“Client acquitted of dangerous driving after running red light and causing accident.” [COMMENTS BY RICHARD NEARY]

R. v. D_____

Between
Regina, and
M A D_____

[2009] B.C.J. No. 68

2009 BCPC 9

File No: 141803

Registry: Victoria

British Columbia Provincial Court
Victoria, British Columbia

E.C. Blake Prov. Ct. J.

Heard: January 6, 2009.
Judgment: January 7, 2009

(36 paras.)

Criminal law — Criminal Code offences — Offences against person and reputation — Motor vehicles — Dangerous operation of motor vehicle — Accused acquitted of dangerous driving — While he ran red light, causing collision, accused's driving did not constitute marked departure from standard of reasonable driver because it was not established he was speeding — Criminal Code, s. 249.

Criminal law — Evidence — Witnesses — Credibility — Criminal record — Accused acquitted of dangerous driving — While he ran red light, causing collision, accused's driving did not constitute marked departure from standard of reasonable driver because it was not established he was speeding — Evidence from accused discounted based on his record of offences involving dishonesty — Eyewitness evidence estimating his speed not reliable.

Trial of D_____ on a charge of dangerous driving. D_____'s vehicle collided with another vehicle as D_____ was proceedings through an intersection and the other driver was turning left. An independent witness observed D_____' vehicle fishtailing on the wet road twice before the collision and turned immediately upon hearing the impact to see the light facing D_____ was red. This witness also estimated D_____ was speeding at the time of the collision based on the sound of his engine. D_____ claimed the light facing him had just turned green, while the other driver claimed she had the green light. D_____ claimed he was not speeding. D_____ had a criminal record of offences involving dishonesty.

HELD: The charge was dismissed. Although the evidence showed D_____ entered the intersection against a red light, it did not establish beyond a reasonable doubt that he was speeding as well. As such, his driving was not a marked departure from the standard of a reasonable driver. D_____' evidence was not accepted as reliable in part because of his record of being dishonest. The eyewitness evidence estimating his speed was not reliable but was accepted on other points.

Statutes, Regulations and Rules Cited:

Criminal Code, R.S.C. 1985, c. C-46, s. 249, s. 249(1)(a)

Counsel:

Counsel for the Crown: Jess R. Patterson.

Counsel for the Defendant: Richard Neary.

REASONS FOR JUDGMENT

E.C. BLAKE PROV. CT. J.:--

INTRODUCTION

1 The Defendant is charged with the offence of dangerous driving, contrary to s. 249(1)(a) of the Criminal Code. In summary, the prosecution arises out of a motor vehicle accident that occurred at the intersection of Beacon Avenue and Resthaven Drive, in Sidney, British Columbia, on November 12, 2007.

2 The Defendant concedes that at approximately 12:30 pm on the day in question he was the driver of a 1984 GMC pickup truck which came into collision with a 1978 Chevrolet Impala driven by L M at the intersection described. The circumstances giving rise to the collision are very much in issue, however. To some extent the legal foundations applicable to a charge of

dangerous driving are also in dispute.

3 In the circumstances, I propose to proceed in this fashion: First, I will review the evidence, making findings of fact as necessary; second, I will consider the applicable legal principles; and third, I will apply the legal principles to the facts as I have found them.

REVIEW OF EVIDENCE AND FINDINGS OF FACT

4 The Crown called three witnesses in support of the dangerous driving charge. The first witness, D A___, testified that he was walking eastbound along Beacon Avenue shortly before the collision occurred. He observed the Defendant's pickup traveling in the opposite direction, westbound, on Beacon Avenue and made certain observations of the manner in which the Defendant drove, to which I will return in detail in a moment. Then he heard a crash behind him. Turning around, he saw the results of the collision: namely, the pickup truck and the Impala, both damaged, just beyond the intersection of Beacon Avenue and Resthaven Drive, less than a block away. He testified that he then immediately observed that the traffic light at the Resthaven Drive intersection showed a red light for traffic proceeding westbound on Beacon Avenue.

5 The second witness for the Crown was L M, the driver of the Impala motor vehicle. She testified that she approached Beacon Avenue traveling southbound down Resthaven Drive. She had seen the traffic light facing her at Beacon Avenue turn green as she left the preceding intersection, which was a four-way stop at Sir James White Boulevard. She covered the approximate 150-metre distance between Sir James White Boulevard and Beacon Avenue at roughly the speed limit, or 30 kilometres per hour.

6 Ms. M testified that the traffic light remained green in her direction of travel as she began a left turn onto Beacon Avenue. She was about 1/4 of the way out into the intersection when she saw the Defendant's pickup approaching her from her left. The pickup was not stopping. Ms. M had only a couple of seconds to react, and she did so by instinctively covering her head with her hands and turning her body to the right. She also unhooked her seat belt to allow herself more flexibility of movement.

7 Some question was raised about the plausibility of Ms. M' testimony concerning the unbuckling of the seatbelt, and I should comment now on that aspect of the matter. As I understood Ms. M' evidence, the unbuckling of the belt occurred simultaneously with the turning of her body to the side and the covering of her head. Seen in that way, I do not see her evidence as problematic, especially in the absence of any evidence about the specific mechanics of the seatbelt assembly.

8 Ms. M testified that her own vehicle was moving slowly at the point of impact, but she was not able to comment on the speed of the Defendant's vehicle at that time. She testified, quite fairly I thought, that she could only judge the speed by reference to the distance which her own vehicle was dislodged upon impact, and she declined to be more specific. The photographic evidence shows that Ms. M' vehicle was spun around from its original direction, facing more or less southbound, until it came to rest facing in a northwesterly direction against the curb on the north side of Beacon Avenue, just west of the intersection. The movement may be described as essentially involving the car spinning about on its rear axle between 90 degrees and 180 degrees, and also being transposed a few feet westward.

9 The Crown also called as a witness the investigating police officer, Constable Treen, who arrived at the accident scene within minutes after the collision. His evidence consisted largely of the introduction of photographs and the description of various distances and road conditions. The evidence which he gave was most helpful and was not contradicted. I have no hesitation in merely injecting portions of his testimony into the evidence of the other witnesses as and where appropriate.

10 The Defendant testified on his own behalf. He described traveling westbound along Beacon Avenue for a city block, admitted for purpose of this proceeding to be a distance of 145 metres, before arriving at the Resthaven Drive intersection. He maintains that he travelled within the speed limit over that distance and that the light facing him turned green just as he arrived at Resthaven Drive. He saw Ms. M move out into the intersection at the last moment and he testified that he attempted to steer to the right, onto northbound Resthaven Drive, in order to avoid her car. Unfortunately, the Defendant says, his attempted move to the right was unsuccessful on the wet road and his pickup continued straight ahead into the drivers' side of Ms. M vehicle.

11 It is against this general evidentiary background that factual determinations must be made and the allegedly dangerous nature of the Defendant's driving assessed. Counsel have, I think, properly identified two aspects of the driving to be carefully analyzed. The first is the question of whether the Defendant proceeded through a red light at the intersection where the collision occurred, and the second is the Defendant's driving pattern, including (but not limited to) his speed, as he proceeded along Beacon Drive in the block leading to that intersection. I find it convenient to deal with the two issues in the order which I have described, while recognizing, of course, that it reverses the chronological pattern.

12 I have no doubt whatever that at the moment when the collision occurred, the traffic light was green for Ms. M and red for the Defendant.

13 I have reached that conclusion, in part, because I do not place much faith in the reliability of the Defendant's testimony generally. I found that he contradicted himself on matters of significance in rather disturbing fashion. In describing how he turned the corner from Fifth Street onto Beacon Avenue he initially stated that he stopped, notwithstanding that the light facing him was green, because he always did so. When pressed on the point, he changed his mind and said that he merely slowed down. His description of the speed he travelled along Beacon Avenue seemed to change each time he mentioned the subject.

14 Nor can I overlook the fact that the Defendant has a lengthy criminal history which discloses a number of convictions for offences of dishonesty. Notwithstanding counsel's creative efforts to distance the Defendant from that record, I must confess that I cannot avoid the feeling that I should be extremely careful at the very least about accepting the word of a man who has been so frequently dishonest, in rather serious ways, in the past.

15 In the present case, the additional difficulty facing the Defendant, at least on the issue of the traffic light, is that Ms. M was herself such a believable witness. She did not attempt in any way to embellish her testimony or to offer evidence based on assumption or guesswork. If she was unsure on a point she said so, as, for example, when describing the speed of the Defendant's vehicle. She was consistent in her recollections, and unshaken in cross-examination.

16 In addition, on this point, I accept the testimony of D A___ that when he turned to look at the crash scene, immediately after the collision occurred, he could see that the traffic light facing westbound traffic on Beacon Avenue was red. Mr. A___ was perfectly placed to make this observation. The photographic evidence demonstrates well that from where Mr. A___ stood he would have a perfect vantage point from which to see both the accident scene and the traffic light in the same line of sight, only about 100 metres away. There was no suggestion whatever that the witness' view was in any way obstructed.

17 The second issue concerns the Defendant's pattern of driving before the accident. As I have already stated, I do not find the Defendant's testimony generally to be particularly helpful. On this second issue, I am reinforced in that conclusion by the fact that the Defendant did not even mention that his vehicle was observed to fishtail on two separate occasions as it began

its course up Beacon Avenue, near Fifth Street. Mr. A___ made this observation, at close range, and was not seriously challenged on it. I find that Mr. A___' observation on that point is quite obviously accurate, and yet the Defendant did not comment on it at all, an oversight which I found quite remarkable. Equally remarkable, perhaps, was the fact that the Crown made nothing of the point in cross-examination.

18 The fishtailing of the Defendant's vehicle does not, however, necessarily lead to the conclusion that the Defendant's vehicle proceeded up Beacon Avenue at a high rate of speed, much less that it arrived at the Resthaven Drive intersection in an uncontrolled fashion. It would appear from the photographs that the roads were wet at the time of the accident, even though it was not actually raining. The Defendant's own evidence, which I accept on this point, confirms what is evident from the photographs. Common experience would suggest that a wet roadway is more apt to cause a vehicle to lose traction when turning a corner. Common experience would also suggest that such a result is more likely as the speed of the vehicle increases, but such a conclusion is imprecise at best.

19 We do indeed have Mr A___' estimate that the vehicle reached a speed of 60 kilometres per hour as it passed him, proceeding over a period of a few seconds in the opposite direction along Beacon Avenue. As Joyce, J. pointed out in R. v. St. Pierre, [2005] B.C.J. No. 3131, at paragraph 15, however, civilian witness' speed estimates are notoriously unreliable, being based, as in this case, on such doubtful factors as the sound of the engine.

20 Mr. A___ does not claim any particular skill or experience in speed estimation, and one always has to wonder how a perfectly well-intentioned estimate may be affected by other, related observations. It seems to be that an observation that a driver is not in perfect control of his vehicle, coupled shortly thereafter with an observation that the driver has gone through a red light and caused a crash, might well skew a layman's perception of the speed of the vehicle. Furthermore, general reservations about Mr. A___' speed estimate are bolstered in this case by the unquestionable truth that the witness' estimate of distance , concerning the length of the block along Beacon Avenue where he made his observations, was significantly in error.

21 In short, in the absence of expert evidence in this case, I am unable to say with any degree of certainty what speed the Defendant was traveling at any time when he proceeded along Beacon Avenue.

22 The observation that the Defendant's vehicle fishtailed on two occasions shortly after it came onto Beacon Avenue is an observation which, as I have said, I do accept, but it does not help me greatly concerning the manner in which the vehicle was driven as it approached Resthaven Drive. The evidence discloses that the distance between Fifth Street and Resthaven Drive is 145 metres. A vehicle traveling at 60 kilometres per hour would require approximately 10 seconds to cover that distance. A vehicle traveling at 20 kilometres per hour would require approximately 30 seconds. Depending on the Defendant's speed, an unknown factor in this case, a significant period of time may have passed after the observed fishtailing near Fifth Avenue. Without further evidence, it would be unsafe to say anything much about the manner in which the vehicle was being driven as it came close to the Resthaven Drive intersection.

23 In the end result, I have confidence in reaching the following conclusions, but no more, concerning the Defendant's driving in the period before the accident:

a) The Defendant entered Beacon Avenue in such a way that he lost control of his vehicle briefly, and then did so a second time before passing Mr. A___, who was perhaps 1/3 of the way along the Defendant's travel route on that street.

b) There is no reliable evidence about the speed of the Defendant's travel along Beacon Avenue, but the roads were wet and there is a reasonable prospect that speed contributed to some extent to the fishtailing in the initial stages;

c) There is no reliable evidence about the speed of the Defendant's vehicle as it approached Resthaven Drive;

d) There is no reliable evidence about the extent to which the Defendant's vehicle was under control when it arrived at the Resthaven Drive intersection; and

e) The Defendant proceeded through a red light at Resthaven Drive and caused the collision with Ms. M' vehicle.

24 I should also add, before leaving the factual background, that given my general reservations about the Defendant's evidence I do not feel able to say whether or not he took evasive action upon discovering that an impact was imminent. He says that he did and I cannot discount that entirely. He was, after all, not found by the investigating officers to be impaired in any way, and he was cooperative and coherent after the collision. Mere self-preservation, if nothing else, would suggest that he probably took steps of some sort to minimize the force of impact, but I cannot be sure.

25 Finally, I should add that I take specific note of the police evidence that at lunchtime on a weekday on a main thoroughfare in Sidney such as Beacon Avenue, both vehicle traffic and pedestrian traffic were likely to be heavy. That evidence is not contested. There is little evidence of the actual state of the traffic at 12:30 pm on November 12, 2007, but of course the Criminal Code dictates that in assessing a driving pattern in the context of a s. 249 prosecution reference must be had not only to the actual state of traffic, but also the extent to which traffic could reasonably be anticipated.

THE LEGAL BACKGROUND

26 There can no longer be any doubt that the offence of dangerous driving involves the imposition of criminal sanctions on the basis of a specified degree of negligence. In R. v. Hundal (1993), 79 C.C.C. (3d) 97, at page 106, Cory, J said this, speaking for the majority of the Supreme Court of Canada:

> [I]t is clear that the basis of liability for dangerous driving is negligence. The question to be asked is not what the accused subjectively intended but rather whether, viewed objectively, the accused exercised the appropriate standard of care. It is not overly difficult to determine when a driver has fallen markedly below the acceptable standard of care. There can be no doubt that the concept of negligence is well understood and readily recognized by most Canadians. Negligent driving can be thought of as a continuum that progresses, or regresses, from momentary lack of attention to civil responsibility through careless driving under a provincial Highway Traffic Act to dangerous driving under the Criminal Code.

27 Later on in the Hundal decision, Cory, J. said this, at page 108:

It follows then that the trier of fact may convict if satisfied beyond reasonable doubt that, viewed objectively, the accused was, in the words of the section, driving in a manner that was "dangerous to the public, having regard to all the circumstances, including the nature, condition and use of such place and the amount of traffic that at the time is or might reasonably be expected to be in such place." In making the assessment, the trier of fact should be satisfied that the conduct amounted to a marked departure from the standard of care that a reasonable person would observe in the accused's situation.

28 In light of the plethora of seemingly irreconcilable cases since the Hundal decision, one may wonder about Cory, J's optimism concerning Canadians' ability to recognize what a "marked departure" from acceptable standards of driving might look like. However that may be, it is quite clear that the Supreme Court of Canada has, in decisions following Hundal, always kept firmly in mind the distinction between the sort of negligence recognized in the civil courts and the criminal form of negligence contemplated by s. 249 of the Criminal Code. As McLachin, CJC stated in R. v. Creighton, [1993] 3 S.C.R. 3 "the law does not lightly brand a person as a criminal".

29 The recent decision in R. v. Beatty (2008), 228 C.C.C. (3d) 225 (SCC), endeavours to explain Hundal in a detailed way. The Court affirms that there are at least two significant differences between civil negligence and the sort of negligence contemplated by the offence of dangerous driving. First, the criminal standard requires proof of a marked departure from the standard of care expected of a reasonably prudent driver. Second, the criminal offence allows of various defences which would not be accepted as valid in a civil proceeding.

30 Dealing with the first point raised in Beatty, it is clear that there remain differences of opinion amongst the members of the Court about whether the "marked departure" applies to the actus reus of the offence or the mens rea, or to both, but for present purposes it does not appear to me that the distinction is of any great moment. However precisely the matter is analyzed, it is obvious that most cases, like this one, stand or fall on the question of whether the evidence discloses that the accused drove in a fashion which shows a "marked departure" from reasonable standards, as opposed to showing mere negligence to a civil standard.

31 In determining where the dividing line may be between mere negligence and negligence which shows a "marked departure" from reasonable standards, I find some assistance in the words of the Ontario Court of Appeal in R. v. Willock, [2006] O.J. No. 2451,at paragraph 31. In that case, Doherty, JA remarked that "conduct that occurs in such a brief time frame in the course of driving, which is otherwise proper in all respects, is more suggestive of the civil rather than the criminal end of the negligence continuum".

32 I emphasize, however, that I view Doherty, JA's dictum in Willock as a helpful guideline rather than as a fixed statement of principle, since it is apparent that most cases in this area are heavily fact-driven, and there clearly are plenty of examples in which short periods of bad driving can be and have been characterized by appellate courts as constituting dangerous driving within the meaning of s. 249. See, for example, R. v. Carlson, [1993] B.C.J. No. 3066 (CA).

APPLICATION OF LAW TO FACT

33 In my view, the present case comes close to the dividing line between careless driving and dangerous driving. If the evidence proved a combination of high speed reckless driving leading up to and followed immediately by a failure to stop for a red light, on a busy city street, I would not hesitate to conclude that dangerous driving had been demonstrated.

34 Carefully analyzed, however, the evidence does not go anywhere near that far, as I have attempted to explain. The elements of speed and recklessness, which the Crown attempted to demonstrate as having occurred in Mr. A___' immediate presence near the Fifth Avenue intersection, have not been proven satisfactorily, and leave open the reasonable possibility that in the period of time immediately before he arrived at the Resthaven Drive intersection the Defendant was proceeding in an unremarkable fashion. I cannot discount that possibility, even though I do not accept the evidence of the Defendant concerning his driving pattern.

35 Undoubtedly, in my view, the Defendant did proceed improperly through the red light at Resthaven Drive. That action plainly amounted to negligence on the Defendant's part and, equally plainly, it caused the collision with Ms. M' vehicle to occur. But I have at least a reasonable doubt that the Defendant's action in that respect can be tied to any larger pattern of bad driving and thereby categorized as anything more than a momentary lapse. In the circumstances, therefore, I am bound to conclude that the charge of dangerous driving has not been made out.

CONCLUSION

36 The charge of dangerous driving is dismissed.

E.C. BLAKE PROV. CT. J.