Indexed as:

R. v. Webb

Between
Regina, and
Daniel Webb

[1995] O.J. No. 827
DRS 95-11544
No. 2913

Ontario Court of Justice (General Division)
Criminal - Barrie, Ontario
Eberhard J.

March 9, 1995.
(22 pp.)

Criminal law — Offences against person and reputation — Motor vehicles — Criminal negligence in operation of motor vehicle — Dangerous driving — Defences — Burden of proof.

The accused was charged with causing the death of two individuals, and bodily harm to four others, by criminal negligence. The accused was the driver of a northbound tractor trailer which crossed three lanes of the northbound highway, then crossed the grassy median divided by a post and cable barrier, entered the southbound lanes and met the heavy southbound traffic head-on. As the tractor trailer continued in an arc across the three lanes of southbound traffic and back again to the median, it left in its path a number of severely damaged motor vehicles. Two southbound drivers were killed and four other commuters were injured to the degree that constituted bodily harm. The accused admitted that he was the driver and that he had caused the injuries and deaths as alleged but raised as a defence that he had started coughing, began to choke and then could not get his breath. He blacked out and then became aware of travelling towards the median with the vehicle in flames. He stated that he then applied the brakes and took the vehicle out of gear, and when it was stopped or almost stopped he jumped out. The Crown's theory was that the accused had fallen asleep at the wheel.

HELD: The accused was acquitted. There was evidence respecting an uncommon condition called "cough syncope" where, particularly after a very vigorous paroxysm of coughing, people sometimes lose consciousness for a few seconds. If the standard of proof in the case were the balance of probabilities, the court would have had no hesitation in finding that it was much more likely that the accused fell asleep and was lying about the coughing than that, on this one occasion only, he suffered a rare syndrome to which he was not predisposed. However, the standard for criminal liability was beyond a reasonable doubt. That a cause for a certain effect was rare did not make it unreasonable. A doubt raised by a rare but feasible explanation did not amount to an unreasonable doubt. The court was left with a reasonable doubt as to whether the accused fell asleep as opposed to blacked out. The accused had therefore offered an explanation which gave rise to a defence, notwithstanding an objective finding of dangerous driving.

Statutes, Regulations and Rules Cited:

Highway Traffic Act, Regulation 600, ss. 4, 6, 8.

Counsel:

Gregory Barker, Assistant Crown Attorney.
Kenneth S. Marley, for the defence.

¶ 1 **EBERHARD J.**:— At about 7:20 am on Tuesday, August 18, 1992 there was a dreadful motor vehicle accident on Highway 400 south of Highway 88 and just north of Canal Road in Bradford, West Gwillimbury, Ontario. On this clear, bright summer morning when commuter traffic is heavy in the southbound lanes of the highway, a northbound tractor trailer crossed three lanes of the northbound highway, the grassy median divided by a post and cable barrier, entered the southbound lanes and thereupon met the heavy southbound traffic head on. As the tractor trailer continued on in an arc across the three lanes of southbound traffic and back again to the median, it left in its path a number of severely damaged motor vehicles. Two southbound drivers, faultless and unwarned, are dead following the impacts that occurred. Four additional commuters were injured to a degree that constitutes bodily harm.

¶ 2 That the occurrence is unspeakably terrifying and unendingly devastating to those affected cannot be doubted. It is the kind of incident that strikes at the core of a fear shared by those in modern society that recognizes that in the common place act of operating a motor vehicle one's very existence is at the risk, without any fault of one's own, of a terrifying and brutal end.

¶ 3 No court of law is required in order to come to such a determination. I have been aware of interested persons in the body of the court who can only be the widows and families of Mr. Moreau and Mr. Rawnsley or of the injured parties. Perhaps they have been surprised and offended that so little mention has been made of their loved ones. That is not because they are forgotten. My heart weeps for them and for those here remembering their lives and reliving the horror of the day of the accident.

¶ 4 You may have heard counsel in argument mention that the consequences, that is, the fatalities and injuries are not relevant to my consideration. No doubt that seems harsh and wrong to those gathered. It is however true in this sense. I am not asked here to assess the loss that has occurred. That it is huge needs no validation from me. Nor am I being asked to assess whether, as between Mr. Webb and the drivers, who is at fault. Clearly it is the conduct of Mr. Webb that put the tractor trailer on highway 400 where something occurred which caused it to cross the median to a line of traffic in which it created a terrible carnage. The adjudication I am asked to make is whether or not the event occurred as a result of the criminal negligence of Daniel Webb. In an assessment of his conduct, I must determine whether the crown has proven a level of intention with respect to that conduct that is criminal.

¶ 5 Mr. Webb is charged that by criminal negligence he did cause the death of Thomas Frank Moreau, did cause the death of Christopher Allen Rawnsley, and did cause bodily harm to Carolin Barr, Christopher Bourne, Donald Cockburn, and John McCullough.

¶ 6 It is admitted that on the morning of Tuesday, August 18, 1992 the accused was involved in a motor vehicle accident on King's Highway 400 in the Town of Bradford, West Gwillimbury, Ontario. As a result of this accident, it is admitted that Thomas Frank Morrow and Christopher Allen Rawnsley died. Carolin Barr, Christopher Borne, Donald Cockburn and John McCullough received injuries which constituted bodily harm.

¶ 7 It is admitted that at the time of the accident, the accused was the driver of a 1988 Ford Highway tractor trailer and that the accident was not caused by any mechanical failure or mechanical problem in the accused's tractor trailer truck.

¶ 8 Witnesses described that the tractor trailer passed from lane to lane, through the median and plowed through the southbound vehicles in a smooth motion without abrupt changes in direction or evidence of either braking or steering activity. The only jerkiness in the movement appeared to be associated with crossing the uneven ground at the median or to some slight extent by the impact of the colliding vehicles. When the tractor trailer reached the farthest side of the southbound lanes and encountered a further post and cable barrier, it arced back into the roadway and came to rest at the centre median barrier.

¶ 9 Lillian Moreau, an unrelated driver of a northbound vehicle, testified she saw the silhouette of the driver of the tractor trailer sitting upright in the driver's seat hanging on to the steering wheel just before the tractor trailer hit the green van. She noted nothing unusual about the head position of the driver, shocked as she was by what was occurring.

¶ 10 Of all the southbound drivers only Adelle Baxter observed anyone associated with the tractor trailer. She was a greater distance north of the collisions when they occurred than others who testified. She was not, during the event, in the same peril. It was not as necessary for her to occupy herself to attempt drastic driving manoeuvres in order to avoid collision with the oncoming massive vehicle. She states that after the tractor trailer hit a white vehicle in the right lane of the southbound highway, it changed direction and came at a different angle towards a green van in the rail lane, she saw a person in a white t-shirt jumping from the vehicle. The truck was still moving and on fire. She does not remember the door of the vehicle opening nor whether the jumper came from the window or a door on the driver's side. Although she is certain that the individual was not standing on the roadway but was airborne when viewed, she cannot say how far above the ground the person was when observed.

¶ 11 Mr. Webb testified that while travelling in the slow lane of the northbound highway 400 between 100 and 105 kilometres per hour, he started coughing. He kept coughing and sort of choked and found he couldn't get his breath. He stated it felt like the top of his head was going to blow off. All this took only seconds. After experiencing that pressure the next thing he was aware of was travelling in the southbound lanes at a northeast angle towards the centre median at perhaps 30 kilometres per hour with the vehicle in flames. He stated that his hands were as they had been when he blacked out, upon the steering wheel. He testified that he then applied the brakes, took the vehicle out of gear and when it was stopped or close to a stop he exited the vehicle finding as he did that his first "step", the fuel tank on the driver's side, was missing and he had to jump. As he did not fall, he concludes that the vehicle was pretty much stopped.

¶ 12 At the scene, Mr. Webb responded to inquiries as to his well being by indicating he was O.K. He made no effort to take advantage of available medical assistance and did not convey to anyone that he had blacked out until giving a statement to Constable McLaughlin between 9:05 and 9:20 am. Therein he indicated, "I don't know if I choked or what. Next thing I know I was bouncing off cars or them off me." In cross-examination he indicates that he was referring to the scene he observed when he got out of the truck and realized that the chaos had been caused by him. He testifies that his memory is better now and that he is certain of the events proceeding the accident. His uncertainty at the time was due to the shock and confusion he was experiencing at the accident scene.

¶ 13 It is admitted that at approximately midday on August 18, 1992 the accused attended at York County Hospital in Newmarket, Ontario where he was examined and released later the same day. A copy of hospital records has been submitted as well as the evidence of the attending emergency physician by way of reading in his testimony at the preliminary hearing. Because Mr. Webb told the medical personnel that he had blacked out, a large number of tests were completed to investigate conditions that might predispose an individual to a loss of consciousness as a result of coughing. The emergency physician was alive to the possibility of an infrequently seen condition called "cough syncope" where, particularly after a very vigorous paroxysm of coughing, people can sometimes lose consciousness for a matter of a few seconds. No physical indicators were discovered and there is neither history nor subsequent occurrence of this condition in Mr. Webb.

¶ 14 It is agreed that the accused underwent a drivers physical examination conducted by Dr. P.M. Kelton on May 24, 1991. Dr. Kelton recorded that the accused had no history of seizures, fits, convulsions or fainting. Following the accident Dr. Kelton arranged for the accused to undergo specialized testing, including electroencephalography, the Holter monitor, a C.T. Scan, diagnostic imaging and pulmonary testing. Dr. Kelton also referred the accused to medical specialists, namely a neurologist and cardiologist and received reports from them about the accused. None of this led Dr. Kelton to believe that the accused had any underlying seizure, disorder or cardiovascular disorder. In January of 1993 Dr. Kelton recommended that the Ontario Ministry of Transportation reinstate the accused's drivers licence which had been suspended on medical grounds following the accident and Mr. Webb's complaint of having blacked out. Dr. Kelton conducted a driver's physical

examination on the accused on at least two occasions since August 18, 1992, namely on July 6 and December 12, 1993 and on these occasions, he found the accused to be healthy.

¶ 15 Also received by way of an Agreed Statement was the expert opinion of Meyer S. Balter, a specialist in respiratory medicine. He reported that:

> Cough syncope is a well described, albeit not terribly common, cause of loss of consciousness. It typically occurs in an obese, middle aged male with a long history of chronic obstructive lung disease. The loss of consciousness may occur in the upright, seated or supine position and usually occurs within 3 to 5 seconds of cough initiation although rarely can take up to 30 seconds to occur after the start of coughing. It is not unusual for patients to have a sensation of light headedness, dim vision and profuse sweating prior to losing consciousness and recovery generally starts within a few seconds and is completed in less then a few minutes. It is not unusual to have a transient period of confusion, lasting a few seconds, following regaining consciousness but then the patient is back to normal.
> The mechanism through which cough syncope occurs remains somewhat contentious and is probably multifactorial. Cough generates very high intrathoracic pressures which can do two things. First, it may reduce return of venous blood to the heart transiently lowering blood pressure. In addition, it appears that the high intrathoracic pressures are transmitted to the cerebral spinal fluid, compressing the cerebral blood vessels and decreasing blood flow to the brain. Finally, coughing is frequently associated with a drop in arterial carbon dioxide partial pressure which may lead to constriction of the blood vessels going to the brain, further compromising blood flow to this critical area.
> Obese men would be at greater risk of developing cough syncope because they are able to generate higher intrathoracic pressures. Mr. Webb appears to be obese by description, weighing 250 lbs. In addition, smokers with chronic obstructive lung disease will already have hyperinflated chests with higher intrathoracic pressures so they may be at a greater risk of transient reductions in cardiac output and blood pressure caused by the cough. There is no evidence that Mr. Webb had chronic lung disease based on his previous history and pulmonary function tests. In addition, it is unclear as to whether or not he had a chronic smoker's cough although if he had a recent upper respiratory tract infection, syncope may have resulted from even a single severe paroxysm of coughing.

¶ 16 Counsel agree that Dr. Balter concluded it was feasible that Mr. Webb lost consciousness due to cough syncope but the medical evidence neither confirms or refutes Mr. Webb's assertion that he coughed and lost consciousness.

¶ 17 The crown offers evidence of a different reason for Mr. Webb losing control of the tractor trailer. Admitted on consent were drivers daily logs and inspections reports for the period of August 1 to 9, 1992 completed by the accused and submitted to Transpectrum Motor Group Inc. prior to the accident and daily logs and inspections reports for the period of August 2 to 18, 1992 prepared and submitted by the accused following the accident. These logs are required pursuant to regulation 600 of the Highway Traffic Act. Section 4 of the said regulation is as follows:

> (1) Every operator shall ensure that every driver employed by or contracted to the operator takes and every driver shall take at least eight consecutive hours off duty after the driver has driven for thirteen hours before the driver may drive again.
> (2) Every operator shall ensure that every driver employed by or contracted to the operator takes and every driver shall take at least eight consecutive hours off duty after the driver has been on duty for fifteen hours before the driver may drive again.

¶ 18 Section 6 of the regulation 600 reads:

> (1) A driver's off duty period under section 4 may be reduced from eight consecutive hours to not less than four consecutive hours.

(2) If a driver's off duty period is reduced as provided in subsection (1), every operator that employs or contracts for the services of the driver shall ensure that the driver takes and the driver shall take an off duty period immediately before beginning driving duty during the same or next day of not less than the sum of eight hours and the amount of time by which the off duty period was reduced (3) a driver's off duty period may not be reduced as provided in sub-section (1) more than once in any period of seven consecutive days.

¶ 19 Section 8 reads as follows:

A driver is considered to have an off duty period of eight consecutive hours if,

(a) The driver takes two rest periods in a sleeper berth;

(b) Neither rest period referred to in clause
(a) is less than two hours;

(c) The total of the two rest periods is not less than eight hours; and
(d) The driver does not drive,

(i) for more than thirteen hours between,

(A) the driver's last off duty period or last rest period of at least two hours in a sleeper berth before the first rest period referred to in clause (a), and,
(B) the second rest period referred to in clause (a), or

(ii) For more than thirteen hours between (A) the first rest period referred to in clause (a), and

(C) The driver's next off duty period or next rest period of at least two hours in a sleeper berth after the second rest period referred to in clause (a).

¶ 20 The evidence of David Kennedy, a transport enforcement officer with the Ministry of Transportation simplifies these requirements. In a 24 hour period a driver may not be on duty driving for more than thirteen hours. There may be an additional two hours of on duty non-driving time but when either of these two limits is exceeded, the driver is in violation if he drives again without eight hours of rest. This eight hour period may be divided into two four hour periods. However, a violation is not cured until a full eight hours off duty is recorded.

¶ 21 It is now conceded by Mr. Webb that he was recording his hours inaccurately. The hours he spent supervising, loading, unloading, fuelling and doing paper work should have been recorded as on duty non-driving time or, if the time was spent relaxing in his sleeper berth, as off-duty time in a sleeper berth. If all of the disputed hours are characterized as on-duty non-driving time, Mr. Webb was in clear, though not gross, violation of maximum hours of work as set out in regulation 600. That violation was not cured because he never, in the time from August 16 when the violation began to the time of the accident, cured the violation by experiencing eight hours off duty. It is argued that such a characterization is unfounded as Mr. Webb may have spent much of that time relaxing in his sleeper berth. Mr. Webb himself does not recall exactly and can speak only of what he generally did. From the total evidence, I find as a fact that On the morning of the accident he was driving in violation of the Provincial Regulation.

¶ 22 In listening to the evidence I made certain findings with respect to the evidence of the witnesses. The accident victims and other motorists who testified were uniformly impressive in their honesty and intelligent perspective. They acknowledged where appropriate the limitations in their testimony brought about principly by the fact that they made their observation while in circumstances of great peril. Where their evidence diverges, I am totally persuaded that it is as a result of inability to make fine distinctions in the face of extreme danger. Their testimony, taken together with the accident reconstruction which was presented by P.C. Hunt as Exhibit 23, is sufficient to create a clear picture of how the accident occurred and in what order the various impacts occurred.

¶ 23 Mr. Webb's evidence is not inconsistent with that of these honest witnesses. By all accounts, the path of the tractor trailer was in and of itself a marked departure from any acceptable driving norm, but there is no doubt, and I find as a fact that Mr Webb was not, during the accident event, operating the vehicle by any conscious act. He was unaware of his actions at that moment. The question in this trial is whether the circumstances that put him behind the wheel of a massive and lethal tractor trailer in that unaware state include his own criminal negligence or dangerous operation of the motor vehicle.

¶ 24 I assessed Mr Webb carefully as he gave evidence. In demeanour he was straightforward. He is not a man who displays his emotions openly, but he demonstrated a genuine remorse for having caused the accident and the horrible carnage he observed at the scene. He did not verbalize a remorse about the deceased victims, but I was persuaded by his understated evidence that the event had a crippling effect on him emotionally.

¶ 25 Demeanour alone is hardly a reliable measure of credibility. Mr. Barker for the Crown pointed to three indices of Mr Webb's lack of credibility:

¶ 26 In examination Mr. Webb failed to mention, when describing his lack of desire to drive after the accident, that he was medically suspended from doing so. When he was challenged about the potentially misleading effect of this omission, he immediately acknowledged it. The net effect was to enhance his credibility because in this and other admissions against interest; I was struck with the impression that Mr. Webb was not trying to bolster his position by trying to make himself look good.

¶ 27 A second suggested sign of lack of credibility was said to be found in Mr. Webb's distancing himself from the responsibilities associated with activities such as loading and refuelling which he had recorded as "off duty" time. It was very effectively demonstrated in cross-examination that Mr Webb had lots to attend to during those periods and it could hardly be said he was not working. Still, such periods were qualitatively different from driving time in terms of concentration and necessary exertion. The contradictions were more in the nature of alternate interpretations or of degree. While I am persuaded that Mr. Webb was rationalizing to some degree his ultimately conceded errors in recording his activities, I am not persuaded that he was lying.

¶ 28 Finally, in relation to credibility, it is pointed out that Mr. Webb frequently began his answers with a phrase such as "If I recollect..." I am not persuaded that this is anything more than a figure of speech in combination with a tendency throughout to speak of his general practice rather than a memory specific to the occasion about which he was being questioned. This exposes a not to be unexpected tentativeness due to uncertainty or the passage of time.

¶ 29 A finding as to the accused's credibility is a necessary component in considering the defence put forward that Mr. Webb lost consciousness by reason of an unforeseeable and unforeseen episode of coughing giving rise to cough syncope described above. This is so because I find as a fact that it could have occurred but is neither confirmed nor refuted by medical evidence. I specifically do not find that Mr. Webb is in a class of persons described by Dr. Balter as being most susceptible. He has none of the related history described and all physicians who have examined him have found him healthy. The cold he had in the days prior to the event is of no consequence by Mr Webb's own evidence and the report of the emergency physician shows nothing related except a bit of unremarkable wheezing. The particular symptoms described by Mr. Webb are not the same as those which typically accompany cough syncope. The fact remains that this is a very rare syndrome and even if Mr Webb had some of the predisposing characteristics it would still be most unlikely that cough syncope would occur on this single occasion. However, I am left with the agreed and unchallenged expert medical opinion of Dr. Balter that it was feasible that Mr. Webb could have lost consciousness due to cough syncope.

¶ 30 Another way of expressing the same conclusion is that it is a rational, though uncommon, inference that could be drawn. If the conceded medical expert cannot eliminate cough syncope as a possible explanation for a loss of consciousness preceding the accident, nor can I unless I find as a fact that it could not have occurred. This would necessarily mean rejecting the testimony of Mr. Webb as untruthful.

¶ 31 If I were to find this central part of Mr Webb's evidence was untruthful, it would be the only part because, as I have indicated, there was nothing else in his testimony that I find unworthy of credit. I have

therefore assessed whether there is evidence to suggest that Mr. Webb's explanation may not be true.

¶ 32 In particular, I considered the evidence of Lillian Moreau concerning first, the lack of any attention attracting driving behaviour as she gradually gained on the tractor trailer travelling northbound and secondly, the observed upright position of the driver while he would have been unconscious if Mr. Webb's evidence is believed. The lack of prior bad driving is consistent with the problem causing the marked departure from driving norms being of sudden onset. That the accused would remain upright at the wheel after coughing, gasping and experiencing pressure in the top of his head before losing consciousness is curious, but not so much of an affront to common sense that I would be driven by that fact to find that Mr. Webb is lying.

¶ 33 All of the witnesses were questioned about braking or driving actions during the impact. None were observed. This was essential to the finding that the departure into the northbound lanes was not the result of conscious driving by Mr. Webb. However, it also is disagrees with his evidence that he came to, noted his whereabouts, braked and took the tractor out of gear before jumping. Adelle Baxter says he jumped after hitting a white car which I find to be vehicle 10 occupied by Donald Cockburn, while the tractor trailer was heading for the median but before it hit the green van. I find as a fact that the impact with the green van began, as per Exhibit 23, while the tractor trailer was in its north west path before changing direction to head towards the median again in a north east direction. All the while, the green van was lodged beneath the tractor cab area being thus pushed along under and in front of the tractor trailer. That this could be perceived as a first impact is not surprising especially because of the chaos, the fire engulfing the forward end of the tractor trailer and distance from which Ms. Baxter was watching. In effect, after careful consideration, I find that her evidence is capable of giving some support to the accused's description of his exiting his vehicle and is not contrary to it as suggested by the manner in which it was attacked in the trial.

¶ 34 Perhaps the most compelling evidence contrary to the explanation given by the accused is that supporting the alternate theory put forward by the crown. There is plenty of evidence to support the obvious, common sense conclusion that Mr. Webb simply fell asleep. I frankly believe this is likely. If the standard of proof in this case were the balance of probabilities, I would have no hesitation in finding that it is much more likely that Mr. Webb fell asleep and is lying about the coughing leading to a black out than that he one time only suffered a rare syndrome to which he is not predisposed. However the standard for criminal liability is beyond a reasonable doubt. That a cause for a certain effect is rare does not make it unreasonable. A doubt raised by a rare but "feasible" explanation, is not an unreasonable doubt.

¶ 35 In assessing contradicting evidence between the prosecution witnesses and the defence witnesses I remind myself must not simply convict if I disbelieve the defence. First, if I believe the evidence of the accused, obviously I must acquit. Secondly, if I do not believe the testimony of the accused but I am left in reasonable doubt by it, I must acquit. Thirdly, even if I am not left in doubt by the evidence of the accused, I must ask myself whether, on the basis of the evidence which I do accept, I am convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

¶ 36 Since I am left with a reasonable doubt that the accused fell asleep as opposed to blacked out as a result of the defence evidence, I do not need to consider whether on the basis of evidence I accept, the crown has otherwise proven its case, but I do so in order to indicate what facts I consider to be established after trial. There are a number of agreed facts set out above which I do not propose to repeat.

¶ 37 I find that during a trip to Montreal and back that began Sunday August 16, 1992 at 9:45am and ended with the accident on Highway 400 at 7:20am Tuesday August 18, 1992 Mr. Webb had no more than 10 and 1/2 hours total sleep. He drove in excess of 20 hours and was on duty but not driving for about 10 and 1/4 hours in this period of just less than two days. Objectively, this would give rise to a concern for fatigue.

¶ 38 In addition, the number of hours and their distribution around sleep are in violation of Ontario regulations designed to prevent driver fatigue.

¶ 39 There is no evidence that Mr. Webb was actually, subjectively fatigued. The evidence of a brief period when he appeared to be sleeping in the emergency ward hours after the accident is not probative.

¶ 40 Mr. Webb completed his log books in a consistently incorrect manner. He was perfunctory in his equipment checks suggesting a certain desensitization to the potential danger of his rig to the travelling public because of its comparative size and weight. In his lack of accurate reporting of on duty, non-driving hours there was advantage to him in minimizing the hours of work reported, thereby leaving available more hours to drive and earn additional income.

¶ 41 I make no finding that in filling out his log books inaccurately that Mr. Webb was engaging in conduct that was a marked departure from what a prudent driver would do. First, he did not attempt to minimize driving hours. Second, the driving hours themselves did not result in a gross violation of the regulations. Third, the errors, while unjustifiable were not demonstrably dishonest. They were careless, perhaps wilfully blind stretches, but they were not blatant disregard for the concerns of the regulation.

¶ 42 Violation of the regulation cannot be simply equated with either criminal negligence or falling below a standard of a reasonable person such that driving that follows is necessarily dangerous in the criminal sense. The regulations represent a legislative view of the number of hours a commercial driver can be on duty before fatigue becomes an objective concern. No evidence was led before me to demonstrate on what basis the number of hours legislated therein were chosen. I do not know statistically or otherwise shown, that driving a commercial vehicle after any particular number of hours becomes more hazardous, but despite the thinness of that evidence I can accept it as a fair indication of when danger begins objectively to increase because it accords with common sense.

¶ 43 It would be of no assistance to the accused to demonstrate to me that it is commonplace in the industry for commercial drivers to drive in violation of the maximum hours set out in the regulations. Nor would it be satisfactory for the accused to say simply, as he has, that in spite of the regulations, he felt rested and alert. As pointed out by Sopinka J. in R. v. Anderson (1990) 53 C.C.C. (3d) 481, in assessing whether the conduct of the accused constituted a marked departure from the norm, as the risk created increases, the objective and subjective approaches converge, since it is easier to conclude that both a reasonably prudent person would have foreseen the consequences and the particular accused must have foreseen the consequences. A driver of an 18 wheel vehicle weighing some 35,000 pounds by rough estimate must be taken to know, in fact does know, that the vehicle will kill, maim and destroy if it meets most vehicles driven by the public head on at highway speed. Such a driver must be taken to know that such a collision would be the likely result of falling asleep at the wheel. Further, there is a heightened awareness in the industry because of such factors as Regulation 600 requiring drivers to report their hours of duty to prevent accidents resulting from driver fatigue. If a driver ignores the requirements, choosing to rely instead on their self-assessed level of fatigue, then they do so having weighed the risk in my view. If it can then be demonstrated that the driver did fall asleep at the wheel, then he cannot be heard to say he thought he was okay.

¶ 44 I am supported in this view by the cases which recognize that a person does not just fall "suddenly" to sleep absent some sleep disorder. Crown counsel cited R. v. Sutherland 7 CRNS 70 [BC Mag CT] which refers to a quote from R. v. Longhurst (1940) 75 C.C.C. 356 at 359:

> I cannot conceive that a man will go to sleep in an instant. Drowsiness certainly precedes sleep, and Longhurst must have known he was sleepy.

¶ 45 It is established that falling asleep at the wheel can constitute dangerous driving. R. v. Zavitz 5 CCC (2d) 348. Under the "modified objective test" set out in the SCC by Cory J in R. v. Hundal, [1993] 1 SCR 867, I am required for dangerous driving to assess objectively the driving in the context of all the events surrounding the incident. While as a general rule personal factors need not be taken into account, flowing from the fact that reasonable standards of health and competence being required as a condition of obtaining a driver's licence, if there is an explanation for the objectively dangerous driving, the trier of fact must show that a reasonable person in similar circumstances ought to have been aware of the risk and of the danger in the conduct manifested by the accused.

¶ 46 The total circumstances that must be considered from the evidence in this case include that Mr. Webb was at the end of a three day run which was not, for him, unusually long. He had accumulated on duty hours that

placed him in violation of driver fatigue regulations of which he was aware. Because of reporting errors consistently made, the non-compliance was not patent on the record. He slept in Oshawa but not enough time off was taken to bring him into compliance.

¶ 47 Mr. Webb was driving a vehicle collision with which constituted so great a risk that objective and subjective awareness of the risk of driving while fatigued merge.

¶ 48 If I were persuaded beyond a reasonable doubt that Mr. Webb fell asleep at the wheel, I would have no hesitation in finding that the accumulation of hours of work, the heightened awareness of concern about driver fatigue brought about by the regulations and the necessary inference that before sleep would come a drowsiness sufficient to make the accused subjectively aware that continuing the conduct of driving constituted actual risk, taken together constituted dangerous operation of a motor vehicle. I would not, on that same evidence find criminal negligence because on the evidence as a whole, including my assessment of Mr. Webb I can find no basis for a finding of wanton or reckless disregard.

¶ 49 However, for reasons earlier explained, I cannot find, beyond a reasonable doubt, that Mr. Webb did fall asleep. He has offered an explanation for his driving conduct of the type recognized in the cases as giving rise to a defence notwithstanding an objective finding of dangerous driving or driving that is a marked departure from the norm. That explanation has left me with a reasonable doubt. Therefore, on all charges, I find the accused not guilty.

EBERHARD J.

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