In The Supreme Court of Bermuda

APPELLATE JURISDICTION
2019: 47

FIONA MILLER
(POLICE SERGEANT)

Appellant

-v-

DENNIS WEBB

Respondent

JUDGMENT

Prosecution's Appeal against finding of No Case to Answer in the Magistrates' Court
Causing grievous bodily harm by driving without due care and attention
Meaning of grievous bodily harm and meaning of careless driving
Sections 37A of the Road Traffic Act 1947

Date of Hearing:	06 October 2020
Date of Judgment:	15 October 2020
Appellant	Mr. Alan Richards for the Director of Public Prosecutions
Respondent	Ms. Susan Mulligan (Christopher's)

JUDGMENT delivered by S. Subair Williams J

Introduction

1. This is an appeal by the Crown against Acting Magistrate's Leopold Mill's finding of no case to answer on Information 18TR04170 to a charge of causing grievous bodily harm by driving without due care and attention contrary to section 37A of the Road Traffic Act 1947 ("RTA").

2. By Notice of Appeal filed on 13 December 2019 the Crown has appealed this decision under sections 4(1)(a) and 4(2)(a) of the Criminal Appeal Act 1952 on the ground that "*the Learned Acting Magistrate Mills erred in law when he found there was insufficient evidence on which a trier of fact, properly instructed, could convict…*".

The Evidence

3. The Crown called two live witnesses at trial, namely the Complainant Ms. Sherrylnn Farrell and an eye-witness civilian witness, Ms. Helen Dill.

4. The Complainant is noted on the Record of Appeal ("the Record") to have described the 13 March 2017 collision during her evidence in chief as follows:

   "*I left home to go for a walk, about 5:50am, by the time I reached the East Broadway area, my pace had slowed. I was walking west and was knocked down along the bottom of Spurling Hill. I had just passed the center of the line when I was knocked down. I had looked both ways and I saw the other witness coming down the hill as I was going across; she was in a taxi; I was at the dotted line at the foot of Spurling Hill…I remember landing close to the sidewalk, about 2 feet from it. I remember Mr. Webb being about 10 feet away from me and I remember him saying 'lady, I didn't see you.' I also remember the other witness, Ms. Dill, asking me for a phone number and I gave her my brother's number; it was a bit of a blur; I recall the ambulance being there…*"

5. For visual aid purposes, photo images of the junction between Spurling Hill and Front Street were placed before Acting Magistrate Mills. Exhibit 1F [page 120 of the Record] closely depicts a sidewalk railing at the bottom of Spurling Hill at the edge of the double white line on the road and near a streetlight pole. As the Complaint crossed the road starting from a point near the streetlight pole, she walked on the path of the double dotted and single dotted line.

6. In crossing the street at the foot of Spurling Hill, the Complainant stated that she looked towards both directions. She said that she saw a taxi travelling down Spurling Hill as she was walking across the dotted line. She further described, when cross-examined, that she recognized the taxi driver and made a 'back-wave' hand-gesture to the taxi driver while she walked across the street. Ms. Mulligan put it to the Complainant in cross-examination that she had to cross the road quickly to get out of the pathway of the taxi coming down Spurling Hill. However, the Complainant disagreed stating that when she greeted the taxi driver, the taxi was at the top of Spurling Hill at such a distance from her that it was unnecessary for her to walk at any fast pace.

7. The Complainant's evidence was that immediately prior to the moment of impact she was already halfway across the road and that the Appellant's vehicle hit her from behind. This part of the evidence was unchallenged at trial. Also without controversy,

the Complainant described the traffic to be light around the time of the accident. She further stated that it was still 'a bit dark' but that the street lights were on as the sun had just started to rise.

8. During Ms. Mulligan's cross examination of the Complainant at trial, the Complainant was challenged on the safeness of her decision to walk across the bottom of Spurling Hill [pages 24-27 of the Record]:

"...

Question:	*You recall Mr. Webb saying 'lady, I didn't see you'; but did you see him?*
Answer:	*When I looked back, I didn't see any traffic at that time.*
Question:	*You said there was a cross-walk and a dotted line?*
Answer:	*The cross walk was not where I was crossing, it was further ahead.*
Question:	*Do you know what the dotted line on the road means?*
Answer:	*My interpretation of the dotted line means 'cross carefully.'*
Question:	*Would you agree that, if it was a cross-walk, it would look like the one further across the road at the bottom of Spurling Hill?*
Answer:	*I would agree that any pedestrian on the road has the right-of-way.*
Question:	*My question was if that was meant to be a cross-walk, it would be laid out the same way.*
Answer:	*I got struck from behind; I'm not endangering anyone?*
Question:	*Did you start out walking on the white dotted line?*
Answer:	*Yes.*
Question:	*And it's the same white dotted line at the bottom of Spurling Hill?*
Answer:	*Yes*
Question:	*Did the dotted line extend, easterly?*
Answer:	*Yes*
Question:	*In your recollection, is there any barrier along the east side of the road?*
Answer:	*I don't recall seeing a barrier but there is a sort of hand-rail but that is further up*
...	
Question:	*If the dotted line means 'cross with caution', what does the double dotted line mean?*
Answer:	*The same.*
Question:	*Are you sure what it means?*
Answer:	*I assume it means just to cross with caution.*
Question:	*The metal railing on the east side of the road from where the double lines start, what was it there for?*
Answer:	*So you wouldn't be confused as you go up the sidewalk; there are a lot of reasons why the rail would be placed there.*
Question:	*Did it occur to you that the... [reason the handrail] was there was because it was unsafe to cross there?*

Answer: *I didn't know that and there was no sign saving [sic] [saying] 'do not cross'...*

...

Question: *I suggest that the single dotted line and double-dotted lines are not markings for pedestrians.*

Answer: *I don't know – I didn't see anything wrong with crossing there;*

9. Ms. Dill's description of the accident given in evidence in chief was unchallenged by the Defence [pages 32-33 of the Record]:

"*I'd just dropped off someone in Hamilton and as I was coming down Spurling Hill, I noticed a young lady on the sidewalk – at the end of the sidewalk on the right-hand side; as she was stepping to go across the street; she was looking at me to make sure I was looking and that's when I heard her scream and I jumped out; she was in a split position; her leg was split open- the back of her calf; I noticed that her hand was very disfigured; I then called 911 for the ambulance....*

Question: *When you first saw the lady, where were you?*

Answer: *As I was driving down the hill, she was looking like she was wanting to cross the street;*

Question: *Where were you when you first noticed the bike?*

Answer: *When she was walking up and trying to cross;*

Question: *When the accident occurred, where was the young lady?*

Answer: *I can't say I saw the rider hit the lady, but I did hear the collision; I reached the bottom of Spurling Hill, stopped and got out of the taxi;*

Question: *You said you didn't actually see the collision view?*

Answer: *Yes*

Question: *Where was the lady before the collision?*

Answer: *The lady was in the road when the collision occurred*"

10. A notice of the agreed facts in this case was filed pursuant to section 30 of the Evidence Act 1905 ("the Agreed Facts"). The Agreed Facts broadly surmised the general layout and road signage where the collision occurred. Paragraph 4 of the agreed facts reads:

"*4. In relation to the junction at Front Street and Spurling Hill;*

a. *The broken double line near the junction of Crow Lane where motorists are leaving Spurling Hill is part of the Give Way road markings. These double white lines indicate the furthest point of travel and motorists are to give way at this point unless the Crow Lane is clear.*

b. *The single broken line between Spurling hill and Crow Lane it [sic] [at] the edge of Crow Lane roadway. This line provides alignment for motorists to keep in their lane when departing from Front Street.*

c. *The hand railing is put in place to discourage pedestrians from crossing this location. Motorists traveling down along Spurling Hill tend to look to the right so they most likely will not see a pedestrian near this give way markings [sic]. This railing system directs pedestrians to travel uphill so that they can use the traffic signals on top of Spurling Hill to cross this street. As well as move away from this Give Way, and junction.*

d. *Additionally if there is traffic queue on Spurling Hill waiting behind this Give Way, the vehicles will hide pedestrians and make visibility impossible for motorists approaching Spurling Hill from Front Street to see them trying to cross this street. This will make this section of [the] street dangerous as a cross walk location. However, if a pedestrian decides to cross at this location they do so at their own peril and clearly have not considered this fencing device in place here.*

e. *There is one warning sign posted to alert motorists [that] there is [a] cross walk ahead on Front Street. This is warning motorists about the cross walk at the Crow Lane and Front Street junction. Motorists are required to take notice of this warning regardless of [the] road way they wish to travel and therefore need to take necessary steps to watch out for pedestrians.*"

11. It was also agreed by both sides that the Appellant was the rider of motor cycle BS359 at the time of the collision and that such collision was visually captured by CCTV motion sensor cameras obtained from Mr. Mark Eldridge, an IT Manager at Renaissance Reinsurance Limited. The CCTV footage was evidenced at trial but was not available for review by this Court on appeal.[1] At paragraph 12 of the acting magistrate's judgment he described the footage as follows:

"*The video footage showed the Complainant crossing the road along the dotted lines seen at the bottom of Spurling Hill... [The] Complainant identified herself on the video crossing the road and, about halfway across, she is shown being struck by a motorcyclist as he headed up Spurling Hill. The force of the collision throws both individuals to the ground and the witness identifies herself lying in the middle of the roadway.*"

[1] Ms. Nicole Hassell of the Magistrates' Court confirmed that she spoke directly with Acting Magistrate Mills who advised that the footage was shown during trial but that the disc of the CCTV footage was retained by the trial prosecutor without having been entered as a trial exhibit.

12. By a report dated 2 May 2017 Dr. Shereen Ramcharan-Palmer, a physician on duty at the Emergency Department of King Edward Memorial Hospital, reported that the Complainant experienced tenderness to her right leg, a 12 cm laceration to her right calf with mild bleeding and a fracture in her left wrist. The Complainant stated in her evidence that she underwent 6 weeks of physiotherapy and explained that she continues to suffer pain in her wrist when engaged in activities such as cooking and household chores and when the weather is either hot or cold. She also said that she is no longer able to walk similar 4 mile distances as she previously did, as a consequence of the ongoing pain to her leg.

The Ruling of No Case to Answer:

13. In a written ruling setting out the evidence heard and surmising the submissions made before him, Acting Magistrate Mills upheld the no case to answer submission made by the Defence. The material portions of his ruling are [paras 36-37 and para 40]:

"...

36. The Court considers that the evidence given by the Prosecution witnesses is credible; moreover, the Court has also had sight of the video footage of the accident itself at the moment of impact between bike and pedestrian. The Court makes the following observations: the roadway at the time of the accident was relatively clear – there were not lots of cars and bikes moving to and fro; the road along East Broadway did not have any traffic on it and Spurling Hill itself was devoid of traffic and, furthermore, it was not raining; the road was dry, the weather was not such as might cause an additional hazard and, although the street lights were still on, it was a clear day, with good visibility, the sun was said to be just coming up at the time and there were no signs of any other traffic in the vicinity of the traffic accident scene at the material time.

37. In final analysis, the Court has reminded itself that the Defendant in this matter is charged with causing Grievous Bodily Harm to the Complainant on 13th May 2017. This is one of the pivotal issues which arose for consideration in the case of The Queen v Symonds (2014) Bda LR 115. Defence Counsel cites this Case in support of her contention that, in her view, the real question for this Court is whether there is any evidence from which the Trier of Fact could properly conclude that the injuries sustained by the Complainant endangered life or permanently injured the Complainant's health. The Medical Report introduced into evidence in this Trial is silent on these particular and material issues.

40. Having carefully considered the Submissions made by Prosecuting Counsel and those made by Defence Counsel and, also having had regard to the Written Submissions of Defence Counsel setting out reasons why the 'No Case' Submission on behalf of the

Defendant should be upheld, the Court rules that the 'No Case to Answer' Submissions made to this Court should succeed. It is ordered accordingly."

The Law on Causing Grievous Bodily Harm by Careless Driving:

14. This Court is concerned with the offence of causing grievous bodily harm by careless driving contrary to section 37A of the Road Traffic Act 1947 ("the RTA")provides:

"Causing death, or grievous bodily harm, by careless driving
37 Any person who causes the death of, or grievous bodily harm to, another person by driving a vehicle on a road or other public place without due care and attention, or without reasonable consideration for other persons using the road or public place, commits an offence."

The Law on Grievous Bodily Harm

15. Having heard Counsel's submissions at the close of the Crown's case, Acting Magistrate Mills cited the case of *R v Golding* [2014] EWCA Crim 889 [para 34 of the Judgment on page 13 of the Record] and correctly considered himself bound by the decisions in *R v Symonds* [2014] Bda LR 115, per Greaves J and *Menzies v R* [2015] SC (Bda) 39 App, per Kawaley CJ [paras 38-39 of the Judgment]:

"38. The Judgment in Symonds settled on the fact that "...there was no meaningful difference between what would constitute grievous bodily harm in Bermuda than in Queensland. The Courts there have defined grievous bodily harm as (i) the loss of a distinct part of an organ of the body (ii) serious disfigurement or (iii) any bodily injury of such a nature that, if left unattended, would endanger or be likely to cause permanent injury to health, whether or not treatment is or could have been available".

39. This Court has also taken note of the fact that former Chief Justice, The Hon. Ian Kawaley, hearing an Appeal from The Magistrates' Court in Menzies v The Queen quoted liberally from the Decision in Symonds and concluded that the Court had correctly stated the Law in that particular case. It follows, then, that that Decision is, of course, binding on this Court."

16. Counsel for both sides accepted that the decision by Justice Carlisle Greaves in *R v Symonds* correctly states the Bermuda law position on the offence of grievous bodily harm and that this was supported by the then Chief Justice, Mr. Ian Kawaley in *Menzies v R.* The issue for resolve requires an analysis of how *R v Symonds* interpreted the statutory term "grievous bodily harm".

17. Grievous bodily harm is defined under the Interpretation part of the Criminal Code at section 3 as follows:

> *""grievous bodily harm" means any bodily harm of such a nature as seriously to interfere with health or comfort"*

18. The term "bodily harm" is defined under the same part of the Criminal Code as:

> *""bodily harm" means any bodily injury which interferes with health or comfort"*

19. The term grievous bodily harm refers only to a measure of bodily harm which is grave enough to seriously interfere with one's health or comfort whereas the term bodily harm refers to any measure of bodily injury which interferes with one's health or comfort. (In *R v Chan-Fook* [1994] 2 ALL ER 552 the English Court of Appeal treated the word "harm" as a synonym for "injury".) The question as to whether bodily harm is "grievous" is clearly a question of degree.

20. In the case of *R v Symonds*, Greaves J considered the Queensland Criminal Code meaning of grievous bodily harm, observing the clear difference of wording from the Bermuda Criminal Code [para15]:

> *"The Bermuda Code was taken from the Queensland Criminal Code and it is often useful to find guidance therefrom but in this instance this latter definition is quite different to the definition of grievous bodily harm at section 1 of the Queensland Code.*
>
> *16. There, it is defined as meaning (a) the loss of a distinct part or organ of the body; or (b) serious disfigurement; or (c) and bodily injury of such a nature that, if left unattended, would endanger or be likely to endanger life, or cause or be likely to cause permanent injury to health; whether or not treatment is or could have been available.*
>
> *17. It would seem therefore, as the prosecutor suggests, that on the fact of the section in the Bermuda Code, the threshold for Grievous Bodily Harm appears to be lower than that in the Queensland Code. On the other hand, when a careful analyst [sic] [analysis] is done of the Bermuda definition and the common law cases it may appear that there is no real difference between the Queensland definition and that intended by the Criminal Code.*
>
> *18. Submitting that the common law may be of some assistance, Ms. Christopher cited the old case of R v Donovan [1934] 2 KB 498, 509 where Swift J said "for this purpose we think that bodily harm has its ordinary meaning and includes any hurt or injury calculated to interfere with the health or comfort of the prosecutor. Such hurt or injury need not be permanent, but must, no doubt, be more than merely transient and trifling.""*

21. The Queensland definition of grievous bodily harm which is provided under Chapter 1 of Schedule 1 [s 1] of the Queensland Code was amended by Act No 3 of 1997. This led to the overruling of pre-1997 Australian Court decisions such as *R v Tranby* [1992] Qd R 432 so to expunge the antiquated notion that impairment of a bodily function had to arise, no matter the gravity of the injury, in order to satisfy the threshold of grievous bodily harm.

22. A real degree of caution is warranted when citing cases decided under the Queensland Code for the general purpose of assessing whether evidence of harm or injury satisfies the threshold for an offence of grievous bodily harm in Bermuda. Notwithstanding, I would equally point out that the statutory definition of "bodily harm" under the Queensland Code parallels with the definition of "bodily harm" under the Bermuda Criminal Code: "*any bodily injury which interferes with health or comfort*".

23. That being said, I would observe that in *R v Symonds* Greaves J did not refer in his ruling to any cases decided under the statutory authority of the Queensland Criminal Code. Likewise, Counsel in this case did not rely on any Australian Court authorities so I need not further consider the applicability of Queensland caselaw.

24. The Court in *R v Symonds* cited *R v Donovan* from the Court of Criminal Appeals of England and Wales' (as it then was[2]) for a definition of bodily harm. The judicial sketch "*... for this purpose we think that bodily harm has its ordinary meaning and includes any hurt or injury calculated to interfere with the health or comfort of the prosecutor. Such hurt or injury need not be permanent, but must, no doubt, be more than merely transient and trifling...*" was provided by Swift J in the course of the English Court's narrative on the issue of consent as a defence to a charge of assault. Notwithstanding the difference in context, there is irresistible parity between the baseline of Swift J's description and the definition of bodily harm under the Bermuda Criminal Code. However, *R v Donovan* does not assist with an examination of the scope and meaning of "grievous".

25. In *R v Symonds* the Court was assisted by a 1996 publication of Charging Standard Guidelines as agreed between the Crown Prosecution Service and the police. Greaves J found that the injuries reported before him "fell squarely within the actual bodily harm category". He thus expressed his doubt for whether such injuries were sufficient to satisfy the Crown's policy guidelines for a charge of grievous bodily harm.

26. The Bermuda Court of Appeal was reported in the case of *Rushe (Informant) v Vivian* [1989] LR 22 to have been guided by extracts from *Thomas on Sentencing*[3] in respect of the offence of causing grievous bodily harm contrary section 18 of the Offences

[2] The Court of Criminal Appeals was superseded by the Criminal Division of the Court of Appeal of England and Wales on 1 October 1966.
[3] This is now annually published as Thomas' Sentencing Referencer

Against the Person Act 1861. Of course, sentencing guidelines and charging guidelines serve two different purposes. However, the Bermuda Court of Appeal's approval of guidelines made in accordance with the 1861 Act provides some insight into this jurisdiction's legal proximity to English law where the offence of grievous bodily harm is concerned.

27. In a 6 January 2020 guidance update[4] on the CPS charging standard on violent crime in the UK, the previous decisions of the English Court of Appeal are relied on:

"The words "grievous bodily harm" bear their ordinary meaning of "really serious" harm: DPP v Smith [1960] 3 W.L.R. 546. Golding [2014] EWCA Crim 889 indicates that harm does not have to be either permanent or dangerous and that ultimately, the assessment of harm done is a matter for the jury, applying contemporary social standards. Further, there is no necessity for an assault to have been committed before there could be an infliction of GBH: Golding.

Bollo, [2003] EWCA Crim 2846 is of assistance to prosecutors when determining the appropriate charge. It clarifies that injuries should be assessed with reference to the particular complaint. That person's age, health or any other particular factors all fall for consideration. The court said, "To use this case as an example, these injuries on a 6 foot adult in the fullness of health would be less serious than on, for instance, an elderly or unwell person, on someone who was physically or psychiatrically vulnerable or, as here, on a very young child. In deciding whether injuries are grievous, an assessment has to be made of, amongst other things, the effect of the harm on the particular individual. We have no doubt that in determining the gravity of these injuries, it was necessary to consider them in their real context."

The guidance in cases such as Golding and Bollom should be applied when determining whether the injury amounts to ABH or GBH. Once again, the level of injury should usually indicate the appropriate level of charge but there may be some truly borderline cases where the factors above (outlined in relation to battery and ABH) are also relevant. Life-changing injuries should be charged as GBH. Just as the need for medical treatment may indicate ABH injuries, significant or sustained medical treatment (for instance, intensive care or a blood transfusion) may indicate GBH injuries, even if a full or relatively full recovery follows…"

28. In the 2014 decision of *R v Golding*, Treacy LJ reading the unanimous judgment of the Court of Appeal of England and Wales held:

"[64] The phrase "grievous bodily harm" means really serious bodily harm, but it is not necessary that the harm should be either permanent or dangerous. See R v Ashman (1858) 1 F & F 88, 175 ER 638. It is not a precondition that the victim should require

[4] See cps.gov.uk

treatment or that the harm should have lasting consequences. In assessing whether the particular harm was grievous, account has to be taken of the effect on and the circumstances of the particular victim. See R v Bollom [2003] EWCA Crim 2846, [2004] 2 Cr App Rep 50 at para 53. Ultimately, the assessment of harm done in an individual case in a contested trial will be a matter for the jury, applying contemporary social standards."

29. This is consistent with the position as it was previously stated by the editors of Archbold (2009 edition) [para 19-206]:

"*Meaning*

"Grievous bodily harm" should be given its ordinary and natural meaning of really serious bodily harm, and it is undesirable to attempt any further definition of it: DPP v Smith [1961] A.C. 290, HL; R v Cunningham [1982] A.C. 566, HL; R. v. Brown (A.) [1994] 1 A.C. 212, HL; R. v. Brown and Stratton [1998] Crim L.R. 485, CA. It is not necessary that grievous bodily harm be permanent or dangerous: R v Ashman (1858) 1 F. & F. 88. Nor is it a pre-condition that the victim should require treatment or that the harm would have lasting consequences; in assessing whether particular harm was "grievous", account had to be taken of the effect on, and the circumstances of, the particular victim: R. v. Bollom, The Times, December 15, 2003, CA. Bodily hamr includes psychiatric injury: R. v. Ireland; R. v. Burstow [1998] A.C. 147, HL; but not psychological injury: R. v. Dhaliwal [2006] 2 Cr. App. R. 24, CA."

30. In summary, the meaning of grievous bodily harm as a matter of Bermuda law is primarily guided by the English case law. It means really serious bodily harm and it is not arbitrarily limited to cases of permanent injury or cases requiring treatment or cases which are life-threatening.

31. Each case will depend on its own facts. What may be really serious harm to one victim may not be really serious harm to another. The degree of seriousness is determinable only by assessing the level of interference to the particular victim's health or comfort. For these reasons I would warn against over-reliance on charging guidelines as the question of whether the evidence establishes grievous bodily harm will always be tied, at least to some extent, to the victim concerned.

The Law on Careless Driving

32. The meaning of careless driving is settled under section 37B of the RTA:

Meaning of careless driving or driving without reasonable consideration

37B (1) A person shall be regarded as driving without due care and attention if the way he drives falls below what would be expected of a competent and careful driver.

(2) In determining for the purposes of subsection (1) what would be expected of a careful and competent driver in a particular case, regard shall be had not only to the circumstances of which he could be expected to be aware but also to any circumstances shown to have been within the knowledge of the accused.

(3) A person shall be regarded as driving without reasonable consideration for other persons only if those persons are inconvenienced by his driving.

[Section 37B inserted by 2012: 18 s. 8 effective 5 October 2012]

33. In assessing whether an accused person's manner of driving fell below the standards of a competent and careful driver, the Court will consider the question both (i) subjectively from the standpoint of what the accused person knew and (ii) objectively so to consider the circumstances which reasonably ought to have been known by the accused.

34. As I most recently observed in Lauren Davis v Fiona Miller [2020] SC (Bda) 42 App (29 September 2020) the offence of careless driving arises where the manner of driving merely falls below what would be expected of a competent and careful driver. This is not to be confused with inadvertent negligence; nor is it suggested that proof of the *actus reus* alone will automatically satisfy the test on sufficiency of evidence as prescribed by Lord Lane CJ in R v Galbraith [1981] 2 ALL ER 1060. In my earlier decision in Miller (Police Sergeant) v Richardson [2018] Bda LR 90 I expressed some approval of the judicial narrative previously given to these latter points in the Ontario Court of Justice in R v Shergill 2016 ONCJ 163. I stated [para 19]:

"*Both parties referred to an impressive variety of case law. However, I do not consider it necessary to address each of those decisions in this judgment. The reasoned decision of particular note and persuasive value was delivered by Justice M.J. Epstein in R v Shergill 2016 ONCJ 163 from the Ontario Court of Justice (at pages 7-8):*

3. Can the fact of an accident alone establish the actus reus of careless driving?

[23] What rings loudly from the case law is that a contextual analysis must be undertaken in each case. Viewed in that light this issue need not be complex. If, in the circumstances, the only reasonable inference to be drawn from the fact of an accident is that the defendant was operating his or her vehicle on a highway without due care and attention or without reasonable consideration for other persons using the highway then the actus reus has been made out. It then falls upon the defendant to establish that he or she reasonably believed in a mistaken set of facts which, if true, would render the act or omission, or that he or she took all reasonable steps to avoid the particular event.

[24] R. v. McIver [1965] 2. O.R. 475 (Ont. C.A.) is still applicable. McIver does not suggest that the fact of an accident is sufficient to establish the actus reus in all cases but simply that it may be sufficient depending on the circumstances. McIver does not purport to establish a new legal presumption in relation to highway traffic law. It simply

re-states a venerable proposition applicable to inferences being drawn from circumstantial evidence. If the fact of an accident may give rise to reasonable inferences other than the defendant was driving carelessly then it will not establish the actus reus.

4. Can inadvertent negligence establish careless driving?

[25] In R. v. Wilson [1970] O.J. No. 1658 (Ont. C.A.) the court took issue with a comment of the trial judge who had said, "... I feel compelled to come to the conclusion in the law that inadvertent negligence, however slight it may be, is sufficient for a conviction under this section." The Court of Appeal indicated in paragraph 3: "Mere inadvertent negligence, whether of the slightest type or not, will not necessarily sustain a conviction for careless driving. In each instance, the Crown must prove beyond a reasonable doubt that the accused either drove his vehicle on a highway without due care and attention, or that he operated it without reasonable consideration for other persons using the highway. One of these two ingredients must be proven to support a conviction under this section.

[26] In light of the Supreme Court of Canada decisions in Beatty and Roy it seems clear that the gravamen of the offence of careless driving is inadvertent negligence. IF the conduct of the defendant falls below the standard expected of a reasonably prudent driver in the circumstances then it is negligent and deserving of punishment under Provincial careless driving provisions. If it does not fall below the standard expected of a reasonable person then it is not negligence and does not amount to a lack of due care and attention.

[27] It appears to me that the position of the Supreme Court of Canada in Beatty and Roy firmly supports the conclusion of the trial judge in Wilson and that the conclusion of the Ontario Court of Appeal can no longer be considered correct.

5. Is "momentary inattentiveness" careless driving?

[28] Again, the answer depends on the circumstances of each case. If, given all the surrounding circumstances, momentary inattentiveness by a driver does not constitute a departure from the due care and attention or reasonable consideration demanded of an ordinarily prudent driver then it cannot constitute the offence of careless driving and is not punishable. If the court considers that given all of the circumstances the degree of inattentiveness displayed by the defendant goes beyond what one would expect of a reasonably prudent driver in such circumstances, then the offence has been made out.

[29] I emphasize that it is, in my view, incorrect to boldly state that momentary inattentiveness cannot constitute careless driving. The trier of fact must conduct an

analysis of the evidence in each case and must measure the evidence of inattentiveness against the standard expected of a reasonably prudent driver." "

35. In this case, Ms. Mulligan directed my attention to a more recent decision from the same jurisdiction of Court of first instance in *The Queen v Andrew Found* 2011, ONCJ 167 (Ont. CJ) where Justice of the Peace R.J. Le Blanc referred to the law on careless driving as settled by the Ontario Court of Appeal. It is important to first note that in these decisions before the Canadian Courts, the offence of careless driving was constructed under section 130 of the Highway Traffic Act:

"*Careless Driving*
130(1) Every person is guilty of the offence of driving carelessly who drives a vehicle or street car on a highway without due care and attention or without reasonable consideration for other persons using the highway."

36. Notably the offence of causing 'bodily harm' or death is created under section 130(3). Section 130(5) is a statutory deeming provision which outlines the meaning of careless driving in Canada:

"*Deemed lack of reasonable consideration*
(5) For the purposes of subsections (1) and (3), a person is deemed to drive without reasonable consideration for other persons using the highway if he or she drives in a manner that may limit his or her ability to prudently adjust to changing circumstances on the highway."

37. Section 37B of the RTA imports a broader definition of careless driving than section 130(5) in Canada. The Bermuda definition applies to anyone whose manner of driving falls below the standard expected of a competent and careful driver. Careless driving under the RTA will most often also apply to a manner of driving which limits or even prevents the driver in question from being able to "prudently adjust to changing circumstances" on a road or highway. On this reasoning, I find that the Canadian authorities shown to me are capable of persuasive value.

38. In the decision of *Andrew Found*, the Court made the following remarks [paras 91-99]:

"*The Ontario Court of Appeal in R v Beauchamp [1952] O.J. No. 495 determined the standard of care and skill for one charged with careless driving is not one of perfection.*

"*The law does not require of any driver that he should exhibit 'perfect nerve and presence of mind, enabling him to do the best thing possible.' It does not expect men to be more than ordinary men. Drivers of vehicles cannot be required to regulate their driving as if in constant fear that other drivers who are under observation, and apparently acting reasonably and properly, may possibly act at a critical moment in disregard of the safety of themselves and other users of the road.*

"But the law does insist upon a reasonable amount of skill in the handling of a vehicle which is a potential source of danger to other users of the road. ...The question always is, 'What would an ordinary prudent person in the position of the plaintiff have done in relation to the event complained of?"

R v Beauchamp deals with allegations involving an accident. The test, where an accident has occurred, is one of proof beyond a reasonable doubt, given existing circumstances of which the driver was aware or should have been aware, still failed to use due care and attention, or to give to other persons using the highway the necessary consideration given the circumstances.

Beauchamp defines "due care" as care owing in the circumstances. As such it is a constantly shifting standard based on road, visibility, traffic and weather conditions that exist or may reasonably be expected, and any other conditions ordinary prudent drivers would take into consideration.

Beauchamp goes on to consider whether the alleged conduct is of such a nature that it can be considered a breach of duty to the public and deserving of punishment.

R v Skorput, [1992] O.J. No. 832 says an acquittal must be registered in any case in which a defendant raises a reasonable doubt by bring forth evidence that they were being reasonably careful, and was not negligent while driving.

R v Kotar, [1994] O.J. No. 763 determined an accident may not necessarily prove a defendant was driving without due care and attention unless for instance, Hodges Rule can be applied, and in the circumstance, the accident gives rise to only one logical conclusion – that the accused was driving without due care and attention. Kotar says reasonable doubt may be raised where a defendant can show, in circumstances that might be reasonably be [sic] *true, that they faced an unexpected, unforeseeable sudden circumstance, and that they reacted as best any reasonable, prudent driver could.*

R v Slawter [2008] O.J. No. 3706 determined mere inadvertent negligence will not necessarily sustain a conviction for careless driving. Slawter maintains one of two ingredients – that the accused drove without due care and attention, or that he operated it without reasonable consideration for others using the highway- must be proven beyond a reasonable doubt to support a conviction under this section. The trial justice of the peace held the defendant was guilty because four vehicles were involved in an accident. An appeal court said this reasoning converts inadvertent negligence – which is not Careless Driving – into Careless Driving. The appeal court ruled the trial justice cannot 'work backward' in assessing the conduct of the defendant where it has not been proven that the result of the conduct was reasonably foreseeable."

39. Ms. Mulligan also relied on the judgment delivered by the Provincial Court of Alberta in R v Schoenberg, 1998 ABPC 128 where Judge S. L.Van De Veen looked at the decision in Beauchamp, inter alia [paras 7-9]:

"In the decision of R v. Beauchamp (1953) 106 C.C.C. 6 the Ontario Court of Appeal held that a charge for careless driving (then s. 29(1) of the Ontario Act) must be supported by evidence proving beyond reasonable doubt that the accused drove in a manner prohibited. The court held that the driver is not under a standard of perfection, however, and the question is always whether the accused acted with the consideration that a driver of ordinary care would show in circumstances. The accused's conduct must be of such a nature that it can be considered as deserving of punishment.

In that case a bus driver who drove his bus out of a garage early in the morning to permit another bus to get out and who intended to back it into position on the street was found not guilty. In the short interval before backing up, a car parked on the street and the bus driver could not see the car, which was damaged as a result of the bus backing into it. In that case the court referred to the decision of R. v. Nickel (1947) 90 C.C.C. 121 which held that the offence of careless driving, being quasi-criminal in nature is made out if there is something which goes beyond mere error in judgment. It contemplates a higher degree of negligence that that giving rise to an action in Civil Courts.

In the case of R v Namink [1979] O.J. 317 the court also expressed the view that because the charge of careless driving is quasi-criminal in nature, there must be conduct deserving of punishment in the circumstances of the case in order for a conviction to lie. The case also held that mere momentary inattention, or a simple kind of error of judgment is not sufficient for a conviction. In that case the court considered a situation where an accused was in the process of passing another vehicle on a highway when the accused's vehicle suddenly skidded causing a sudden loss of control resulting in an impact with the vehicle the accused had intended to pass. There was no evidence of excessive speed and witnesses testified that both cars were being driven in a normal fashion. The only explanation for the skid advanced was that possibly an icy patch of road was the cause for the loss of control.

In the decision of R v Globocki (1991) 26 M.V.R. (2d) 179 the court considered a somewhat similar fact situation to that before the court in this case. There the accused struck and killed a jaywalking pedestrian. The pedestrian in that case, however, was wearing dark clothing and had been on a four lane highway for some distance before being hit. She was not in or near a crosswalk, as in the case before me, but the reasoning of the court in that case has some application to the case before the court. The court held that where an accident has occurred, the fact that serious injury or death has occurred is not generally relevant to an assessment of whether the charge of careless driving has been made out. It is the accused's departure from the required standard of

care which must be looked at and then an assessment must be made as to whether this departure is deserving of punishment.

The Law on No Case Submissions

40. In *Miller (Police Sergeant) v Richardson* [2018] Bda LR 90 I restated the law on no case submissions as follows [paras 16-18]:

"*The Law Governing Applications on No Case Submissions*

There are decades of reported cases which establish that, as a matter of Bermuda law, the Courts have been guided by the Galbraith principles in identifying the correct test to be applied when determining a submission of no case to answer.

One would be hard-pressed to find an experienced criminal law practitioner who has not cited from the well-known judgment of Lord Lane CJ at p. 1042B-D:

"How then should the judge approach a submission of no case? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury...

There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge."

The second limb of the Galbraith test entails a judicial assessment of the quality and reliability of the evidence, rather than its sufficiency. A Magistrate is thus called upon to consider whether or not the strength of the evidence is such that it could support a conviction."

Analysis and Decision

41. In this case, it appears on the face of the no case ruling that the acting magistrate found that the evidence was sufficient to establish a case of careless driving but insufficient in proving the element of grievous bodily harm. Notwithstanding, the acting magistrate

dismissed the case entirely without any apparent deliberation for the Crown to proceed on a simple charge of careless driving contrary to section 37 of the RTA. (Section 492 of the Criminal Code, which applies to summary prosecutions by virtue of section 491, permits a conviction on any offence established by the evidence and which is an element of the offence charged.)

42. Further, Acting Magistrate Mills accepted a flawed submission from Counsel that a case for grievous bodily harm could only be made out if the injuries sustained endangered life or caused a permanent injury to health. This was a clear mistake on the law. The acting magistrate appears to have misunderstood the *ratio* and the *dicta* in *R v Symonds* in finding that grievous bodily harm was limited to cases involving life endangerment or permanent injury. This more reflects the law under the Queensland Criminal Code not under the Bermuda Criminal Code.

43. Grievous bodily harm simply means any bodily harm which is of such a nature that it seriously interferes with health or comfort. The English case law is clear and persuasive: grievous bodily harm carries its natural meaning i.e. really serious bodily harm. The harm need not be permanent or dangerous. *R v Symonds* does not suggest otherwise. In fact, the 1996 Charging Guidelines referred to by Greaves J were established and guided in accordance with English case law and not case law decided under the Queensland Code.

44. In the present case, the injuries included tenderness to her right leg, a 12 cm laceration to the right calf with mild bleeding and a fracture to the left wrist. The acting magistrate was informed on the evidence that the Complainant underwent 6 weeks of physiotherapy and suffered continued pain in her wrist and leg. Against this background, the acting magistrate was duty bound to consider whether this evidence of injury could support a conviction for grievous bodily harm i.e. Could these injuries be properly regarded as "really serious" interference with the Complainant's health or comfort? I find that the acting magistrate erred in his duty to consider this question and he erred in his finding of no case to answer.

45. As for the element of careless driving, the acting magistrate expressly accepted the credibility of the Crown's evidence and found no evidence of any roadway obstruction or traffic. He found that visibility in the vicinity of the accident and at the time of the accident was good. On my assessment of the evidence, the only reasonable inference to be drawn from the Respondent having collided into the pedestrian Complainant at the foot of Spurling Hill is that the Respondent was operating his vehicle without due care and attention.

46. As a matter of general legal principle, I accept that the *actus reus* alone is insufficient to support a *prima facie* case of careless driving. However, in this case the surrounding circumstances of the accident (eg. clear visibility, no traffic or other obstruction and no

challenging weather conditions) were such that careless driving on the part of the Respondent was the only reasonable inference to be drawn.

47. Ms. Mulligan placed much emphasis on the danger imposed by the Complainant's decision to cross the bottom of Spurling Hill from the Crow Lane side. She pointed to the Agreed Facts where the Crown conceded that the hand railing bordering the Crow Lane sidewalk was put in place to discourage pedestrians from crossing this location as a protective measure against motorists traveling down along Spurling Hill. This point, of course, does not engage a motorist, such as the Respondent in this case, who was travelling onto and up Spurling Hill. A traffic queue on Spurling Hill was another scenario of pedestrian danger contemplated in the Agreed Facts. However, in this case the roads were clear of any traffic as the only vehicles on the scene were that of the Respondent and the single taxi traveling down Spurling Hill.

48. The Respondent clearly had a case to answer on the careless driving component of the case. This could only be defeated by a positive defence to the Crown's case that the Respondent took all reasonable steps to avoid the collision which ensued. However, as matters currently stand, the prosecution's evidence does not leave open any reasonable inference of inadvertent negligence or momentary inattentiveness which might constitute a defence to careless driving. On the strength of the Crown's case, there was clear *prima facie* evidence to support the only reasonable inference that the Respondent's manner of driving fell below the standard expected of a reasonably competent and careful driver.

Conclusion

49. The appeal is allowed and the matter shall be remitted to the Magistrates' Court for retrial before another magistrate.

Dated this 15th day of October 2020

THE HON. MRS JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE