IN THE DISTRICT COURT
AT LEVIN

CRI-2015-031-001228
[2016] NZDC 3824

NEW ZEALAND POLICE
Prosecutor

v

DAVID MCGONIGAL
Defendant

Hearing: 4 March 2016

Appearances: Sergeant S Chamberlain for the Prosecutor
P Murray for the Defendant

Judgment: 4 March 2016

ORAL JUDGMENT OF JUDGE G M ROSS

---

[1] Mr McGonigal faces one charge of operating a vehicle on a road, namely Oxford Street in Levin, carelessly and thereby causing the death of Marie Hall. This is said to have occurred on 26 March 2015. I have heard evidence from both prosecution and defence in respect of this denied charge and now I give my decision and reasons for it.

[2] So far as the elements of the charge itself are concerned the first of these is that the defendant was the driver of a car which collided with the victim, Mrs Hall, on her mobility scooter and secondly, that the defendant failed to exercise the degree of care and attention that a reasonable and prudent driver would have exercised in the circumstances outlined in the evidence. The third element of the charge is that the careless driving of the defendant was causative of the injuries and subsequent death of the victim.

[3] A brief background to the matter is that the defendant and Mrs Hall on her scooter were involved in an accident in Oxford Street, Levin on 26 March 2015 in the late afternoon. A Mitsubishi Outlander vehicle driven by the defendant collided with the mobility scooter ridden by 83 year old Mrs Hall. Mrs Hall was described as bouncing off the scooter, going into the air and landing on the roadway. She suffered serious injuries from which effectively she died some four days later. She had been riding on the scooter across Oxford Street in a west to east direction from near shops on the west side towards the Horowhenua District Council building on the east side. The defendant for his part had exited the Horowhenua District Council carpark by an exit on the south side of the District Council building itself, that exit adjoining an entranceway or exit to O'Malley's Super Liquor. The defendant turned right at the exit in order to attain the northbound lane as that was his intended direction of travel.

[4] In this case the prosecution case is that in failing to see the mobility scooter with Mrs Hall on it at any stage prior to colliding with her and failing to take into account her presence on the roadway and assuming that there were no other road users on the part of the road that he was using to whom he had to pay regard, that this has been a failure to exercise that degree of care and attention which a reasonable and prudent driver would exercise in the circumstances.

[5] From the point of view of the defence case the defendant denies that he has been careless in any respect or at all. He admits that he did not see the scooter ridden by Mrs Hall but that this did not arise out of any absence of care on his part. Rather, he says, he took great care particularly in proceeding from the exit only after looking in each direction several times and ensuring that the road was clear of cars. Only then did he proceed. When he checked the roadway he says Mrs Hall was not there to be seen and during the brief period of passage in leaving the exit he did not see her until the collision had actually occurred. This he attributes to a blind spot which is created by the right-hand or driver's side A-pillar on the car he was driving.

[6] What is not in dispute in this case is firstly, the identity of the defendant as the driver of the car and secondly, that the injuries and subsequently the death of the victim were caused by and in the collision. In this regard in any event there is

unchallenged medical and pathological evidence to this effect from an accident and emergency doctor, a pathologist and also from a reviewing pathologist.

[7] The essential element of the charge then which I am required to determine is whether the defendant has been careless in the operation of his motor vehicle. In making this assessment and determination there are a number of things which I have to take into account. The first of these is that this is a criminal prosecution. The onus is on the police to prove the elements of the charge beyond reasonable doubt. There is no onus on the defendant to prove or disprove anything and all facts need not be proven beyond reasonable doubt, only the elements of the charge. In this case the defendant himself has given evidence and he has also called a witness on his account to give evidence. The fact that the defendant has given evidence himself and called evidence from another, Mr Goss, does not change the onus or the standard of proof to which I have referred.

[8] I have considered all the evidence in this case, that was one of the reasons why I adjourned it until today so that I could take into account the material which was introduced as evidence but not read through on a line by line basis. In this case in assessing the facts from the evidence which I have heard, it is not really a case where there are issues of credibility in the sense of truthfulness or otherwise of the witnesses. All witnesses have given their evidence honestly and to the best of their ability in terms of the recall of the incident itself.

[9] In terms of prosecution witnesses there were two eyewitnesses to the incident, Mr Davenport and Mr White. Mr Davenport for his part was parallel parked outside the Horowhenua District Council building just to the north of the portico but facing south. Just as he was about to pull out from this parked position with a clear southbound lane to pull into and red lights at the Bath Street intersection behind him as he had checked by his rear vision mirror, Mrs Hall was seen by him to come across the road on her scooter. She had come out of an access lane next to a bike shop depicted in the photographs with the blue barrier arms which on the evidence I heard were not in place on the day. He said that he saw her stop in the centre of the road so he waved her on by a gesture with his hand, knowing that the southbound lane was clear and by his gesture

allowing her to take advantage of this. As he waved the defendant's vehicle came out and struck the back of the scooter. He said it just clipped the back of her scooter and he saw the victim bounce in the air and land on the ground. He thought that the scooter was virtually stationary at the time it was clipped. He immediately alighted from his vehicle to render assistance. Until the impact occurred he had not seen the defendant's vehicle prior. He thought that she might have been aiming at the southern exit of the district council as Oxford Street is curved all the way outside the district council building from the entry to the southern exit and the scooter could not get up the kerb. Moreover he could not be sure that Mrs Hall had actually noticed him.

[10] The other eyewitness was Mr White who was driving in the northbound lane in Oxford Street and going past the bike shop or just before it. He noticed the scooter crossing the road, that is to say the northbound lane, and to stop in the median strip. He saw the defendant's car at the exit from the district council and he saw it stop there, then pull out from its stationary position and, to use his expression again, "Just clip her," indicating he was seen to be indicating a right-hand turn before he pulled out. He thought that the scooter was going to go straight across the road but he too appreciated the kerb position on the other side of the road and considered that she was actually heading on an angle and he too told the Court that she came out of the driveway next to the bike shop.

[11] In cross-examination he said that the scooter was "hoofing" across to denote a reasonable speed in busy traffic. He considered himself to be the first on the scene and helped to lift the scooter off Mrs Hall.

[12] The next prosecution witness was Constable Joines who was the first or among the first police officers on the scene and her evidence linked up the defendant as the driver of the white Mitsubishi and she conducted a brief notebook interview with the defendant.

[13] Mr Maddaford gave evidence as a senior crash analyst with the Central Districts Serious Crash Unit and he had prepared a substantial crash investigation report in respect of this accident. Amongst his conclusions as

part of the inquiry were that the vehicles themselves and their condition with no faults could be discounted as causative factors in the crash. He assessed an estimated area of impact from all of the material which was available to him. This area of impact was on the eastern edge of the flush median strip just south of the nearest parallel park outside the council building to the exit, that is to say the closest parallel park to the exit which was used by the defendant. That is set out in part 4 of the report at figures 3 and 7. With the necessary adaptation from the defendant's point of view and from his own expert witness, Mr Bass, that witness would appear to concur with the area of impact of Mr Maddaford at plan 1 and plan 2 under the test set-up scenario.

[14] Then Detective Constable O'Brien interviewed the defendant by a DVD recorded interview on 10 June 2015. From this the defendant described the contact as being a glancing type hit and he accepted that he only saw the scooter, "Essentially when we collided," after saying that at no point had he seen the scooter. From where it came out and from where he was he said he would not have seen it even if it was there. There was no additional explanation made at that time.

[15] There were a large number of police photographs which were produced by consent of scene shots of both sides of the road and the roadway itself and then there was the closed circuit television evidence. That has been in some senses a feature of this case because the availability of closed circuit television footage has come and is in one sense of the collision itself. This is more incidental than deliberate because of a camera mounted inside the Horowhenua District Council building and aimed at the foyer of the building just inside the portico. A small part of Oxford Street though is captured nonetheless and by consent the relevant part of the recorded footage was played on a number of occasions. It was played enlarged, it was played with snapshots and played frame by frame.

[16] Because of the intrusion of building parts and also foliage from a tree outside this footage was not as helpful as it might have been. But it does show the defendant's car pulling out of the exit, stopping and then proceeding in a northerly direction until impeded by the collision with the scooter. The defendant's car is not shown as being at right angles to the footpath and appears to be in a position where

it is traversing the flush median diagonally in order to reach the northbound lane. Also though consistent with the evidence of Mr Davenport and Mr White, the scooter appears to be moving at the time of impact with its front facing slightly to the south on an angle as Detective Constable O'Brien accepted and interpreted.

[17] In the defence case the defendant himself gave evidence. This was similar to his interview with Constable Joines and Detective Constable O'Brien but with greater detail about completely stopping whilst exiting the council carpark to check that the road was clear in both directions before pulling out. The explanation is made that he could not see the scooter and the rider because they were in his blind spot and the blind spot as I have outlined before in the A-pillar on the right-hand side of his vehicle.

[18] The second witness for the defendant was Mr Bass who is another experienced accident investigator. The possibility of the A-pillar being a blind spot was raised by Mr Maddaford, the police crash investigator, in his report and this is at chapter 8 of his report under fig 10 at page 17 and under analysis. He said there, "The A-pillar of the Mitsubishi Outlander does create a blind spot for the driver. This was photographed to demonstrate it visually, however, as the vehicle turns so does the obscured area therefore what was obscured should become visible to the driver."

[19] Mr Bass conducted a series of reconstructed accident tests with the defendant at the exact same spot early one morning. The result of those tests led to his evidence and a conclusion on the blind spot issue. There were over 15 test runs which were carried out and the defendant recreated the driving which gave rise to the accident and Mr Bass presenting evidence that front-on he was about the same width and height as the mobility scooter with the flag up, and he took in the tests the role of the mobility scooter in terms of its apparent movement and also apparent speed so far as this could be determined from the police investigation. The driver testing here involved a headcam to record as closely as possible the view of the driver pulling out of the exit.

[20] I shall return to that but many of the cases involving careless use or careless use causing injury, or careless use causing death are fact specific. The category of the defence that is raised here, that there was a blind spot and therefore a driver could not see or could not see past an obstruction, that kind of defence has been raised before. In this case it is not just a defence of "I didn't see her", it is "I couldn't see her, something has prevented me from seeing her". This is what I apprehend the defence to be here and that at no stage prior to the impact did the defendant see the scooter or Mrs Hall nor, he says, was he able to. However, clearly she was there and she reached the point of the impact unseen by the defendant.

[21] The law is reasonably clear, even if from older cases, as to a driver's obligation in these matters. From *Strawbridge v Mason* [1939] NZLR 877 in the Court of Appeal the duty of the driver of a vehicle if blinded from any cause is either to stop or to proceed with extreme caution.

[22] There are other cases which involve a driver being confronted by the rays of the sun. This case is a little dissimilar to those. One sun strike case though with some similarities is the *R v Pegler* CA214/03, 10 November 2003 decision which was cited by the prosecutor where a defendant's argument that it was consistent with the exercise of reasonable care to drive on the road in the immediate vicinity of a shopping centre where he could not see where he was going and where pedestrians were to be expected, without knowing precisely that the way was clear was a simply untenable argument. However, these cases are all dependent upon the circumstances of each case.

[23] There was another case which was referred to me by the prosecutor *Police v Marshall,* District Court, Dunedin, 5/3/2009, CRN 8012003151 where a truck driver claimed that a truck mirror was a blind spot and prevented him from seeing a pedestrian about to enter a pedestrian crossing. The Judge said in that case that the standard of care is the standard to be applied to a driver of this particular vehicle with its three known blind spots, there were others, the rear vision mirror was but one of them. A reasonable and prudent driver would have been aware of the blind spot created by the A-pillar in the cab and adjusted his position and where and how often he looked out of his windscreen in order to ensure that no pedestrian was

obscured by the A-pillar and the truck driver failed to meet the standard of care in that case.

[24] A further decision is in *Naysmith v Police*, High Court, Tauranga, 23/6/2011, CRI-2011-470-14 which is a more recent decision of the High Court in Tauranga where a pedestrian again was approaching a pedestrian crossing. The significance of that case presently is that there were a double stage crossing because of a raised pedestrian refuge and a different significance attaches to the pedestrian crossings in those cases. But the critical point in this case was not when the victim stepped onto the crossing but when he should reasonably have been seen and his actions anticipated and that was, His Honour found, when the victim was crossing the first crossing.

[25] In addition there is the further decision in *Rattray v Ministry of Transport*, High Court, Christchurch, 17/10/1986, AP196/86, Holland J, which points to the responsibilities of drivers even when they cannot see and there are unseen hazards. The case involved a driver of a vehicle making a right-hand turn into a parking building across a stationary line of traffic and he collided with a cyclist travelling in the same direction as the traffic which was stopped. He was passing on the left of the traffic and was, of course, for that reason not capable of being seen and was performing what was described as an "unusual manoeuvre". The obligation on both to keep a vigilant look out was said to be extreme and the appellants in that case visioned the driver's vision of the cyclist was obscured by the line of traffic. However, the Court held that the cyclist was not seen until it was too late to avoid a collision but the Court was satisfied beyond a reasonable doubt in the circumstances that the appellant was going too fast through the gap in the line of traffic so he did not have the capacity to stop soon enough to avoid the collision with the cyclist. He was found guilty on the careless use charge.

[26] Then there were a number of other references. I shall not go through the cases but they are referred to in the textbook by Judge Becroft, *Becroft and Hall's Transport Law* under para LTA 37.7m(i). The cases which are referred to there point to a manoeuvring vehicle where an unusual situation is created that there is an obligation to proceed with greater caution and a driver who is carrying out an

unusual driving manoeuvre as we have just seen from the *Rattray* case, has a higher obligation to keep a vigilant lookout. Also when changing direction and undertaking a turn a driver is required to keep a proper lookout and in particular when changing direction. That, however, refers I think more to the u-turn type of case as opposed to the manoeuvre which was being made by the defendant in the present case.

[27] Here I would describe the manoeuvre as slightly unusual, that is because the south lane had to be completed, then the flush median and then the attainment of the northern lane which was the direction of travel the defendant wished to go in. The other slightly unusual matter about it though, of course, there is no prospect of having canvassed the issue with the victim herself, that the defendant himself had a left turning arrow out of the exit and the carpark from which he had been and he turned right. However, there was a background to this and the signage on the exit has apparently been altered. On the evidence nothing hinges upon the directional arrow or that it seemed to be in a contrary direction to that which was adopted by the defendant and on his own evidence and that of Mr Maddaford nothing further seems to me to hinge on that.

[28] But here though he has still been exiting onto a busy road and the question has to be asked, what is the appropriate standard for a reasonable and prudent driver? Clearly the defendant stopped in a position where he could see northbound and southbound traffic and clearly, in my view, he has demonstrated prudence and caution before proceeding out with the objective to which I have just referred.

[29] The test runs, accepting this is as close as you can get to the car and driver and road situation as the defendant was in at the time of the accident but not the other conditions and not the traffic conditions, but the test runs confirm what could be seen in the CCTV footage, that is that there is no doubt that he stopped and this appears to have been in a place where he had a view of traffic in both the northbound and southbound lanes. Not only did he stop, but this appears to have been for an appreciable period of time and the tests show that on each test there were some four sweeps from side to side and back again of his head checking oncoming traffic. However, in the course of these sweeps the camera passed in front of the vehicle and across the road and it might not have been thought that was an immediate area of

focus for the defendant but the evidence showed parked cars and retail shops and an access way. The victim had come out of the access way, had crossed the footpath, had crossed the northbound lane and had entered the flush median and on the evidence of Mr Davenport and Mr White, most probably she had stopped in the flush median.

[30] One of those witnesses was stationary and nearby and one of them was oncoming. The defendant was at or about the same time, about to exit and was checking the road, in particular the north and south lanes and she remained unseen by the defendant. But she has been seen by both Mr Davenport and Mr White. She was there. And in the time that it took him to move off relatively a few metres to the point of impact and at a speed which he assesses, and it seems not to have been challenged, at 15 kilometres per hour to that point of impact, she had moved to the same place. She was diagonal or on an angle and arguably less visible for that reason than if she was side on.

[31] The defendant's assumption on proceeding in the direction which he chose was that there was nothing there because he had not seen anything but Mr Davenport had seen her from across the road also. The distance from the defendant to the victim would not have been much different to that of Mr Davenport's but the defendant was at a slight angle to the exit point of the victim from the access way and he says that he was obscured by his A-pillar. He has a duty in this regard to take into account any pedestrian vehicle or other road user with whom you might be required to share the road and only when this duty of care is carried, out to observe and to recognise any potential road user or sharer can the assumption be made bare moments later that there is nothing there and for that reason the A-pillar obscuring the view in one sense did not matter. The driver believed, having checked save for the A-pillar when the vehicle was facing ahead out of the exit way, that he had covered off the likelihood of any road user being where the victim was.

[32] The particular driver in this situation has to, and faced with that kind of obstruction or restriction in visibility, solve the problem for himself. In the same way as the earlier cases pointed to a manner of overcoming an obstruction or a difficulty, in the present case as the sergeant prosecutor put to the defendant in

respect of the immediate pre-collision driving, he could have moved his body forward to see or moved his head around the pillar. Arguably if there was a problem a driver in this situation could open his window to look out to avoid the obstructing pillar altogether. This, in this case, applies to exiting the council carpark as it does to immediately prior to impact. Exiting for this defendant involved seeing a potential hazard first and taking it into account and the emphasis here by the defendant in speaking to the police and in the evidence that he gave in Court was in respect of the north and south lanes. There can be no question of carelessness so far as the attention that was given to that kind of vehicular traffic is concerned but it is, in my view, entirely possible that the close attention that he has paid in that area has taken his focus away from other road users. At the time of the impact the other road users, the victim on the scooter, was unseen by him and he has effectively admitted that he has been driving blind.

[33] The reasonable and prudent driver would adjust his driving to avoid a risk of that kind and the kind of steps which I have just referred to and those suggested by the prosecutor in cross-examination of the defendant admittedly were not taken by him at that time, that he might shift his head or his body around to get a better view and to overcome the blind spot obstruction.

[34] As to the reconstruction, the victim in the form of Mr Bass in the vizavest which is highlighting his presence in any event as visible and noticeable in front of the camera, is visible and is seen in the camera shots as the head-mounted camera sweeps left and right over the front of the car. That together with the evidence of the eyewitnesses to this incident satisfies me about this case that the tests do not leave me in any doubt so far as the availability of the victim to be seen is concerned. She should have been seen at the earlier exiting time and factored into the defendant's movements. A reasonable and prudent motorist would have, in this situation, seen her and a reasonable and prudent motorist would have been aware of blind spots and adjusted himself or herself or even the car to a position to ensure a view before proceeding.

[35] So far as the tracking and turning issue is concerned, in respect of the cone of blindness moving with moving vehicles, that is posited on continuous movements

and turning of both vehicles. However, the evidence is of the scooter stopping on the flush median and the defendant's vehicle making a right turn out of the exit, was still on the flush median having passed the south lane at the time of impact.

[36] So far as the area of impact is concerned there was no turning, no view was being sought or could be obtained but the defendant relied upon his knowledge and belief from the earlier view ahead that he had that there was nothing that he should factor in, made the assumption and continued to pull out nonetheless.

[37] I am not left in any reasonable doubt about the carelessness as defined on this occasion. The charge is established.

G M Ross
District Court Judge