused's dancing as: "She was being careful. Just moving with the music". They stayed until about 1:30 am. The men had begun drinking earlier that day and continued do so liberally through the evening so that they were visibly fairly intoxicated. Mr. Ivany was clearly `three sheets to the wind', so that his perception and recollection of events was entirely unreliable. For example, he thought that the argument between Ms. Sinclair and the accused took place outside the apartment building and that Ms. Tetrault left at that point without going up to the apartment.

¶ 30 Given the condition of the men, Ms. Sinclair had invited them to stay over for the night at her apartment. This turned out to become a problem that was key to the conduct of Ms. Tetrault thereafter.

¶ 31 During the cab drive back, while Ms. Tetrault gave instructions to the driver, she fretted and started to become upset about her outing with Ms. Sinclair being spoiled. Back at the apartment she began arguing about this turn of events with Ms. Sinclair and became very emotionally upset and loud. She stated that she preferred to return home to her husband whom she missed rather than stay in the apartment with these two men. Ms. Sinclair, and perhaps Mr. Kent, tried to persuade her to remain. Because it was late, she was upset and had had something to drink.

¶ 32 However, Ms. Sinclair testified that Ms. Tetrault was not impaired, was O.K. to drive and that she would have stopped her and not have let her go had she thought otherwise. I would discount Mr. Kent's opinion on the accused's condition entirely for the reason that it varied from time to time, that it was based on guessing and upon her emotional state during the argument, and that his perception that she thought that her husband might be cheating on her, was mistaken. In fact, Ms. Tetrault in arranging her stay over with Ms. Sinclair had suggested that her husband have a night out with a friend or friends as well and he had accepted the suggestion. She had tried to reach him repeatedly, late in the evening, by means of her cell phone but he had not yet returned home. During her argument with Ms. Sinclair she had merely said that she missed him and wanted to be at home rather than stay over with the two men in the apartment.

¶ 33 She remained in the apartment for 20 to 25 minutes. Just about the time she would be setting out in her car she did manage to reach her husband as the phone records help to confirm. He had returned home and was somewhat intoxicated and tired. He advised her to stop and have something to eat. She drove north on Victoria Park and stopped to have something to eat at the Steak Queen fast food restaurant. Neither the person operating the Steak Queen nor any of the patrons both inside the premises and those eating outdoors who were interviewed noted anything unusual about any other patron during the time in question. Having eaten her sandwich or most of it, she then set out to complete her journey with the aforementioned results.

¶ 34 Upon all of the evidence I am content that her emotional state had settled down. The evidence disclosed that when such arguments flared up sometimes referred to as mood swings, she would quickly revert to calm afterwards. As well, based on her ability to navigate during the evening, the opinion evidence of Ms. Frizzell and Ms. Sinclair and the particulars of driving that led up to the collision, the aftermath of the toenail removal did not appear to be a factor of notable consequence. Although there was no evidence specifically on the point, she may have been tired at that time of the morning as would the other drivers, but on the other hand she did have an hour's nap before supper. The only additional factor of concern and requiring close consideration was what if any effect did her drinking of that evening have upon her ability to drive. The evidence on the kind and number of drinks was in considerable conflict.

¶ 35 As a result of this conflicting evidence counsel were reasonably required to put differing scenarios to Dr. Mayers and Dr. Corbett, the expert toxicologists, to elicit their opinions. The evidence of the serving personnel at Carlos Murphy's, without the benefit of sales tapes and given the busy evening, was understandably at odds. I was leery of the evidence of the server Ms. Garrido because she was just too cocksure, and when confronted with conflicting evidence of Ms. Goodyear, the bartender, and with an obvious mistake she had made as to beer labels, she tossed them off like a speck of dust from her shoulder. I prefer the evidence of Ms. Garrido, who knew Ms. Sinclair and the accused, together with the evidence of the other server, Ms. Berdar. This would indicate that the accused between 7 or 7:30 pm and 10:30 pm had 4 drinks, 2 single Grand Marniers and 2 Brown Cows. Although Ms. Sinclair was an earnestly honest witness throughout, her evidence on this point was not of much assistance given that her attention was diverted to the hockey game and to her boyfriend. The evidence of the accused had to be viewed with great care given the obvious existence of a motive to downplay.

¶ 36 Consumption of drinks at Rio's between 10:30 pm and 1:30 am was even more difficult to assess. Because there was no evidence from serving staff I was required to sift through the evidence of the accused, Ms. Sinclair and the two men. Given the condition of the two men at that point their evidence was not very reliable. Considering together the evidence of all four with an eye to motive on the part of Ms. Tetrault, my

best and fairest conclusion would be that she had 2 more one ounce alcoholic drinks of either wine or liquor. I cannot say which.

¶ 37 That would fit the second scenario put by the Crown to Dr. Mayer involving the consumption of a total of 6 ounces of alcohol between 7:30 pm and 1:30 am. Based on that scenario, and configuring the accused's height and weight and an average elimination figure of 15, Dr. Mayer arrived at a calculation of concentration of alcohol in the blood at 0 to 10 milligrams of alcohol in 100 millilitres of blood at 2:30 am, with 10 being the highest possible and with no appreciable effects of impairment.

¶ 38 It then remains to determine whether the accused's negligent driving, in all of the surrounding circumstances, constituted criminal negligence, or the lesser and included degree of negligence of dangerous driving, or of a still less serious degree of civil negligence that was short of amounting to either criminal negligence or dangerous driving.

THE LAW

¶ 39 Criminal negligence causing death is made an offence under s. 220 of the Criminal Code. Criminal negligence is defined in s. 219 as follows:

> Every one is criminally negligent who
>
> (a) in doing anything, or
> (b) in omitting to do anything that is his duty to do,
>
> shows wanton or reckless disregard for the lives or safety of other persons.

¶ 40 In Ontario the test as to whether there has been a wanton or reckless disregard for the lives or safety of others as it pertains to driving motor vehicles is stated to be an objective test in the case of R. v. Gingrich (1991), 65 C.C.C. (3d) 188 (Ont. C.A.), where, at p. 197, Finlayson J.A. stated:

> This court has held in two recent decisions (see R. v. Cabral (1990), 54 C.C.C. 54 C.C.C. (3d) 317, ... and R. v. Nelson (1990), 54 C.C.C. (3d) 285 that the mens rea for criminal negligence in the operation of a motor vehicle involves an objective assessment of the accused's conduct notwithstanding the decisions of the Supreme Court of Canada delivered in Tutton, [1989] 1 S.C.R. 1392, and R. v. Waite (1989), 48 C.C.C. (3d) 1, ...

¶ 41 And he further elaborates at p. 199:

> ..... The crime of criminal negligence is negligence. There is no need to import the concept of a subjective intent in order to obtain a conviction. The crime is the well recognizes tort of civil negligence; the sins of omission and commission that cause injury to one's neighbour, elevated to a crime by their magnitude of wanton and reckless disregard for the lives and safety others.

¶ 42 In determining whether the instant negligent operation of the motor vehicle amounted to wanton or reckless disregard for the lives or safety of other persons, Morden J.A., in the case of R. v. Sharp (1984), 12 C.C.C. (3d) 428 (Ont. C.A.) provides the following practical assistance at p. 436:

> .... Proper elaboration would make clear to the jury the necessity for the driving to amount to a marked and substantial departure from the standard of a reasonable driver in the circumstances ..... and that the driver either recognized and ran an obvious and serious risk to the lives and safety of others or, alternatively, gave no thought to that risk.

¶ 43 Dangerous driving i.e., dangerous operation of a motor vehicle is made a lesser or included offence of criminal negligence in the operation of a motor vehicle by virtue of s. 662(5) of the Code.

¶ 44 It is constituted an offence by s. 249(1) of the Code which provides that:

> Every one commits an offence who operates
>
> (a) a motor vehicle in a manner that is dangerous to the public, having regard to all the circumstances, including the nature, condition and use of the place at which the motor vehicle is being operated and the amount of traffic that at the time is or might reasonably be expected to be at that place;

¶ 45 The mens rea of dangerous driving is to be assessed objectively, in the context of all the surrounding circumstances. The trier of fact must be satisfied that the conduct amounted to a marked departure from the standard of care that a reasonable person would observe in the driver's situation. R. v. Hundal, (1993), 79 C.C.C. (3d) 97 (S.C.C.)

CONCLUSION

¶ 46 Based upon the facts I have determined from all of the evidence, the accused was negligent in that she misjudged the time and distances required to complete her manoeuvre, which although not illegal, ought to have been attempted with the care appropriate to the nature of the manoeuvre of crossing over 3 lanes and in view of all of the surrounding circumstances of time, distances and traffic. Failure to anticipate that circumstances of time, distances and traffic. Failure to anticipate that another driver would be speeding at 80 to 90 KPH in the attendant circumstances does not constitute negligence on the part of the accused.

¶ 47 However, in my opinion her negligence did not amount to the degree of either marked and substantial departure from the standard of a reasonable driver in the circumstances so as to constitute, beyond a reasonable doubt, a wanton or reckless disregard for the lives or safety of the drivers of that group of vehicles approaching from the west. Nor did it constitute, beyond a reasonable doubt, such a marked departure from the standard of care that a reasonable person would observe in her situation.

¶ 48 Accordingly the accused is found not guilty on Count 1.

Re: COUNT 2

¶ 49 Based upon the following evidence, taken cumulatively,

* That the accused, seconds after the impact, moved her vehicle to the westbound curb lane of Lawrence Avenue.
* That she was seen by Mr. Comber, a passenger in Mr. Ooms vehicle, to turn her head and look back at the accident scene.
* That she was seen at close hand by Mr. Bourque, a bystander, to pick up a cell phone and appear to start dialling, and shortly after to drive at a normal speed to the west where she turned onto Victoria Park northbound.
* That the cell phone records and the evidence of her husband indicate a conversation with him ensued for the next 8 minutes.
* That she parked the vehicle in an apartment building parking lot situate on the last street off Victoria Park before it meets Highway 401 and in a place not visible from Victoria Park.
* That she must have been aware that her vehicle was seriously damaged with the driver's seated shifted to the left and her inability to open the driver's side door.
* That during a cab ride some time later to the home of her friend, Ms. Rebello, as the cab drove south on Victoria Park, the accused's attention was caught by the flashing lights at the accident scene causing her to have some glimpse of mental recognition that she may have been part of that scene.
* That upon the evidence heard to that point regarding the accused's history of anxiety or panic attacks, her leaving the scene could reasonable be ascribed to the sort of panic

attack common to persons leaving the scene, albeit that she was more prone to such onsets of panic.

* That her conversation on the cell phone with her husband, John Ridge, and with her friend, who phoned her at Ridge's request, was characterized by hysteria and incoherence. Again, not something necessarily inconsistent with the upset and panic often associated with such events.

then, the accused was guilty beyond a reasonable doubt of the offence charged in Count 2 of failing to stop her vehicle with intent to escape civil or criminal liability, give her name and address and, where (as here) any person was injured or appeared to require assistance, offer assistance.

¶ 50 However, to this Count in the indictment the accused pleaded not guilty by reason of insanity, pursuant to s. 16 of the Code, which provides that:

(1) No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.
(2) Every person is presumed not to suffer from a mental disorder so as to be exempt from criminal responsibility by virtue of subsection (1), until the contrary is proved on a balance of probabilities.
(3) The burden of proof that an accused was suffering from a mental disorder so as to be exempt from criminal responsibility is on the party that raises the issue.

¶ 51 In furtherance of discharging the onus of burden of proof, the defence, in addition to other relevant evidence in the trial, relied upon the evidence of Dr. Julian Gojer.

¶ 52 Dr. Gojer was clearly qualified on the basis of his academic history and his practical experience as well as his history of testifying as an expert witness at all levels of Ontario courts and in courts outside the Province. In particular, he is a forensic psychiatrist who has testified for the prosecution in dangerous offender applications and is the appointed Psychiatrist member of the Ontario Review Board.

¶ 53 Dr. Gojer's expert opinion was that the accused did suffer a panic attack after the accident. In his opinion it was triggered by the sudden and unexpected flashing of lights behind her, (most probably Mr. Lucente's high beam), the sound of the impact, the apprehension of the lights of vehicles coming toward her from the east, and then a man (either Mr. Comber or Mr. Bourque, - I cannot determine which if either of them it might be.) - pointing at her and yelling something like "Oh my God. Oh my God." In Dr. Gojer's opinion the panic attack escalated to the point of such intensity and anxiety that it caused her to fall into a state of shock and a dissociative state, i.e., automatism.

¶ 54 It was apparent that Dr. Gojer was keenly aware of the leading case of R. v. Stone, [1999] S.C.J. No. 27 and of the special concerns expressed by the court therein.

¶ 55 In particular, Dr. Gojer recognized that in relation to the particular offence of failing to remain the possibility of the accused feigning unconscious action was very high and that an opinion of acting in a dissociative state could not be safely offered on the evidence of the accused alone. He realized that it was necessary to take into account the evidence of others whose observations were contemporaneous to the behaviour of the accused, and, again, in the instance of this particular offence, the need to search for a historical foundation to form a properly concerned opinion.

¶ 56 Accordingly he reviewed the evidence of the accused's actions throughout the day in question, reviewed evidence in relation to the collision, interviewed both Mr. Ridge and Ms. Rebello as to their perceptions of the accused's behaviour immediately following the event, and he interviewed Ms. Lee Arema who had counselled the accused in therapy for some five years.

¶ 57 He discounted the evidence of Ms. Rebello and Mr. Ridge of emotional upset and hysteria on the part of the accused as only to be expected. But he took into consideration the evidence that she was confused and incoherent; apparently aware that something had happened but not exactly what; unaware of and incapable of indicating exactly where she was located after the accident; aware of not being able to open the driver's door but requiring to literally be talked out of her car by Ms. Rebello; requiring to be told of Ms. Rebello's address that she ought to have been fully aware of; vaguely considering the possibility of some personal connection to the scene as her cab passed the accident scene with flashing lights probably from police and ambulance vehicles; lapsing in and out of awareness and unable to give a coherent account to Ms. Rebello despite the latter's best efforts, so that in the end before she advised the accused to try to rest and sleep while awaiting further word from her husband, Ms. Rebello could not ascertain whether any accident had occurred at all. In the morning Mr. Ridge ascertained that his wife had been in an accident and that it entailed a resulting fatality. He drove to Toronto to take his wife to the police station.

¶ 58 Dr. Gojer found Ms. Rebello's evidence instructive and important, as well as persuasive and supporting Mr. Ridge's perceptions that had to be considered with an awareness that he could readily have a motive to favour the accused. He concluded that Ms. Rebello's account supported a finding that the accused was unable to rationally process bits and pieces of information that she vaguely grasped, and that her evidence was consistent with that of Mr. Ridge.

¶ 59 Dr. Gojer also considered her behaviour on returning home that day where Mr. Ridge described her behaviour as being in shock, sitting frozen, unresponsive, wandering around the house, her speech becoming slurred the following day and she looked dazed and confused. On the advice of Ms. Lee Arema, the accused's former therapist, he took her to the hospital in Barrie where she was admitted and remained for 5 days. He noted however that the diagnosis was of Adjustment Disorder and Depression and a history of polysubstance abuse, and not symptoms of dissociation.

¶ 60 Most importantly, Dr. Gojer interviewed Ms. Lee Arema with whom the accused was in therapy for some 5 years when Ms. Tetrault sought help for strategies on how to prevent a relapse to a prolonged cocaine use and an interim abuse of alcohol after stopping the use of cocaine. Ms. Arema had documented episodes of dissociative periods of time loss, the taking on of a different identity where she would call herself Linda and talk in a different tone and curl up like a baby on the floor and fall asleep. Ms. Rebello related brief relapses into cocaine use one in 1997 and once in 1998 and further episodes of dissociation. Her working diagnosis was of posttraumatic stress disorder, dissociative identity disorder along with fugue states and dissociative amnesic states. In addition she had a history of prominent panic symptoms, depression and anxiety. Ms. Arema's notes are on file at the Foundation for Addiction and Mental Health.

¶ 61 At this juncture a brief history of the accused's life and background, her substance abuse and need for therapy with Ms. Arema would be useful. She was born in Saskatchewan, the seventh of 9 children. When she was 5 years of age she and the younger of her siblings were removed from their home because of physical and sexual abuse by their father. She was made a ward of the CAS and placed in a foster home across the street where the male parent abused her physically until the severe beating was discovered by a worker and she was removed and placed with a farm family where she first experienced normal life and a loving mother figure. Unfortunately this came to an end when at age 13 or 15 she was raped by one of the sons and was removed and placed in a group residence in Winnipeg. Her associations there placed her very soon into the use of heroin and an introduction to street life, including prostitution. She thereafter led a life of prostitution, stripping at 18 and assisting in thievery. At an early stage of addiction, she stopped the use of heroin and thereafter became a cocaine addict and remained so for some 20 years.

¶ 62 From age 27 her life began to change to a remarkable degree. She got a job as a waitress, then did office work, managed in evening sessions to acquire a grade XII upgrading and eventually completed a 3-year business course at Ryerson Institute. She then found her niche as a "headhunter" for an employee search firm where she earned as much as $70,000.00 to $80,000.00 a year.

¶ 63 She attended on her own initiative for assistance to break her cocaine habit and the interim abuse of alcohol to which she resorted as a crutch to stave off yearnings for cocaine. With brief relapses she had done

remarkably well.

¶ 64 The defence of automatism amounts to a claim that the actions of the accused were not voluntary. An accused must first establish a proper foundation for this defence. First, he has the legal burden to adduce evidence that, by common necessity, would include psychiatric evidence, to satisfy the trial judge that there is a reality on the evidence to raise the issue, sufficient for the judge to allow it to be considered by the trier of fact.

¶ 65 In other words, there must be some evidence from which a jury could reasonably infer that the accused acted in a state of automatism. It is at this point that the accused has the evidentiary burden of satisfying the finder of fact upon a balance of probabilities of the validity of the defence.

¶ 66 Dr. Gojer's considered medical opinion under oath, and conceding that 100% certainty was not possible, was that at the crucial time post accident the accused was suffering from symptoms of a Dissociative state, evidenced by a state of shock and symptoms of confusion, a lessened state of awareness of surroundings and what she was doing. Her actions were reflexive without cognitive control, i.e., a state of automatism that was characterized by her lapsing in and out of the condition so that she suffered an inability to rationally process observed phenomena. Evidence of a continuing degree of probable state of shock continued into the following two days.

¶ 67 Given the accused's documented history of dissociative disorder triggered by stressful events it was Dr. Gojer's further opinion that this had constituted a pre-existing mental disposition so that her state of automatism fell into the category of a mental disorder,

¶ 68 At this point the court's observation at parag. 186 of R. v. Stone (supra) is notable:

> ..... In particular, when determining whether the evidentiary burden for automatism has been satisfied, trial judges must be careful to recognize that the weight to be given to expert evidence may vary from case to case. If the expert testimony establishes a documented history of automatistic-like dissociative states, it must be given more weight than if the expert is simply confirming that the claim of automatism is plausible. In the former case, the expert is actually providing a medical opinion about the accused. In the latter case, however, the expert is simply providing an opinion about the circumstances surrounding the allegation of automatism as they have been told to him or her by the accused.

¶ 69 I am satisfied, based on Dr. Gojer's opinion evidence and the evidence that he relied on to form that opinion, that the accused has satisfied the threshold requirement. There is a real basis to hold that the issue of insane automatism is a live issue upon which a trier of fact could reasonably infer that at the pertinent time the accused suffered from a state of insane automatism.

¶ 70 I am persuaded of the considered expert medical opinion of Dr. Gojer by reason of his impressive credentials, by reason of the nature of his forensic practice that would militate against his leaning to favour the accused just because he has been retained by her counsel, and by the manner in which he capably withstood a vigorous and learned cross examination. As a witness testifying under oath his evidence was marked by his willingness to readily acknowledge evidence such as that outlined as factual on pages 18 and 19 supra, as well as inconsistencies within the accused's interview with him as well as between things related to him by the accused and her evidence at trial. An instance of the former occurred where the accused in her interview with Dr. Gojer in quick sequence told him that on the day in question when she was at Ms. Sinclair's she did not have a headache and did not take any Tylenol 3, and then stated in the next sentence that she did take a Tylenol 3 before dinner. Dr. Gojer indicated that the accused exhibited genuine problems with memory, and that taking the inconsistencies into account he was nevertheless content that they did not affect the validity of his diagnosis. For the purpose of credibility and reliability, I would take a similar view of the inconsistencies in Ms. Tetrault's evidence as outlined by the Crown, in that they were of the sort to be expected given the passage of time, the trauma of the events and the ordinary frailties of human memory. They were not of the sort to seriously undermine the credibility of the witness.

¶ 71 I found Mr. Ridge to be a forthright witness but, keeping in mind the clear existence of a possible motive to favour the accused, I relied more heavily in support of Dr. Gojer's basis for diagnosis on the evidence of Ms. Rebello, who presented as an intelligent person motivated to be accurate and truthful.

¶ 72 Taking these factors into account and in the context of the findings of fact referred to on pages 18 and 19 supra, and the reasonable inferences to which they led, I am content that the accused has satisfied the evidentiary onus of proving on a balance of probabilities that she suffered from a state of insane automatism during the pertinent time, being a mental disorder, i.e., a disease of the mind, according to the provisions of s. 16 of the Criminal Code.

¶ 73 Accordingly, on Count 2 the accused is found to have committed the offence but is found not criminally responsible on account of mental disorder.

¶ 74 Pursuant to the provisions of s. 672.45(1) of the Code I am prepared to hold a disposition hearing on application of the accused or the Crown.

¶ 75 In this rather difficult case I am indebted to both counsel for the exemplary and high quality of expertise with which they conducted the proceedings and for the invaluable assistance that they gave me.

WREN J.

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