CR 02223

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

KURT LEHNIGER

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT

1 This is an appeal from conviction entered in Justice of the Peace Court on a charge, commonly referred to as "careless driving", under s.154(1) of the Motor Vehicles Act, R.S.N.W.T. 1988, c. M-16:

> **154.(1) No driver shall operate a vehicle on a highway without due care and attention**.

2 The appellant raises a number of points but I need to address only three:

(a) an alleged failure by the presiding Justice of the Peace to appreciate a certain piece of evidence;

(b) the unavailability of a map referred to in the evidence; and

(c) an alleged misdirection on the burden upon the trier of fact.

3 I do not need to outline in detail the facts of this case. Simply put, the appellant says a car pulled suddenly in front of him causing his vehicle, in an attempt to avoid a collision, to "bump" the other vehicle; the people in the other car, however, say that the appellant came quickly up behind them and then side-swiped their vehicle when he attempted to overtake them. All agree that the appellant stopped the vehicle on the highway after overtaking the other vehicle.

4 At one point in his judgment, the Justice of the Peace, in commenting on the evidence of a police officer, said:

> **But I also heard evidence from Constable Wamsteeker and she says that she saw the damage on the car, on both vehicles, and where she indicates the damage was, on your vehicle it was somewheres on the right hand side approximately where the passenger side is of your van, the passenger door.** ***There's no evidence before the Court that the damage was on the bumper, which would - you know, there would have to, I would think, be some damage on the bumper if you were trying to avoid this accident, and that's consistent with where the damage is on the McKay car.*** **Because if you heard what Wamsteeker was saying, she was saying the damage actually occurred on the rear driver's side of the vehicle, not to the bumper of the car but to the actual rear driver's side of the car. I take that to mean that somewheres around the door, that it was not the bumper. There was no evidence in her, when she had a look at the vehicles, that there was any damage around the bumper, so it's consistent with also what they were saying, and that is that you actually swerved into it. From what I can see in the evidence, it's unlikely that that kind of damage is caused by swerving and hitting, sort of glancing, getting around this vehicle that would indicate that in fact there was some vehicle moving over into the McKay vehicle. That's where the damage occurred.** (emphasis added)

5 Appellant's counsel says that the Justice was wrong in his assessment of Cst. Wamsteeker's evidence. At trial the officer said:

> **Mr. Lehniger's vehicle was, I believe, a 1985 Chevy Astro van, blue in colour, and the damage to his vehicle was on the passenger side doorway and front fender area. There was damage at that point. On the McKay vehicle, it was an older model yellow GMC station wagon, and the damage to that vehicle was on the driver' side approximately the rear door area of the vehicle, to the best of my recollection.**

6 I fail to see any misunderstanding or lack of appreciation by the Justice of this evidence. It is clear, when read in context, that the "bumper" referred to by the Justice in the emphasized portion of his remarks is a reference to the bumper of the McKay vehicle, not that of the appellant.

7 On the next point, appellant's counsel complains that at the trial a hand-drawn map was referred to by some witnesses yet we do not know what was on this map since it was not made an exhibit at trial. Obviously it should have been. I do not think, however, that the failure to do so is fatal in this case. The Justice made no reference to it in his judgment and there is nothing to indicate that it was used for any other purpose than as a handy reference tool. I conclude that nothing turns on this issue.

8 The final point, regarding the burden on the trier of fact, refers to the following comments by the Justice:

> **The question here is, Mr. Lehniger, was this careless driving. They say that in fact the careless driving in this case was you drove out and you swerved into them, and the question is whether in fact you swerved into them. That's the issue here, that's one of them, okay. *So I must make some decision in fact, who's telling the truth*. Whether Mr. McKay and his daughter or whether you were telling the truth when you say you tried to avoid the accident. (emphasis added)**

9 If the extract that I have emphasized above were part of instructions to a jury then clearly it would be an error. The rule of reasonable doubt applies to credibility issues. The trier of fact need not definitely decide the credibility of any witness. There is always the legitimate possibility that the trier of fact will be unable to resolve conflicting evidence and thus left in a state of reasonable doubt: R. v. Challice (1979), 45 C.C.C. (2d) 546 (Ont.C.A.); R v. Chan (1989), 52 C.C.C. (3d) 184 (Alta.C.A.).

10 After reviewing the whole of the Justice's remarks, however, I am satisfied that he applied the correct test as to the standard of proof. He considered all of the evidence and, based on the totality of the evidence, he concluded that the prosecution proved its case beyond a reasonable doubt.

11 I also think that some allowance should be made for the fact that these are Justice of the Peace proceedings. Normally such proceedings are not conducted by legal professionals. Some of the more subtle philosophic and linguistic nuances of the law may no doubt be foreign to the participants. The ultimate object is to make sure justice is done. In this case I have concluded that it was.

12 What the appellant really is asking me to do is conduct my own assessment of the evidence. This I cannot do. An appeal court will not disturb findings of fact based on assessments of credibility except in cases of palpable error. As stated by Estey J. in Harper v. The Queen (1982), 65 C.C.C. (2d) 193 (S.C.C.) at page 210:

> **An appellate tribunal has neither the duty nor the right to reassess evidence at trial for the purpose of determining guilt or innocence. The duty of the appellate tribunal does, however, include a review of the record below in order to determine whether the trial Court has properly directed itself to all the evidence bearing on the relevant issues. Where the record, including the reasons for judgment, discloses a lack of appreciation of relevant evidence and more particularly the complete disregard of such evidence, then it falls upon the reviewing tribunal to intercede.**

13 In this case a review of the record reveals that the Justice directed his mind to all of the evidence bearing on the relevant issues. The offence of "careless driving" deals with inadvertent negligence and is to be judged on an objective standard based on all of the surrounding circumstances: R v. Beauchamp, [1953] O.R. 422 (C.A.); R v. Jacobsen (1964), 48 W.W.R. 272 (B.C.C.A.); R v. McIver, [1965] 2 O.R. 475 (C.A.); affirmed [1966] S.C.R. 254. While the offence consists of a breach of duty to the public, there need not be evidence of an actual danger to the public at the time of the offence: Smallman v. The Queen, [1964] 1 C.C.C. 340 (P.E.I.S.C.).

14 The Justice of the Peace here found three incidents within the continuum of the conduct of the appellant, each of which in his opinion constituted careless driving. He reached his conclusion on his assessment of the evidence at trial. He was in the best position to assess

credibility. I can find no error.

15 The appeal is therefore dismissed.

John Z. Vertes
J.S.C.

Counsel for the Appellant: Austin Marshall

Counsel for the Respondent: Douglas Miller