PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Thomas,* 2021 NSPC 19

Date: 20210412
Registry: Kentville

Between:

Her Majesty the Queen

v.

Zachary Thomas

Judge:	The Honourable Judge Ronda van der Hoek
Heard:	April 9, 2021
Decision	April 12, 2021
Charge:	Section 100(2) of the *Motor Vehicle Act*
Counsel:	William Fergusson, for the Crown Zeb Brown, for the defence

Overview:

[1] On a stretch of rural road in Hants County, Mrs. Northrup's driveway begins where the last dash of a broken yellow passing line ends. While starting a left-hand turn to cross the left-hand lane into the driveway, her vehicle was struck on the driver's side by Mr. Thomas' vehicle as it was executing a pass. He is charged with failing to drive or operate a motor vehicle in a careful and prudent manner, contrary to section 100(2) of the *Motor Vehicle Act,* R.S.N.S., c. 293, s. 1.

[2] Mrs. Northrup was the Crown's sole witness and photographs of the accident scene were admitted by consent. Following the close of the Crown's case, defence counsel moved for a directed verdict arguing a lack of evidence that Mr. Thomas' driving was not careful and prudent.

Decision:

[3] After conducting the limited weighing permitted on such an application, I conclude the motion must be denied because there was evidence capable of supporting the conclusion Mr. Thomas' driving was neither careful nor prudent. Before considering Mrs. Northrup's testimony, it is useful to consider the law that applies on such an application.

The Law:

[4] On an application for directed verdict the Court must determine if there was sufficient evidence such that a properly instructed jury, acting reasonably, could find Mr. Thomas guilty of the offence charged beyond a reasonable doubt: *United States v. Shephard* (1977), [1977] 2 S.C.R. 1067. There need only be some admissible evidence of sufficient strength to support a reasonable inference he committed the offence.

[5] The evidence may be direct or circumstantial. Where the evidence is direct and the only issue is whether the Court can accept it without a need to first conduct a reliability and credibility assessment, the test for directed verdict has not been met. Where the evidence is circumstantial and capable of supporting different inferences, the Court may weigh the evidence in a very limited manner to determine whether the inference proposed by the Crown is reasonable without crossing the line into impermissible speculation. In *R. v. Arcuri*, 2001 SCC 54, Chief Justice McLachlin addressed the task for the latter scenario at paragraph 23:

> The judge's task is somewhat more complicated where the Crown has not presented direct evidence as to every element of the offence. The question then becomes whether the remaining elements of the offence -- that is, those elements as to which the Crown has not advanced direct evidence -- may reasonably be inferred from the circumstantial evidence. Answering this question inevitably requires the judge to engage in a limited weighing of the evidence because, with circumstantial evidence, there is, by definition, an inferential gap between the evidence and the matter to be established -- that is, an inferential gap beyond the question of whether the evidence should be believed...The judge must therefore weigh the evidence, in the sense of assessing whether it is reasonably capable of supporting the inferences that the Crown asks the jury to draw. This weighing, however, is limited.

> The judge does not ask whether she herself would conclude that the accused is guilty. Nor does the judge draw factual inferences or assess credibility. **The judge asks only whether the evidence, if believed, could reasonably support an inference of guilt**. [emphasis added]

[6] As a result, should the Court conclude the evidence supports more than one possible inference, and one supports the Crown's burden, the Court cannot simply choose between them. Instead, it must deny the defence motion, permit the trial to continue, and apply a proper balancing to all the evidence following closing submissions.

The Testimony of Mrs. Northrup:

[7] Mrs. Northrup testified that she was in her car returning to her home on the [...] Road, a paved secondary road with two directional lanes divided by double yellow lines and a broken passing line that ends "right where my driveway turns in". As she was approaching her driveway, she "went to turn in" and "he hit" her vehicle "in the right of my car, right where my front fender and tire are". Later in her testimony she corrected herself and testified the impact occurred on the left driver's side of her vehicle and not the right side.

[8] Mrs. Northrup explained that she saw Mr. Thomas' car at the last second when she caught him in her side mirror while looking to see if there was mail in her

mailbox located at the mouth of the driveway. But by that time, “he was right there”, on the opposite side of the road, “going to pass me” and while she may have swerved back into her lane, impact was unavoidable. Her car ended up sitting on the solid yellow lines, his landed in the ditch.

Did she signal her intention to turn?

[9] Mrs. Northrup explained that the otherwise straight road behind her has a little dip near her neighbor’s driveway. She testified that while “coming through” and as she approached her driveway, she put her signal light on, and looked in the rear-view mirror. She says she did not see anything and looked at the mailbox.

[10] Upon looking at the mailbox, she saw Mr. Thomas’ vehicle in her side mirror, explaining it was at the “very back corner of my car when I saw it”. At that point she was slowing down to turn and guessed she was travelling approximately 20 km/hr. She explained, “I think I just started to turn and then noticed him and swerved back to the right”.

[11] On cross-examination baseline facts were re-established: the date, the incident occurred on a nice day, there was no precipitation, the incident occurred on a fairly straight road with an available lawful passing lane, and the passing lane “ends” at her driveway (I note that a lawful pass must start over a broken line but may lawfully

conclude after the line becomes solid.). She slowed, looked in her rear-view mirror and saw nothing, looked for mail, and "slowed right down and started to turn". She believes her car was over the center line when it was struck because she was "into the turn".

[12] The more interesting part of her cross-examination came when she testified that she did not conduct a shoulder check before making the turn.

[13] She also testified that she had her signal on somewhere between her neighbor's driveway and her own. The defence played portions of her audio statement given to police that day, and after hearing the first, Mrs. Northrup confirmed she told the police officer that she was returning from her sister's home, was slowing down "getting ready to turn into the driveway and was getting ready to put a signal on", when she looked in her rear view mirror and "saw him along side of me and was struck".

[14] While Mrs. Northrup agrees she said this, she says that she was quite distraught at the time, had struck her head, was bleeding, and all she knew was she had put her "signal light on and the car came from nowhere".

[15] Defence counsel played the following from a second portion of her audio statement: "just as I was turning, just as I was ready to turn, I did not see him, I just

put signal on, well *just started to put it on, well I just started to put it on when I realized he was there beside me".* Asked by the officer was it on, she replied, *"I assume it was on*". Mrs. Northrup agrees she also said those words to the officer.

[16] There was no dispute Mr. Thomas left the scene and came back with his parents, by that time Mrs. Northup's husband had arrived and "things got heated between all the people". Asked if she recalled saying, "Calm down, I did not have my signal on". She testified, "I don't recall saying that".

Position of the Parties:

[17] Defence counsel says Mrs. Northrup's evidence supports a conclusion Mr. Thomas was lawfully permitted to pass at the location, however *suggests* he should not have done so given she had engaged a left turning signal and had started into the left-hand lane. But the evidence is simply that a passing vehicle hit a car that abruptly turned into the lane in front of it whose driver did not first conduct a shoulder check. The collision was unavoidable.

[18] Mr. Thomas' vehicle, and thus his driving, was observed for mere seconds before impact and a conclusion about whether it was not careful and prudent simply is unavailable. The resulting collision is the Crown's only foundation for the offence, and the mere presence of an accident is not enough to discharge the evidentiary

burden. I am asked to prefer the inference Mr. Thomas was passing and Mrs. Northrup turned into his path. While defence counsel acknowledges there is some mixed evidence about whether she engaged a signal and when, he argues it does not matter because there was a lack of evidence of careless driving on the part of Mr. Thomas.

[19] In reply the Crown agrees there is not "a lot of evidence of Mr. Thomas' driving" but argues there is enough to deny the motion. Should the trial continue, he says he recognizes the issues arising from his case and is aware of the anticipated defence evidence.

The elements of the offence:

[20] Section 100(1) of the MVA, rendered an offence pursuant to s. 100(2) MVA, reads as follows:

> **Duty to drive carefully**
>
> 100 (1) Every person driving or operating a motor vehicle on a highway or any place ordinarily accessible to the public shall drive or operate the same in a careful and prudent manner having regard to all the circumstances.

[21] The elements of the offence have been judicially considered and defence counsel submitted for my consideration *R. v. Abdo*, 2015 ONCJ 44, which contains a review of case law defining careless driving. At para 10-13:

Has the Crown proven beyond a reasonable doubt that the defendant committed the offence of careless driving?

[10] One of the leading cases concerning careless driving is that of *R. v. Beauchamp*, 1952 CanLII 60 (ON CA), [1953] O.R. 422, [1953] 4 D.L.R. 340 (C.A.). In paragraph 19 of this decision, Mackay J.A. states:

"It must also be borne in mind that the test, where an accident has occurred, is not whether, if the accused had used greater care or skill, the accident would not have happened. It is whether it is proved beyond reasonable doubt that this accused, in light of existing circumstances of which he was aware or of which a driver exercising ordinary care should have been aware, failed to use the care and attention or to give other persons using the highway the consideration that a driver of ordinary care would have used or given in the circumstances. The use of the term 'due care', which means care owing in the circumstances, makes it quite clear that, while the legal standard of care remains the same in the sense that it is what the average careful man would have done in like circumstances, the factual standard is a constantly shifting one, depending on road, visibility, weather conditions, traffic conditions that exist or may reasonably be expected, and any other conditions that ordinary prudent drivers would take into consideration. It is a question of fact, depending on the circumstances in each case."

[11] At paragraph 21 of the same decision, Mackay J. states further:

"There is a further important element that must be considered, namely, that the conduct must be of such a nature that it can be considered a breach of duty to the public and deserving of punishment. This further step must be taken even if it is found that the conduct of the accused falls below the standard set out in the preceding paragraphs."

[12] As well, I must consider the case of *R. v. Wilson* (1971), 1970 CanLII 365 (ON CA), 1 C.C.C. (2d) 466, [1971] 1 O.R. 349 (C.A.), another decision concerning careless driving. In that case, Gale C.J.O. stated, at paragraph 3, that:

"Mere inadvertent negligence, whether of the slightest type or not, will not necessarily sustain a conviction for careless driving."

One of the many subsequent cases that cite both *Beauchamp* and *Wilson* in an analysis of a careless driving charge is that of *R. v. Ereddia* (2006), 2006 ONCJ 303 (CanLII), 37 M.V.R. (5th) 179 (Ont. C.J.).

[22] In this province the elements of the offence were considered in *R. v. Creaser*, [1994] NSJ No. 669, at paragraphs 21 to 26 where Provincial Court Judge

Batiot reviewed *R v. Mann,* 1966 CanLII 5 (SCC), and concluded generally that the provincial charge of careless driving deals with "inadvertent negligence". Also addressing same are *R. v. Schlawitz*, 2009 NSSC 230, *R. v. Urquhart*, 2019 NSSC 230, and *R. v. Burke*, 2014 NSPC 16. In *Burke*, after a comprehensive review of prior cases, Scovil J. fashioned the following list of considerations for assessing a charge under s. 100(1) MVA:

> [12] From the above review of the law, we can derive the following in relation to what must be considered before a Court makes a finding that an Accused operated a motor vehicle in a manner that was not careful or prudent under Section 100(1) of the *Motor Vehicle Act*:
>
> 1. That the driving must be such as to bring it into inadvertent negligence.
>
> 2. That the vehicle was operated without due care and attention, or
>
> 3. That the vehicle was operated without reasonable consideration for other persons using the highway.
>
> 4. It must go beyond the mere error in judgment indicating a measure of indifference by the Accused or a want of care.
>
> 5. That the factual standards shifts depending on the road, visibility, weather conditions, traffic conditions existing or reasonably expected, together with any other conditions an ordinarily prudent driver would take into account.
>
> 6. That the requisite elements of the offence must be proven by the Crown and beyond a reasonable doubt.
>
> 7. Was there any intentional risk taking such as to be deserving of punishment?

[23] In applying these considerations, I must consider the direct and circumstantial evidence of Mrs. Northrup.

Weighing the testimony:

[24] Addressing only “careful and imprudent”, Mrs. Northrup says she looked in her rear-view mirror and did not see another vehicle, noting there was a dip on the otherwise straight road before her neighbor’s driveway. As a result, it is available to conclude Mr. Thomas’ car was in the dip when she looked back.

[25] Mrs. Northrup testified that she engaged her signal light between her neighbor’s driveway and her own. There is no evidence of the distance between the two driveways. As a result, it is available to infer she activated the light at a reasonable distance from her own driveway. As a result, it could be available to be seen by a driver behind her vehicle. I recognize this evidence varied on direct and cross-examination, but for the purpose of the directed verdict motion, I must consider the direct evidence and the inference supportive of the Crown’s case.

[26] Mrs. Northrup proceeded to turn without first conducting a shoulder check and noticed Mr. Thomas’ vehicle in her side mirror while looking to see if there was mail in her mailbox and while turning. Since her evidence was that she did not see his vehicle before signaling her intention to turn, I can conclude it was not there to be seen when she first started her turn. I can infer his vehicle came up quickly upon her car that had slowed and signaled.

[27] In the circumstances, her car was struck and it is available to infer Mr. Thomas' vehicle was proceeding too quickly to stop.

[28] Reminding myself that I am not permitted to make findings of reliability or credibility at this stage, but merely determine the reasonable inferences I can accept from the evidence, the best inference for the Crown's case is Mrs. Northrup engaged the signal light, slowed, and Mr. Thomas disregarded same and tried to pass her car as she executed a lawful maneuver.

[29] It is available to conclude Mr. Thomas was inadvertently negligent, that he failed to operate his vehicle with care and attention, that he was operating it without reasonable consideration of Mrs. Northrup's use of the road. There is sufficient evidence supporting an inference his driving went beyond a mere error in judgement and indicated a measure of indifference or a want of care. I can conclude the driving conditions were excellent at the time, with a possible visual impact caused by the dip in the road before the neighbor's driveway, and that passing was legally permitted at that portion of the road. It is available to the Court to also conclude Mr. Thomas was engaged in risk taking behaviour because he did not allow Mrs. Northrup to complete her turn.

[30] I am aware the evidence suggests conflicting reasonable inferences, but I must choose the inculpatory ones. So, on my careful consideration of the testimony, I conclude there was some admissible evidence of sufficient strength to support a reasonable inference Mr. Thomas's driving lacked care and prudence. Despite an accident sometimes being simply that, this trial may proceed and all the evidence will be evaluated at the end.

[31] Motion denied.

van der Hoek J.