C.A.C. No. 02860

NOVA SCOTIA COURT OF APPEAL

Cite as: R. v. MacGillivray, 1993 NSCA 210

Jones, Hart and Chipman, JJ.A.

BETWEEN:

DANIEL GEORGE MacGILLIVRAY	)	Joel E. Pink, Q.C.
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	Robert C. Hagell
	)	for the Respondent
HER MAJESTY THE QUEEN	)	
	)	
Respondent	)	Appeal Heard:
	)	November 22, 1993
	)	
	)	
	)	Judgment Delivered:
	)	December 8, 1993
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THE COURT: Leave to appeal granted and the appeal against sentence dismissed per reasons for judment of Jones, J.A.; Hart and Chipman, JJ.A. concurring.

JONES, J.A.:

This is an appeal against conviction and sentence on a charge of operating a

vessel in a manner dangerous to the public contrary to s. 249(4) of the **Code**.

August 17, 1991 was a beautiful summer day at Cribbons Point on St. George's Bay, Antigonish County. It was warm and sunny, visibility was unlimited and the sea was relatively calm. There is a wharf at the point where fishermen dock their vessels along with pleasure boats. As you leave the dock and proceed along the shore, there are two small promontories jutting into the sea known as "the Rocks" which form part of the sand beach. It is a popular swimming area. The rocks protrude some 17 metres into the Bay and attract young swimmers as it is possible to dive from the outer limits into the water.

On August 17th a large number of youths, estimated from 25 to in excess of 50 were swimming at the rocks during the afternoon. Included among the swimmers at approximately 3:45 p.m. was William Corsten and six of his friends. They were students around 18 or 19 years of age. They were frequent swimmers at the Point. On that day they were diving and frolicking in the water and then proceeded to go for a swim as a group out into the bay. As they were swimming back to the rocks a power boat came around the point and proceeded along the beach front towards the swimmers. The boys in the water and people on the shore tried to warn the occupants of the boat of the danger by waving their arms and shouting but to no avail. Tragically William Corsten was struck by the boat and the propeller caused the boy fatal injuries. The boy's leg was severed. The operator of the boat was the appellant, Daniel George MacGillivray. Mr. MacGillivray heard a thud when the boat struck the boy. As the boat passed, the other passengers saw the swimmers in the water from the rear. The boat turned and the occupants proceeded to recover Mr. Corsten from the water. He was taken to shore and then in the appellant's truck to the hospital in Antigonish where he died later in the day.

The appellant was subsequently charged with operating a vessel in a manner that was dangerous to the public thereby causing the death of William Corsten contrary to s. 249(4) of the **Criminal Code**. He was tried before Mr. Justice Anderson during the first four

days of March, 1993. There were many witnesses including the boys swimming with the deceased. There was no doubt from the witnesses that the weather conditions were excellent and the sea relatively calm. Witnesses on the shore and in the water testified that the bow of the boat was elevated out of the water. It was impossible to see in front of the boat from the operator's position for a considerable distance particularly when the bow was elevated. The witnesses on the beach and in the water generally stated that the boat was going fast, estimating the speed from 25 to as high as 50 kilometres an hour. There was evidence that the boys were spread over an area of some 20 feet. A number of the witnesses testified that the boys were 25 to 30 metres from the rocks when the boat passed. Most of the witnesses acknowledged that it was difficult to estimate the distance but many of them stated that it was common to see people swimming in the area where the Corsten boy was struck. There was also evidence that boats did not frequent that area along the shore. Eight witnesses on the shore testified that the operator of the boat was looking towards the shore and waving at them. Three of the swimmers in the water saw people in the boat.

Constable Brian Murray is an R.C.M. Police diver. He was called to the scene shortly after 4 p.m. He recovered the deceased's leg from the water at a spot indicated to him by the appellant. The limb was on the ocean floor. He estimated the distance at 100 yards from the closest point of land and that the water was 18 feet deep. When travelling in the appellant's boat from the wharf to the scene the bow was raised and he could only see the sky and the horizon. It was his opinion that having regard to the conditions, the limb sank directly to the bottom of the sea.

Constable Balleine of the R.C.M. Police was the investigating officer. He interviewed the appellant at the scene following the collision. There was no evidence that the appellant had been drinking. He did not take a written statement at that time. The appellant stated that he was roughly 200 or 250 feet off shore. He noticed people waving from shore and that he waved back. He heard a thud, slowed down and saw five or six heads

in the water. He also saw blood in the water. He turned his boat and took the injured boy to the hospital. He told the officer that he was operating the boat between 15 and 20 knots. He also estimated his speed at 40 kilometres per hour. The appellant said he was scanning ahead but did not see the boys in the water. Later that evening the officer took a formal statement from Mr. MacGillivray. In that statement he said he was 200 to 250 feet from shore and that the boat was going 5 to 10 miles per hour.

The Crown called Captain Michael Krugger , an expert in the operation of small boats. He described the design and operation of the power boat. The boat is designed to plane on the water as the speed increases. With the front of the vessel raised 15 degrees it was impossible to see for two miles dead ahead from the operator's position. The witness testified that it is necessary to maintain a proper lookout at all times and to proceed at a safe speed having regard to all the conditions.

The appellant testified on the trial. He is an electrician and linesman by trade. He is familiar with Cribbon's Point and knew it was a swimming area. He had fished out of the Cribbon's Wharf for a number of years. He testified that swimmers usually went out about 80 feet from the rocks. He had only purchased the boat in July of that year. His father and sister and Roy Austin were passengers in the boat. The engine was around 125 horsepower. He testified that he was proceeding at around 15 m.p.h. some 250 to 300 feet from the shore.

He was parallel to the shore. He was looking over the bow and the right hand side of the boat. No one else was on watch. He did not expect to see any swimmers at that distance from shore. When he heard a thud, his sister hollered and he turned around and saw the boys in the water. He was about 150 feet away when he turned the boat.

Defence witnesses placed the boat at 250 to 300 feet from shore. They also stated that it was uncommon to see swimmers that far from shore.

The defence called Mr. Allison Tupper, an engineer. Mr. Tupper took photos and

film of the vessel in operation by way of demonstration. Mr. Tupper testified that it was exceedingly difficult to see objects immediately in front of the vessel even when looking over the side. The vessel was being operated at a speed of 15 to 20 miles per hour. He concluded that the boat was being handled in a careful and prudent manner at the time of the collision.

The appellant was convicted and sentenced to a term of ninety days to be served intermittently. The trial judge also imposed a term of probation of two years and prohibited the appellant from operating a motor vessel for a period of five years. The appellant has appealed his conviction and the Crown has applied for leave to appeal against the sentence.

On the main appeal there are two grounds:

> "that the learned Trial judge erred in law in applying the subjective test for the **mens rea** of dangerous driving rather than the objective test, as adopted by the Supreme Court of Canada in **R. v. Hundal** (March 11, 1993), File No. 22358;
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> that the learned Trial judge erred in law and fact by failing to consider the totality of the circumstances and in so doing, that his decision is perverse and not founded upon all the evidence called;"

In his decision Judge Anderson referred to the decision of Lambert, J.A. in **R. v. Hundal** (1991), 63 C.C.C. (3d). He followed that decision as setting out the appropriate test for dangerous driving under s. 662(5) of the **Code**. In that decision Lambert, J.A. applied a subjective test as being necessary in order to establish the **mens rea** for the offence. This Court had reached the same conclusion in **Regina v. MacPhee**, 38 C.C.C. (2d) 49. Following Judge Anderson's decision the Supreme Court of Canada's decision in **R. v. Hundal** (1993), 79 C.C.C. (3d) 97 was filed. In **Hundal** the Supreme Court applied the objective standard. Cory, J. in delivering the judgment for the majority stated at p. 108:

> "In summary, the **mens rea** for the offence of dangerous driving should be assessed objectively but in the context of all the events surrounding the incident. That approach will satisfy the dictates both

> of common sense and fairness. As a general rule, personal factors need not be taken into account. This flows from the licensing requirement for driving which assures that all who drive have a reasonable standard of physical health and capability, mental health and a knowledge of the reasonable standard required of all licensed drivers.
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> In light of the licensing requirement and the nature of driving offences, a modified objective test satisfied the constitutional minimum fault requirement for s. 233 (now s. 249) of the **Criminal Code** and is eminently well suited to that offence.
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> It follows then that a trier of fact may convict if satisfied beyond a 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 on 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.
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> Next, if an explanation is offered by the accused, such as a sudden and unexpected onset of illness, then in order to convict, the trier of fact must be satisfied that a reasonable person in similar circumstances ought to have been aware of the risk and of the danger involved in the conduct manifested by the accused. If a jury is determining the facts, they may be instructed with regard to dangerous driving along the lines set out above. There is no necessity for a long or complex charge. Neither the section nor the offence requires it. Certainly the instruction should not be unnecessarily confused by any references to advertent or inadvertent negligence. The offence can be readily assessed by jurors who can arrive at a conclusion based on common sense and their own everyday experiences.

McLachlin, J. stated at p. 109:

> As my colleague Cory J. points out, fault in criminal offences may be assessed by an objective standard or by a subjective standard. An offence can require proof of a positive state of mind, such as intent, recklessness or wilful blindness. If so, the Crown

> must prove beyond a reasonable doubt that the accused possessed the requisite state of mind. This is a subjective test, based on what was actually in the accused's mind. On the other hand, the fault may lie in the accused's negligence or inadvertence. In this case an objective test applies; the question is not what was in the accused's mind but the absence of the mental state of care. This want of due care is inferred from conduct of the accused. If that conduct evinces a want of care judged by the standard of a reasonable person in similar circumstances, the necessary fault is established. The relevant circumstances may include circumstances personal to the accused, relating to whether the accused lacked the capacities or powers necessary to attain the mental state of care required in the circumstances."

As stated by Cory, J. the basis of liability is negligence. The question is whether viewed objectively, the conduct of the appellant was dangerous having regard to all of the circumstances. I am satisfied that the test applied by Anderson, J. was more stringent than the objective test and ultimately was based on that standard. In applying that test there was no miscarriage of justice which would necessitate a new trial.

I will deal with the second ground of appeal. In **Foster v. The Queen** (May 26, 1993) S.C.C. No. 02784 at p. 1, Matthews, J.A. stated:

> "With respect, the appellant, in his lengthy factum and oral argument, wishes us to try this case again. This court has said on many occasions, that is not our function. We are required, as enunciated by the Supreme Court of Canada in **Yebes v. R.**, [1987] 2 S.C.R. 168, (1987), 36 C.C.C. (3d) 417, to determine whether a properly instructed trier of fact, acting judicially could reasonably have convicted the appellant. In doing so, we must re-examine and to some extent reweigh and consider the effect of the evidence. This jurisdiction extends to findings of credibility. See **R. v. W. (R.), supra** where McLachlin, J., after setting out the test remarked:
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> > 'That said, in applying the test the court of appeal should show great deference to findings of credibility made at trial. This Court has repeatedly affirmed the importance of taking into account the special

> position of the trier of fact on matters of credibility: **White v. The King**, [1947] S.C.R. 268, at p. 272; **R. v. M. (S.H.)**, [1989] 2 S.C.R. 446, at pp. 465-66. The trial judge has the advantage, denied to the appellate court, of seeing and hearing the evidence of witnesses. However, as a matter of law it remains open to an appellate court to overturn a verdict based on findings of credibility where, after considering all the evidence and having due regard to the advantages afforded to the trial judge, it concludes that the verdict is unreasonable.'"

Anderson J. concluded that the collision occurred approximately 100 yards from the rocks. He also found that the area "adjacent to and out from the rocks, was an area where swimming and swimmers were prevalent".

His conclusions are as follows:

> "The accused bought the boat on July 20th and used it a few times. When they left the wharf the sister was sitting on the ladder at the back of the boat with her feet in the water. Roy and Ray were on the back bench and the accused at the wheel. The bow of the boat was raised so that there was no visibility directly ahead of the boat. It was possible to have some visibility by leaning over the side and looking forward. This was not done. When the boys saw the boat coming towards them they waved their arms and hollered - the people on the rock did the same. The message did not reach the people on the boat.
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> I find that the speed of the boat under other circumstances would not be unusual. The sea was relatively calm with what was described as a small chop. The evidence indicates that the boat appeared to be bouncing or skipping as it approached the boys in the water.
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> I might add at this juncture that I was impressed with the evidence of the expert Allison Douglas Tupper. He was a knowledgeable and fair witness and I accept his testimony.
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> I have considered all the evidence and find that the accused operated the boat at a speed, with no visibility

> ahead, no proper lookout, in an area which he knew or ought to have known was a recreational swimming area, in a manner a prudent person would not. And by doing so caused the death of William Francis Corsten. The advertent negligence can be inferred from the conduct and driving of the accused."

In coming to that conclusion he had to weigh a great deal of evidence with many inconsistencies. There was clear evidence of excessive speed having regard to the circumstances. There was also evidence that swimmers were commonly in the area 300 feet from shore. The evidence also established that visibility in front of the vessel was obstructed and that a proper lookout was not being maintained. Accepting that evidence and applying the objective standard there was ample evidence to sustain the conviction. I would accordingly dismiss the appeal against the conviction.

On the application for leave to appeal against the sentence the Crown contends that the sentence was clearly inadequate having regard to the serious nature of the offence. There is no question that the consequences of this offence were tragic in the extreme involving the death of a young man. However, that must be viewed in the light of the appellant's background and the degree of fault which contributed to the death. The appellant's conduct did not reach the standard of criminal negligence as defined by the **Code**. The appellant is 39 years of age and has family responsibilities. He is gainfully employed at his trade. The pre-sentence report was favourable. There was a previous incident involving a boat which was dealt with as a summary conviction matter. The details were sketchy. There was no evidence of drinking in this case and the appellant was co-operative with the police during the investigation. Having regard to all of the circumstances I can find no error on the part of the trial judge in imposing an intermittent sentence. I would grant leave to appeal and dismiss the appeal against sentence.

J.A.

Concurred in:

Hart, J.A.

Chipman, J.A.

C.A.C. 02860. No.

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

DANIEL GEORGE MacGILLIVRAY	)	
Appellant	)	
- and -	)	R E A S O N S FOR
	)	JUDGMENT BY:
HER MAJESTY THE QUEEN	)	
	)	JONES,
	)	J.A.
Respondent	)	
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