

**IN THE MATTER OF
The Highway Traffic Act, R.S.O 1990, c. H.8**

Between

Her Majesty The Queen

prosecutor

and

Adam Cianchino

defendant

**Ontario Court of Justice
Mississauga, Ontario**

Quon J.P.

Reasons for Judgment

Charge: s. 130, H.T.A. – “careless driving”

**Trial held: February 1 and April 6, 2010
Judgment rendered: July 12, 2010**

Counsel:

Pat John, provincial prosecutor

James Morton, Q.C., counsel for the defendant

Cases Considered or Referred To:

Jivraj v. Fischer (1992), 124 A.R. 81, [1992] A.J. No. 133 (QL) (A.Q.B.).

Moseley v. Spray Lakes Sawmills (1980) Ltd., [1997] A.J. No. 30 (QL), 25 M.V.R. (3d) 92 (A.Q.B.).

Nova Scotia (Attorney General) v. Richard, [1986] N.S.J. No. 354 (QL), 45 M.V.R. 127 (N.S.C.A.).

R. v. Beauchamp, [1953] 4 D.L.R. 340, 16 C.R. 270, 106 C.C.C. 6, O.R. 422 (O.C.A.), per Pickup C.J.O., J.K. Mackay and F.G. Mackay JJ.A.

R. v. Chamberlain, [1999] N.B.J. No. 597 (QL), 49 M.V.R. (3d) 92 (N.B.Q.B.).

R. v. Hundal (1993), 79 C.C.C. (3d) 97 (S.C.C.).

R. v. Lower, [1982] B.C.J. No. 737 (QL) (B.C. Co. Ct.).

R. v. Sault Ste. Marie (1978), 40 C.C.C. (2d) 353 (S.C.C.).

R. v. Skorput (1992), 72 C.C.C. (3d) 294 (Ont. Ct. (Prov. Div.)), per MacDonnell J.

R. v. Waite, [1989] 1 S.C.R. 1436, 13 M.V.R. (2d) 236, 69 C.R. (3d) 323, 48 C.C.C. (3d) 1 (S.C.C.).

R. v. Weedon (1987), 7 M.V.R. (2d) 21 (B.C. Co. Ct.).

R. v. Wilson, [1971] 1 O.R. 349, 1 C.C.C. (2d) 466 (O.C.A.), per Gale, C.J.O., MacKay and Jessup, JJ.A.

Statutes, Regulations and Rules Cited:

Highway Traffic Act, R.S.O. 1990, c. H.8, ss. 130, 132(1), 147(1).

Authorities Considered or Referred To:

Archibald, T., Jull, K., and Roach, K. *Regulatory And Corporate Liability: From Due Diligence To Risk Management* (Aurora, Ontario: Canada Law Book Inc., 2007).

Hutchison, S.C., Rose, D.S., Downes, P. *The Law of Traffic Offences*, 2d ed. (Toronto, Ontario: Carswell, 1998).

Paciocco, D.M. and L. Stuesser, L. *The Law of Evidence*, 5th ed. (Toronto, Ontario: Irwin Law Inc., 2008).

Exhibits Entered:

Exhibit #1 - copy of a chart prepared by Officer Michael Korn, the accident reconstructionist, of speed and distance calculations for the pickup truck driven by Giancarlo Micelli for the five seconds prior to the collision that is based on the data retrieved from the Collision Data Recorder inside the pickup truck.

Exhibit #2 - photographs taken by Officer Michael Korn, the accident reconstructionist, on March 20, 2009, of skid marks and damage to vehicles involved in the collision on the eastbound lanes of the 407 ETR highway, west of Highway 427 in the City of Brampton.

1. INTRODUCTION

- [1] In this regulatory proceeding, Adam Cianchino, the defendant, has been charged with committing the offence of careless driving, contrary to s. 130 of the Highway Traffic Act, R.S.O. 1990, c. H.8 (“H.T.A.”), after a pickup truck travelling at 112 k.p.h. collided into the rear of the defendant’s motor vehicle, which had been travelling at approximately 50 k.p.h., a speed much slower than the posted speed limit of 100 k.p.h. for the highway that those two vehicles were on. As such, the prosecution contends that the defendant’s conduct in driving his motor vehicle at this significantly slower speed fell below the standard of what a prudent and reasonable driver would have done in the same circumstances, and that this specific form of driving conduct engaged in by the defendant forms the basis for establishing the offence of careless driving.

2. BACKGROUND

- [2] On Friday, March 20, 2009, at about 8:24 p.m., a GM Silverado pickup truck driven by Giancarlo Micelli was travelling eastbound in the second lane from the right shoulder on Highway 407, the privately-operated highway and tollway known by its proper name of the 407 Express Toll Route (“407 ETR highway”), and approaching the exit ramp for southbound Highway 427. The speed limit for this part of the 407 ETR highway, which is located in the City of Brampton, is posted at 100 k.p.h.
- [3] Five seconds before the collision and just before he attempted to take the exit ramp to go south onto Highway 427, Micelli had been driving at a rate of speed that exceeded the posted speed limit by 19 k.p.h. This information about its speed was retrieved from the pickup truck’s Collision Data Recorder (CDR), which can record driver inputs, the speed of the vehicle, and the deployment or near deployment of airbags, for a five-second period before the collision. The CDR device recorded the pickup truck had been traveling at a speed of 119 k.p.h. five seconds before the collision occurred with the rear of the defendant’s vehicle and at one second before the impact the pickup truck had been travelling slower at 112 k.p.h.
- [4] In order to facilitate taking the exit for Highway 427, Micelli needed to change lanes to go into the slow lane or the lane closest to the right shoulder. Almost instantaneously upon moving into or entering the slow lane, Micelli’s pickup truck collided with the rear of the defendant’s motor vehicle that had been travelling at a supposedly much slower speed in the eastbound slow lane. Micelli testified that he did not apply his brakes before the collision because there had not been enough time for him to react to the defendant’s vehicle suddenly appearing in his path, which is also verified by the lack of pre-collision skid marks on the road coming from the pickup truck.

- [5] Before the collision occurred between the two vehicles at 8:24 p.m., the defendant and three members of his family had also been travelling eastbound on the 407 ETR highway, in their 1990 silver-coloured Mercedes Benz convertible vehicle. At some point and time before the pickup truck struck the defendant's vehicle, the defendant began to experience mechanical problems with his vehicle which prevented the vehicle from supposedly going more than 50 k.p.h. and which necessitated the defendant moving his vehicle into the slow lane and having to activate his vehicle's four-way flashers. The defendant also said he had been travelling at this slower speed for sometime between five to ten minutes before the collision, and that as soon as he had realized that his vehicle had not been operating properly he had immediately moved his vehicle into the slow lane and put on his four-way hazards.
- [6] The defendant was also nearing the off-ramp for southbound Highway 427, when the pickup truck, which had also been travelling eastbound in the lane just to the left of the defendant's lane, approached the defendant's vehicle at a high rate of speed with the intention of moving into the slow lane in order to exit at the southbound Highway 427 off-ramp. Almost immediately after the pickup truck changed lanes into the slow lane, it crashed into the rear end of the defendant's vehicle. This collision also caused the defendant and the three members of his family to sustain injuries. However, it had been the defendant's wife and son who were the ones most seriously injured in the collision between the two vehicles, and because of the severity of their injuries, which included possible brain damage, there is ongoing civil litigation that arose from the motor vehicle accident.
- [7] Furthermore, the defendant and his family had taken a March Break trip away in the Niagara Falls area and had been on their way home to the City of Markham when the collision occurred.
- [8] In addition, at the time of the collision, the weather was clear and the visibility had not been affected by fog or snow. The roads, as well, had been dry. However, it had been dark out at the time of the accident, but the highway had been illuminated with artificial lighting.
- [9] Moreover, Micelli had testified that he had only noticed brake lights being on in front of him just before the collision, while the defendant had testified that he had not used his brake lights, but had been travelling with his emergency hazard lights engaged, which could appear to be brake lights depending on whether the defendant's four-way emergency lights use the same signal lights or brake lights when engaged or that they are the same colour as the brake lights for that model and make of car. Micelli also said after he had noticed those brake lights on in front of him his pickup truck had travelled a further 100 feet before the collision had occurred.

- [10] In addition, after the impact with the defendant's vehicle the pickup truck had spun clockwise and then collided with the guardrail and finally came to a rest facing west in the eastbound lane. Meantime, the defendant's vehicle after being struck was guided by the defendant until it stopped and came to rest in the right shoulder of the eastbound lane, about 150 meters east of where the pickup truck had come to a stop. Moreover, from one officer's observation the pickup truck was a write-off because of the extensive damage to its front end. After emergency personnel arrived, members of the defendant's family were taken by ambulance to the hospital.
- [11] Also, officers of the Ontario Provincial Police (O.P.P.) subsequently arrived at the accident scene and began an investigation and reconstruction of the accident. After the investigation had been completed, it was then determined by the O.P.P. that the defendant would be charged with "careless driving", contrary to s. 130 of the H.T.A. A Part III information was then sworn and a summons issued on July 28, 2009, for the defendant to appear and answer to the charge.
- [12] In his defence, the defendant contends that despite going only 50 k.p.h. in a 100 k.p.h. speed zone when his vehicle had been struck by the pickup truck, he nevertheless had been driving prudently and appropriately for the circumstances by having immediately moved over to the slow lane and driving close to the shoulder of the road with his vehicle's hazard lights on. Furthermore, the defendant maintains that it had been the driver of the pickup truck who had actually caused the accident by driving without due care and attention when he had changed lanes without looking forward and by exceeding the speed limit by close to 20 k.p.h. The prosecution, on the other hand, argues that the defendant has failed to provide a reasonable justification for remaining on the 407 ETR highway and to continue driving at that excessively slow speed of 50 k.p.h. on a highway that is meant for traffic going at 100 k.p.h. In other words, the defendant's driving conduct prior to the collision occurring, in light of the defendant driving at that excessively slow speed for five to ten minutes on a high-speed highway and possibly passing an exit for which he could have used to leave the 407 ETR highway, had been done without reasonable consideration for other persons using the highway, considering it was nightfall and the hazard he had created for other motorists travelling behind the defendant's vehicle.
- [13] The trial of the defendant's careless driving charge commenced on February 1, 2010, and was completed on April 6, 2010. Eight witnesses testified at the trial, which comprised of seven witnesses testifying for the prosecution and one witness, the defendant, testifying for the defence. In addition, after the prosecution finished presenting its case the defence brought a no-evidence motion, but the motion was dismissed as there had been some evidence adduced on each essential element of the offence on which a properly informed trier of fact acting reasonably could have convicted the defendant. After the trial was completed, I reserved judgment and adjourned the matter to July 12, 2010, to render my decision. These, therefore, are my written reasons for judgment.

3. THE CHARGE

- [14] The Part III information laid against the defendant on July 28, 2009, charged the defendant with committing the following offence:

Adam CIANCHINO, of Markham, Ontario, on or about the 20th day of March, 2009, at the City of Brampton in the Regional Municipality of Peel, at about 8:24 PM, did commit the offence of:

*did operate a motor vehicle on a highway,
TO WIT: Highway 407 E/B, CARELESS DRIVING,
contrary to Highway Traffic Act, section 130.*

4. THE EVIDENCE

(a) Summary of Jason Kaye's testimony (a motorist travelling directly behind the pickup truck)

- [15] Jason Kaye testified that on March 20, 2009, at about 8:20 p.m., he had been operating a 1999 Jeep Cherokee motor vehicle eastbound on the 407 ETR highway, heading towards Highway 427. He believes the 407 ETR highway is a four-lane highway. He also said he had been either driving in the curb lane or one lane over. He further said the road had been clear, the weather had been perfect, and it had been dark out. However, he also said he had no difficulty seeing around despite the sun having set.
- [16] Furthermore, Kaye said he had been going at 100 k.p.h., which is the speed limit for this road. He also said the traffic at the time had been light.
- [17] In addition, Kaye said he had been following a truck and was about 100 meters to the back of it. He also said the truck was a regular medium to large silver-coloured pickup truck. Furthermore, he estimated he had been following this truck for quite a few minutes before he observed a big puff of smoke and the pickup truck strike something and then swerve to the left after the collision. Moreover, he only observed that smoke appear in front of the pickup truck, but can't be certain whether the smoke had been to the right or left of the truck. He then slowed down and swerved to dodge debris littered on the road. He also observed broken pieces and pieces of a bumper. He then continued further and eventually pulled over.
- [18] Moreover, Kaye said a Mercedes Benz vehicle had been involved in the collision with the pickup truck. He also observed the driver of the Mercedes Benz vehicle had been a male and that for the pickup truck it had not been a female driver.

- [19] Furthermore, Kaye said there had been multiple vehicles in front of the pickup truck, but was not certain if the Mercedes Benz vehicle had been one of them. He also said there had been nothing travelling to the right of the pickup truck nor had there been traffic between his vehicle and the pickup truck nor any vehicles to the right or to the left of the pickup truck between his own vehicle and the pickup truck.
- [20] Kaye also said just before the accident he did not see the pickup truck change lanes. He further said the pickup truck had been in the same lane that his vehicle had been travelling in. Moreover, he said he cannot confirm where the vehicle that was in front of the truck had been. Also, he said he cannot confirm what the pickup truck had hit at the time of the collision.
- [21] For clarification, Kaye said the first lane was to the left, near the centre of the road, the second lane was the lane to his left and the second lane from the middle of the road, and that fourth lane was the curb or slow lane. He also believed he had been in the third lane or fourth lane.
- [22] After the collision, Kaye said the Mercedes Benz vehicle went to the left and was in the fourth lane, the same lane as the pickup truck was in when it had moved off. However, he also said the accident had not been in the second lane but had happened in the third or fourth lane. He also said the Mercedes Benz vehicle was in either the third or fourth lane, but he cannot be certain when he saw the Mercedes Benz vehicle. Furthermore, he said he could not see in front of the truck or see the vehicles that were in front of the truck.
- [23] In addition, Kaye said the pickup truck was a little bit out of control and then pulled to the side. In addition, he said he never observed the truck hit the Mercedes Benz vehicle. However, when he did see the Mercedes Benz vehicle it was still moving. He also said the Mercedes Benz vehicle was a little out of control but then it pulled over to the side of the road. Then, he said the police officers arrived. He also said both the driver of the truck and the driver of the Mercedes Benz vehicle had remained until the officers arrived.
- [24] Kaye also said he had a passenger in his vehicle named Mary Rodrigues. He also said there were three passengers in the Mercedes Benz vehicle. He said he saw a little girl, a boy and an older woman. In addition, he said the little boy was in the back seat on the passenger side, while the older woman was in the passenger front seat.
- [25] In addition, Kaye said he had been in the right hand lane or the slow when all this happened. He also said he had been driving with the speed of the traffic and that he had been able to stop when the accident occurred.
- [26] Furthermore, Kaye said he cannot be certain if he had observed any brake lights. However, he recalls there being brake lights ahead of the pickup truck. He also said he does not recall seeing brake lights from the pickup truck before or after the

accident. Moreover, he said he did not recall seeing any brake lights illuminate just before the accident.

- [27] In addition, Kaye said he was also surprised to hear that the pickup truck had been doing 119 k.p.h. He also said he had been keeping an eye on his speedometer as well as looking for the Highway 427 exit.

(b) Summary of Officer Colin Style's testimony

- [28] Officer Colin Style testified he is with the Ontario Provincial Police and had been on routine patrol on March 20, 2009. He also said it was 8:25 p.m. when he responded to a radio call concerning a serious accident occurring eastbound on the 407 ETR highway, west of Highway 427.
- [29] Furthermore, Officer Style said that when he arrived at the scene at 8:34 p.m., he observed a large debris field and a seriously damaged pickup truck on the right shoulder that he opined was a write-off. He also said that Constable Scherdown was already there when he arrived.
- [30] In addition, Officer Style said he verbally spoke with the driver of that Ford pickup truck. He also said the driver had no injuries.
- [31] Officer Style also said he noticed a silver-coloured vehicle stopped further up with an unconscious young male person in the rear of the vehicle that had been seriously injured. Moreover, he noticed several people standing outside that appeared to be quite frantic. He then told them that paramedic and fire services were on route and not to move the young person. When the paramedics and fire services did arrive, he said they took over the medical care. He then took statements and assisted with traffic at the scene.
- [32] In addition, Officer Style said there had been no snow or fog and that motorists would have been able to see ahead for a distance of several hundred meters.
- [33] Moreover, Officer Style said he had not dealt with any Collision Data Recorder, although he has heard of the device.

(c) Summary of Giancarlo Micelli's testimony (the driver of the pickup truck involved in the accident)

- [34] Giancarlo Micelli testified he had been operating a 2003 Chevy Silverado pickup truck eastbound on the 407 ETR highway. He believes the 407 ETR highway has five lanes. In addition, for the purposes of his narrative he described lane two as the second lane from the curb lane, while lane one is the curb lane or slow lane that also goes to the off-ramp. He also said he had been in the second lane for about 15 minutes and in the process of changing from the second lane to the first lane.

- [35] In addition, Micelli said he had gotten onto the 407 ETR highway from Highway 410, but did not stay the whole time in one lane or stay in lane two. Furthermore, he said he changed lanes so he could get off at Highway 427 to go south. He also said he had been about 100 yards (or 91.44 metres) from the off-ramp when he changed lanes.
- [36] Micelli also said he had looked over his shoulder and put the signal on, and that on the second time he had looked over his shoulder, he then proceeded to change lanes. Furthermore, after completing the lane change he said he then looked straight ahead and observed a brake light in front of him, but had no time to put on his own brakes. Moreover, he said at the time of the accident he did not know what it was, but after the accident he realized he had hit a car, which he believes was a Mercedes Benz motor vehicle.
- [37] Furthermore, when Micelli had first looked over his shoulder he said he saw lots of cars behind him that were close to him, so he did not change lanes on the first look. He also said there had been cars in front of him in his lane. In addition, he said he still had his signal on and that he was getting close to the off ramp.
- [38] After Micelli looked over his shoulder a second time, he also observed cars to the left of him. He further said that when he had first checked for traffic he had also observed cars to his left. On the second time he had looked over his shoulder for traffic he said that he had been about 100 yards away from the ramp and travelling at the speed limit of 100 k.p.h. He further said that it had been on the second time he had looked over his shoulder that he had commenced to make the lane change and entered into the other lane. He also said at that time he did not see anything. Furthermore, he said that before he changed lanes there had been cars in front of him in the second lane.
- [39] In addition, Micelli said that when he had changed lanes there had been no time for him to see anything. He also said that as soon as he got into the other lane he hit the car. Furthermore, he said that he might have travelled about 100 feet at the most before the object was in front of him. Moreover, he said that when he noticed the brake lights he thought it was a car. He also said that he is not sure if he slowed down or stopped once he hit the car.
- [40] Furthermore, Micelli said there had been no traffic in the first lane, only cars in front of him. He also said it had been between 5:00 to 6:00 o'clock when he had hit the object. Furthermore, he said there were highway lights in the area. In addition, he said that after he had made contact with the other vehicle his own vehicle had swerved and hit the guardrail. He also said his vehicle had not been moved before the officers came.

- [41] In addition, he said it was after the second time he had looked over his shoulder that he had changed to the slow lane so he could go off to Highway 427. In addition, he said he had made sure there had been no one in his blind spot.
- [42] Micelli also said there had been lots of cars on the 407 ETR highway.
- [43] Moreover, Micelli acknowledged that when he had got to the turnoff he had looked over his shoulder into the blind spot before he changed lanes, but had not looked up ahead before he changed lanes. He further said that no one had told him that his Crash Data Retrieval system stores information on what had occurred five seconds before the accident. In addition, it had been news to him that five seconds before the accident he had been going 74 m.p.h. and at 70 k.p.h. at the point of the crash.
- [44] In addition, Micelli said it had not been a foggy night and that he had a clear view in front of him for at least 500 yards.
- [45] Micelli also said he had been alone in his vehicle and that he had observed two people get out of the Mercedes Benz vehicle.

(d) Summary of Officer Colleen Benner's testimony

- [46] Officer Benner testified that she had been with Constable Scherdown and had assisted him in the investigation. She had received a call at about 8:30 p.m. regarding a motor vehicle accident that had occurred east of Highway 427. She also said she had arrived at the scene at 8:39 p.m. In addition, she said she observed at the scene a pickup truck with damage to the front end and that it had been facing the wrong way. She also identified the driver of this pickup truck as Carlo Micelli, who had provided her with a driver's license. Furthermore, she said she had given a caution to Micelli.

(e) Summary of Officer David McLaren's testimony

- [47] Officer McLaren testified that on Friday, March 20th, at 8:40 p.m., he had attended a motor vehicle accident near Goreway Drive on the 407 ETR highway, in the Region of Peel, in the City of Brampton. Furthermore, he said that when he arrived at the scene he had assisted Constable Scherdown with traffic control and in the investigation.
- [48] In addition, Officer McLaren said he had observed a dark-coloured pickup truck on the shoulder of the road with complete front-end damage and a silver-coloured Mercedes Benz vehicle with rear-end damage. He also observed a passenger trapped inside the rear of the Mercedes Benz vehicle that had been assisted and extricated from the vehicle by the fire department. In addition, he observed up ahead a Jeep SUV motor vehicle with a male and a female person. He said he then spoke to them and they had informed him that they had witnessed the

accident. He also said the driver of that Jeep SUV motor vehicle had identified himself as Jason Kaye with an Ontario driver's license. He further said he had been satisfied with Kaye's identity. He also said he had taken a statement from Kaye.

- [49] Officer McLaren also said the person in the rear of the Mercedes Benz vehicle that he saw extricated was a 14 year-old male, but does not recall which seat the male had been in. He also said he did not speak to anyone that had been directly involved in the accident.
- [50] In addition, Officer McLaren said he had gone to the hospital afterwards and at 0025 hours he had observed or had been told by the nurses and doctors of the injuries involved.

(f) Summary of Officer Michael Korn's testimony (the accident reconstructionist)

- [51] Officer Korn testified that he is a police officer with the Ontario Provincial Police (O.P.P.) and had been assigned as the accident reconstructionist for this case. He was also accepted by the defence as an expert in accident reconstruction.
- [52] In addition, Officer Korn said on March 20th at approximately five minutes to 9:00 p.m. he had been called to attend at the accident scene. He also said the motor vehicle collision occurred in the eastbound area of the 407 ETR highway near Goreway Drive in the City of Brampton. He further said he had arrived at the scene at 9:45 p.m. Upon his arrival, he observed the 407 ETR highway had been closed and secured by the 407 O.P.P. detachment. He also said the 407 ETR highway is an eight-lane highway and an east-west road, with the eastbound lanes having 4 lanes.
- [53] Moreover, Officer Korn said he is a member of the Traffic Investigation Team for vehicle and scene examination. He also said he had used a Total Station and had shot the scene for the likeness of the scene. In addition, he said he had taken photographs of the scene. Furthermore, he said he had used the data he had collected and the photographs he had shot to compile the Collision Report.
- [54] Officer Korn also said the highway was straight and of concrete construction. It was also dry and lit with artificial lighting. He also said there had been no debris and no construction in the area and that the weather was clear and did not limit visibility. He also said the road is a posted 100 k.p.h. speed zone.
- [55] In addition, Officer Korn said that all the skid marks on the road had been post-collision skid marks. In other words, he said there were no pre-accident skid marks. However, he did note there was collision debris in the area and tire marks or skid marks to the Mercedes Benz vehicle. He also said the skid marks for the Mercedes Benz vehicle were for the most part straight.

- [56] Moreover, Officer Korn said that for his purposes he designated the lane closest to the right hand edge as lane four and that the lane closest to the centre of the road as lane one.
- [57] Officer Korn also said that when the Mercedes Benz vehicle had been struck from behind by the pickup truck, the pickup truck had been travelling at a greater speed and the momentum from the pickup truck had pushed down the rear tires of the Mercedes Benz vehicle onto the road. In addition, he said the tire marks for the pickup truck had revealed that the truck had rotated, slid and then skidded into the right hand shoulder guardrail and had stopped facing in the west direction. He also said the Mercedes Benz vehicle was in lane four, that its final resting spot was beyond the collision, and that it had stopped further east of the collision or point of impact. In addition, he said the Mercedes Benz vehicle was about 150 to 200 meters away from the pickup truck's location in the right shoulder.
- [58] In the accident report, Officer Korn confirmed there had been two sets of tire marks, one from the Mercedes Benz vehicle's point of impact going straight and one from the pickup truck that was not straight but curved to the right side. He further said after the pickup truck had hit the Mercedes Benz vehicle the truck had spun in a clockwise rotation and that was what had caused the curved marks as the truck went to the right shoulder.
- [59] Furthermore, Officer Korn said the ramp was further east of the accident scene and that the ramp is for Highway 427 and is numbered as exit 58. He also said the ramp is located across the municipal line in the municipality of Vaughan. In addition, he said the ramp was still 200 to 300 meters beyond the Mercedes Benz vehicle.
- [60] Officer Korn also identified Exhibits #1 and #2 for this proceeding as photographs he had taken of the skid marks and the damage to the vehicles.
- [61] In addition, Officer Korn said the area where the accident occurred was a straight road but that it gradually curves to the left. He also said that for the reconstruction of the accident he had set up his Total Station device in lane three so that he could obtain and capture all the evidence. In addition, he said the skid marks from the Mercedes Benz vehicle had been recorded and that he believes they were located 100 meters away from the point of impact and collision. He also said all three lanes were mapped. Moreover, he said the exit ramp was straight and level and with a gradual uphill grade for vehicles going eastbound, but the uphill did not affect a driver's vision. He also said there was artificial lighting in the area.
- [62] Furthermore, Officer Korn said that when the pickup truck had contacted the Mercedes Benz vehicle it had caused loading down. He also said the Mercedes Benz vehicle had been under control after it had been struck and that he did not see any evidence of over-steering. He, therefore, concluded that the driver of the

Mercedes Benz vehicle had brought it to a stop by braking or coasting and not done out of control.

- [63] In addition, Officer Korn said he had looked at the Crash Data Recorder (CDR) in the pickup truck. He further said the CDR is a device or instrument analogous to a black box, but for vehicles. He also said it is a diagnostic tool that records information about air bag deployment or near bag deployment and driver inputs. In addition, he said there is a system interface between the modules that presents in readable form. He also said the pickup truck is a General Motors (GM) product.
- [64] Moreover, Officer Korn said there were readings from the CDR for the five seconds for near air bag deployment and for the airbag deployment. He also said the CDR records the speed of the vehicle. He further said the speed is accurate to within two or three percent. In addition, he concluded the pickup truck in striking the Mercedes Benz vehicle caused the Mercedes Benz vehicle to accelerate. He also said there had been no braking by the pickup truck at any point during those 5 seconds. However, he could not determine what lane the pickup truck had been in.
- [65] In addition, Officer Korn said he had been informed by an officer at the scene that the Mercedes Benz vehicle had been going at approximately 50 k.p.h. However, there is no crash data recorder information in the defendant's Mercedes Benz vehicle that is available because the Mercedes Benz company does not supply North American support.

(g) Summary of Constable Carl Scherdown's testimony

- [66] Officer Scherdown testified that at 8:29 p.m. on Friday, March 20th, he had departed to a personal injury call on the eastbound right shoulder of the 407 ETR highway at Highway 427. However, he did not observe the accident, but did observe a pickup truck facing westbound in the right shoulder and a Mercedes Benz vehicle in the right shoulder. He said this was in the City of Brampton.
- [67] In addition, Officer Scherdown said the pickup truck had no alcohol smell. Furthermore, he observed in the silver-coloured Mercedes Benz vehicle an adult female, a child, and an adult male in the rear seat trying to get a 14-year-old child out. He also said there had been intermittent crying and blood coming from the child's nose. Moreover, he said there had been no alcohol smell from the adult male. He also said the adult male was alert
- [68] Officer Scherdown also said that at 2055 hours, the 14-year-old male child had been taken to Toronto Sick Kids Hospital with a head injury. He also said the female adult was holding a 10-year-old child. He said there were no injuries to the 10 year old. He further said that to the right side of the silver Mercedes Benz vehicle he had observed an adult female bleeding to the rear of her head. Furthermore, he said an adult male had been nurturing his 14-year-old son in the

rear right side of the back seat. He also observed there had been little response from the 14 year old. He further said that his main focus had been on that child. In addition, he said an ambulance arrived at 8:30 p.m. He also said he had been with the child for a couple of minutes when he noted their arrival. He also said there were two injured persons. In addition, he said that he had immediately travelled to the Toronto Sick Kids Hospital to interview the driver of the Mercedes Benz vehicle and arrived at the hospital at 2054 hours and that about 25 minutes had passed.

- [69] Furthermore, Officer Scherdown said he assumes the mark on the forehead of the 14-year-old male resulted from having contacted his mother who had been sitting in the front passenger seat. At the hospital, he said he had been informed at 1:00 a.m. on March 21, about the head injury and other injuries to the 14 year old, but things were looking positive for the child.
- [70] Furthermore, he said the pickup truck had hit the Mercedes Benz vehicle when the vehicle had been in lane four.
- [71] Officer Scherdown also said he had taken Micelli's statement. He also said he had cautioned Micelli and recorded the statement. He further said that Micelli had replied yes to the caution. In addition, he said Constable Colleen Benner had been in the car at the time Micelli's statement had been taken, while Officer McLaren had recorded the statement.
- [72] In addition, Officer Scherdown said he had been the first one on the scene. He also said that after a consultation was held it was decided to lay a Part III careless driving charge against the defendant.
- [73] The defence also conceded at this point that there had been no identification issue with Micelli.

(h) Summary of Adam Cianchino's testimony (the defendant)

- [74] The defendant testified he is 41 years old and employed in telecommunications sales. He also said he has driven for about 24 years in Ontario as a licensed driver.
- [75] Furthermore, the defendant said that on March 20, 2009, at 8:30 p.m. he had been driving home from Niagara Falls for the end of March break. He said his wife had been in the passenger seat, his daughter had been behind him, and his son had been in the rear seat on the passenger side. He also said at the time his wife was 43 years old, while his son was 14 years old, and his daughter was 11 years old.
- [76] In addition, the defendant said he had been driving a 1990 convertible Mercedes Benz motor vehicle. He also said it had been clear out, about dusk time, and starting to get dark. He also said the weather had been warm, dry, and not wet.

- [77] Moreover, the defendant said the accident had happened on the eastbound lanes of the 407 ETR highway, just before the exit to Highway 427. He further said he had been driving at about 50 k.p.h. at the time because he had car problems and could not go much faster than that. In addition, he said the car's difficulties were related to his tachometer. He said it would go up and keep rising, but would not fall as it would normally do when his car switches gears. He also said he had trouble going over 50 k.p.h. without "red lining". Instead, he said, his car would go to caution when a certain amount of revolutions occurred. Furthermore, he said his vehicle was an automatic and it would reach about 4000 r.p.m. when it would not switch gears.
- [78] Furthermore, the defendant said he could not remember how long he had been travelling between his vehicle starting to operate improperly and the accident occurring. He also said he could not remember when or where he got on the highway. However, he does remember stopping for coffee that evening at a Tim Hortons somewhere along the way. In addition, he said he had moved to the fourth lane when he realized he had a problem. On the other hand, the defendant did say that before the accident had occurred he had been driving for five to ten minutes after his mechanical problems started. He also said he had put on the hazard lights in the slow lane and had been driving close to the right shoulder in the fourth lane. He also said he had moved to the fourth lane once he realized he had a problem and had been travelling 5 to 10 minutes in the fourth lane after he realized there was a problem. He also said he had travelled for 10 minutes in the fourth lane but cannot remember how much of that time he had travelled after realizing he had a problem.
- [79] In addition, the defendant said he had been talking to his wife about what to do and whether they should get off the highway or to continue driving at a slow speed with the vehicle's hazards on. He also said that he had been in his discussions with his wife and had not yet made decision on what to do when they were suddenly hit. He also said that his thoughts were to continue with their path, drive slowly with the hazards on, then get off, and take a side street.
- [80] Furthermore, the defendant said he did not see the pickup truck before and only saw it when he saw its lights. He further recollects that seconds before the impact he had observed in his rear view mirror lights behind him coming at him quickly. In addition, he said the lights appeared to be moving too fast to stop. He said he then braced himself for the impact. After the impact, he said his vehicle was pushed forward and that he then tried to keep his vehicle going straight. However, he could not recall braking at any point.
- [81] Moreover, the defendant said everyone in his vehicle had been injured. He said his wife bumped her head and received a concussion, a shoulder injury, and possible brain damage. In addition, he said his daughter's front teeth went through her front lip and she needed dental work. He also said his son received a head

injury, broken bones in his head and face, and had brain damage. For himself, he said he received a sore back and shoulder.

- [82] In addition, the defendant said there is other ongoing litigation resulting from the accident.
- [83] The defendant also said there had been no vehicle in front of him but cannot remember if there had been any traffic to his left at that moment. In addition, he said the traffic had been light. However, he said cars had been passing him even with light traffic. He also said his four-way flashers were working. He said he had put on his four-way flashers at the same time as he had changed lanes. He further said that when he realized he had a problem he had moved to the fourth lane and turned on his flashers.
- [84] Furthermore, the defendant said he had been travelling at the speed limit before the problem had occurred and when the problem occurred he was travelling at about 50 k.p.h. and could not go any faster. He also said that his hazards had been on at the time he had observed the headlights in his rear-view mirror. He further said he had noticed the headlights on behind him and had assessed that they were in his lane and then noticed the lights were coming at him. When his car was hit, he said his vehicle was pushed forward and he held the steering wheel and kept control. He also said that when his car was pushed forward he noticed his car went faster than his car had been going.
- [85] In addition, the defendant said he does not know the distance in which his car had been pushed forward. He also said he did not see the car that hit his vehicle being close to him. He further said that both his hands were on the wheel and he had been able to bring his vehicle to stop safely onto the shoulder. In addition, he said his vehicle had not gone slightly into the other lane. He also said he felt like he had been pushed forward but had not felt he had been veering right or left. In addition, he said he had kept his vehicle going straight for some distance. However, he said he had gone to the right when he had been hit. Also, he said his car was fully on the shoulder when the police officer arrived, but cannot remember where it was. Furthermore, he could not consciously remember pulling his car to a stop. He also said that he had not been honestly sure if he knew it had been a pickup truck until after he had been told.
- [86] Furthermore, when asked if there had been an exit ramp between when he had realized he had a car problem and the accident itself, the defendant said he had been still discussing the problem with his wife but assumes there would have been an exit and that he would have passed it. He also said he lives in Markham and had been going home, but does not consciously remember taking the exit for Highway 427 to get off.

5. ISSUES

[87] The issues to be decided in this proceeding may be summarized as follows:

- (a) Is the conduct of driving at a significantly slower speed than the posted speed limit for the highway in question a manner of driving conduct that could form the basis for the offence of careless driving?
- (b) If slow driving could be the basis for careless driving, has the prosecution proven beyond a reasonable doubt that the defendant had been driving without due care and attention or without reasonable consideration for other persons using the highway?
- (c) For the circumstances, would a prudent and reasonable driver having mechanical problems with their motor vehicle, which prevents the motor vehicle from going more than 50 k.p.h. on a highway with a posted 100 k.p.h. speed limit, have gotten off the highway earlier by taking the first exit available after becoming aware of the vehicle's mechanical problem or would they have stayed on the highway while driving slowly with hazard lights on in the slow lane, despite the hazard which the slow-moving vehicle would have created for other motorists using that particular highway, especially when it was nightfall and dark out?
- (d) If the defendant's slow-driving conduct on the evening in question has departed sufficiently from the standard of a prudent and reasonable person in the same circumstances, would this driving conduct be deserving of punishment?
- (e) If the prosecution proves beyond a reasonable doubt the defendant committed the *actus reus* of the careless driving offence, has the defendant met its burden in establishing a defence of due diligence on a balance of probabilities by taking all reasonable care in the circumstances to avoid the event?

6. RELEVANT LAW

[88] The offence of careless driving is set out in s. 130 of the Highway Traffic Act, R.S.O. 1990, c. H.8 [*emphasis is mine below*]:

130. *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 and on conviction is liable to a fine of not less than \$200 and not more than \$1,000 or to imprisonment for a term of not more than six months, or to*

both, and in addition his or her licence or permit may be suspended for a period of not more than two years.

- [89] On the other hand, the specific offence of driving unnecessarily slow is set out in s. 132(1) of the Highway Traffic Act, R.S.O. 1990, c. H.8 (emphasis is mine below):

Unnecessary slow driving prohibited

132(1) *No motor vehicle shall be driven on a highway at such a slow rate of speed as to impede or block the normal and reasonable movement of traffic thereon except when the slow rate of speed is necessary for safe operation having regard to all the circumstances.*

Exception

132(2) *Subsection (1) does not apply to a road service vehicle as defined in Part X.*

- [90] In addition, s. 147(1) of the Highway Traffic Act, R.S.O. 1990, c. H.8, requires slow moving vehicles drive in the right hand lane where it is practical to do so and as close as practical to the right hand curb or edge of the roadway:

Slow vehicles to travel on right side

147(1) *Any vehicle travelling upon a roadway at less than the normal speed of traffic at that time and place shall, where practicable, be driven in the right-hand lane then available for traffic or as close as practicable to the right hand curb or edge of the roadway.*

Exception

147(2) *Subsection (1) does not apply to a driver of a,*

- (a) vehicle while overtaking and passing another vehicle proceeding in the same direction;*
- (b) vehicle while preparing for a left turn at an intersection or into a private road or driveway; or*
- (c) road service vehicle.*

7. ANALYSIS

- [91] To start with, negligent driving can be considered as a continuum of culpability or blameworthiness that progresses from a momentary lack of attention that gives rise to civil responsibility, along to inadvertent negligent conduct that is deserving of punishment and is the basis for finding careless driving under a provincial

Highway Traffic Act, and finally to advertent negligent conduct that is the basis for finding dangerous driving under the Criminal Code: R. v. Hundal (1993), 79 C.C.C. (3d) 97 (S.C.C.), per Cory J at para. 35.

- [92] By the same token, the offence of careless driving in Ontario may encompass many forms of driving conduct. It has been broadly defined in s. 130 of the H.T.A. as the driving conduct of a motorist on a highway that is without due care and attention or without reasonable consideration for other persons using the highway. Thus, the heart of this proceeding is to determine whether the defendant's conduct of driving at the slower speed of 50 k.p.h. on a 400 series highway where the speed limit is 100 k.p.h., and which resulted in an accident involving injuries, fulfills these statutorily defined elements for the careless driving offence.
- [93] In addition, careless driving is a regulatory offence that has been classified as a strict liability offence where the fault element is one of negligence. In other words, the prosecution does not have to prove any *mens rea* element in order for a conviction, but is only required to prove the prohibited act for the offence beyond a reasonable doubt. And, once the prosecution fulfills that onus of proof, then in order to be acquitted the defendant must meet its burden of proving on a balance of probabilities that he had taken all reasonable steps for the circumstances to avoid the particular event or that he had reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent: R. v. Sault Ste. Marie (1978), 40 C.C.C. (2d) 353 (S.C.C.).
- [94] Moreover, the Ontario Court of Appeal for Ontario has formulated an objective test for this negligent form of driving in R. v. Beauchamp, [1953] 4 D.L.R. 340, 16 C.R. 270, 106 C.C.C. 6, O.R. 422, as whether the prosecution has proved beyond a reasonable doubt that the accused, in light of the existing circumstances of which the accused was aware of or which a driver exercising ordinary care ought to be aware, failed to use the care and attention or gave other persons using the highway the consideration that a driver of ordinary care would have used or given in the circumstances and that the conduct in question must be of the nature that breaches a duty to the public and deserving of punishment:

It is whether it is proved beyond reasonable doubt that the accused, in the light of existing circumstances of which he was aware or of which a driver exercising ordinary care should have been aware, failed to use the care and attention or to give to other persons using the highway the consideration that a driver of ordinary care would have used or given in the circumstances.

...

There is a further important element that must also be considered, namely, that the conduct must be of such a nature that it can be considered a breach of duty to the public and deserving of punishment.

- [95] Furthermore, MacDonnell J. (as he was then) reasoned in R. v. Skorput (1992), 72 C.C.C. (3d) 294 (Ont. Ct. (Prov. Div.)), that it is the conduct that is determinative of establishing careless driving and not the mere fact that an accident had occurred:

Those remarks affirm that the 'prohibited act' which the Crown must prove in order to establish a prima facie case of careless driving is not the mere fact of an accident but rather the conduct

- [96] Hence, proof of mere negligent driving does not necessarily equate to the offence of careless driving. To make out the offence of careless driving the impugned driving must be shown to depart from the standard of care that a reasonably prudent driver would have exhibited in the same circumstances that confronted the motorist and is deserving of punishment: R. v. Wilson, [1971] 1 O.R. 349, 1 C.C.C. (2d) 466 (O.C.A.).
- [97] In addition, the distinction between the regulatory offence of careless driving and the criminal offence of dangerous driving is that the criminal offence requires proof of the mental element of advertent negligence for a conviction while the regulatory offence requires only proof of the prohibited act that is based on inadvertent negligence: R. v. Waite, [1989] 1 S.C.R. 1436, 13 M.V.R. (2d) 236, 69 C.R. (3d) 323, 48 C.C.C. (3d) 1 (S.C.C.). Furthermore, in considering whether the defendant's impugned driving in the case at bar is careless driving, his driving conduct is evaluated objectively against the standard of what a prudent and reasonable person would have done in similar circumstances, and if the impugned driving departs sufficiently from that standard so as to make the particular driving conduct deserving of punishment then a prima facie case for careless driving is made out. In contrast, because the criminal offence of dangerous driving also requires proof of a mental element for a conviction, then the driving conduct in question for the criminal offence must be shown to be more than just ordinary negligent driving, but a "marked" or striking departure from what a prudent and reasonable driver would have done in the same circumstances.
- [98] However, MacDonnell J. in R. v. Skorput, eruditely points out that the offence of careless driving is somewhat of an anomaly or paradox in that the failure to take reasonable care for which the defendant has the obligation to disprove on a balance of probabilities as part of being duly diligent is also an element of the *actus reus* of the offence that the prosecution has to prove beyond a reasonable doubt [*emphasis is mine below*]:

in the prosecution of a regulatory offence the Crown ordinarily establishes a prima facie case upon proving that the defendant committed the actus reus of the offence. At that point, the burden of showing that reasonable care was taken shifts to the defendant. However, careless driving is somewhat of an anomaly in that the failure to take reasonable care is part of the actus reus of the offence.

- [99] In other words, if the prosecution proves beyond the reasonable doubt the *actus reus* of the offence for careless driving, which includes the defendant not driving with due care and attention or driving without reasonable consideration for other persons using the highway, how is it that the defendant can still be acquitted if he

only has to prove on a balance of probabilities that he took all reasonable steps in the circumstances to avoid the event?

[100] Academia has resolved this paradox by utilizing a risk analysis framework that involves differentiating between risk assessment and risk management for the two-stage inquiry. In the textbook by Todd Archibald, Kenneth Jull, and Kent Roach, entitled, “Regulatory And Corporate Liability: From Due Diligence To Risk Management” (Aurora, Ontario: Canada Law Book Inc., 2007), the authors at pp. 4-14.1 to 4-15, resolved this issue by equating the assessment of the risk with the first stage of proving the *actus reus* of the offence and by equating the management of that risk with the second stage of proving the due diligence defence. In the present situation, where the *actus reus* of the offence requires proof of the defendant’s lack of reasonable care then the first stage of the inquiry requires the trier to assess the risk and foreseeability of the harm that could result from the defendant’s conduct and the defendant’s awareness of the risk of harm that his conduct would create in deciding whether the *actus reus* of the offence has been committed beyond a reasonable doubt; while for the second stage of the inquiry, in which the defendant has the onus to establish a due diligence defence on a balance of probabilities to avoid liability, the trier assesses the defendant’s efforts in the management of that risk of harm to determine whether the defendant had taken all reasonable care in the circumstances:

The concept of due diligence might appear to create a paradox at first sight. If the prosecution has proven that the actus reus has occurred beyond a reasonable doubt, how can the defence prove that reasonable steps were taken to avoid that very event or any foreseeable harm? As first blush, due diligence appears to undercut the risk assessment inherent in the actus reus. If one is committed to the values underlying the codification of these standards in the first place, it seems counter-intuitive to now engage in a discussion of their permissible failure. For example, for an environmentalist, it seems wrong to acquit a corporation for permitting a discharge that impairs the environment.

The resolution of this apparent paradox lies in distinguishing between risk assessment and risk management. Risk assessment is central to the codified standards that the prosecution must prove were violated, when the focus shifts to due diligence, the issue relates to fault and punishment. Should an organization or individual be punished for their failure to maintain the codified standards in this particular case? Here the emphasis is on risk management. It is possible that a failure to maintain standards is excusable in all the circumstances when put in a larger context. This is unique to the two-staged element of due diligence.

[101] The authors also in their textbook, “Regulatory And Corporate Liability: From Due Diligence To Risk Management”, at p. 1-3, reasoned that proof of actual harm is not required to prove a breach of a regulation but whether the standard of care designed to prevent the harm has been met by the accused person:

Many regulatory offences do not require actual harm but, rather, are based on a threshold standard of care designed to prevent harm.

[102] However, before deciding whether the prosecution has met its burden in proving beyond a reasonable the defendant has committed the offence of careless driving, a determination must first be made on whether the conduct of slow driving on a highway is conduct that could be the basis for the offence of careless driving.

(A) Is slow driving a form of driving conduct that could be the basis for careless driving?

[103] Slow driving, intuitively, would be associated with prudent and cautious driving in most situations. However, could such driving conduct also fall into the range of driving that is imprudent and negligent driving, which would form the basis for the offence of careless driving? The prohibited act for the offence of careless driving can be proven by the prosecution beyond a reasonable doubt in one of two ways: (1) the defendant had driven his motor vehicle without due care and attention or (2) the defendant had driven his motor vehicle without reasonable consideration for other persons using the highway.

[104] Of interest to this proceeding is that the legislators of this province have already provided a specific offence for “unnecessary slow driving” in the H.T.A. under s. 132(1). That specific offence provides for penal consequences if a motorist operates or drives their motor vehicle on a highway at an unnecessarily slow rate of speed where it would impede or block the normal and reasonable movement of traffic using the highway, unless the motorist can demonstrate that their slow driving was necessary in all the circumstances for the safe operation of the vehicle. In that case, the slow driving would be permitted. Thus, the offence of unnecessary slow driving is concerned with safety and the necessity for driving at a low rate of speed on a highway [*emphasis is mine below*]:

132(1) *No motor vehicle shall be driven on a highway at such a slow rate of speed as to impede or block the normal and reasonable movement of traffic thereon except when the slow rate of speed is necessary for safe operation having regard to all the circumstances.*

[105] Moreover, in identifying the purpose for enacting the prohibition against slow driving on a highway, it is noteworthy that the province of New Brunswick has adopted similar slow driving legislation in their traffic act as to that contained in Ontario’s *Highway Traffic Act* legislation. The purpose of the slow driving legislation in New Brunswick was explained in R. v. Chamberlain, [1999] N.B.J. No. 597 (QL), 49 M.V.R. (3d) 92 (N.B.Q.B.), at para. 23, that it is for ensuring the safety of all highway users and to avoid creating a situation where an accident might occur:

In reviewing the various sections in the Act dealing with slow driving it is clear that the purpose of the various provisions is to ensure the safety of all highway users and to avoid creating a situation where an accident might occur.

[106] Furthermore, in Moseley v. Spray Lakes Sawmills (1980) Ltd., [1997] A.J. No. 30 (QL), 25 M.V.R. (3d) 92 (A.Q.B.), at para. 18, Paperny J. of Alberta's Queen's Bench confirmed the law's recognition that a slow moving vehicle on a highway is a potential hazard to other motorists driving in the same direction, since the motorist approaching that slow-driving vehicle may not have enough time in the circumstances to avoid a collision (*emphasis is mine below*):

The law has long recognized the fact that a slow moving vehicle on a highway may pose a hazard to other vehicles inasmuch as the driver of the approaching vehicle under the circumstances may not have enough time to avoid a collision: Jivraj v. Fischer (1992), 124 A.R. 81 at 88 (Q.B.). Further, in cases involving stationary vehicles on highways that pose a hazard to approaching vehicles, courts have found that operators of the stationary vehicle owe a positive duty to other motorists, not to create a situation which causes a danger or hazard on the highway.

[107] Moreover, in Jivraj v. Fischer (1992), 124 A.R. 81, [1992] A.J. No. 133 (QL) (A.Q.B.), the court found a motorist to be driving negligently at a speed of 80 k.p.h. on a highway with a posted speed limit of 110 k.p.h., and that the slower speed was an unreasonable speed since it represented a significant danger to highway safety if the motor vehicle had not been operated with extra care taking into account the effect its slow speed may have on other vehicles operating at or near the speed limit, especially when the vehicle was driven slowly in the fast or high speed lane (*emphasis is mine below*):

While there is no minimum speed limit on Highway No. 1 at this location, I find that to travel at a maximum speed of 80 kph (approximately 72% of the speed limit) with a motor home unit of this length, weight and complexity represents, in the vernacular, "dawdling", and, having regard to other vehicles legally travelling at up to 110 kph, is an unreasonable speed under section 69 of the Highway Traffic Act, that represents a significant danger to highway safety, if the motor vehicle is not operated extra carefully to take into account the effect that its slow speed may have on other vehicles operating at or near the speed limit - this is especially so when travelling in or crossing into the left lane, which is the "fast" or high speed lane, having regard to sections 73 and 74 of the Highway Traffic Act.

...

The result is that he presented a slow moving, lengthy, obstruction, in the "fast lane" on a fast moving highway, and made a left turn into (or started a in-turn through) a median, at considerable safety risk to vehicles approaching from behind at or near the speed limit, especially when they would have some distractions to which I have referred and especially as their vision would be somewhat initially restricted due to the aforementioned rise. ...

[108] Additionally, in Jivraj v. Fischer, the court also considered that the accused motorist had breached other provisions of Alberta's Highway Traffic Act in confirming the driving conduct of the accused had been negligent (*emphasis is mine below*):

From an examination of the aforementioned provisions of the Highway Traffic Act, one can find a number of breaches of the Rules of the Road. I make reference to the breaches of those provisions not in the sense of just a statutory breach, but as confirmation of negligence.

[109] Ergo, since careless driving is a form of negligent driving and that slow driving can be found to be negligent conduct in the circumstances, as had been considered in Moseley v. Spray Lakes Sawmills (1980) Ltd. and Jivraj v. Fischer, then the conduct of slow driving by a motorist on a highway in Ontario can be the basis for the offence of careless driving.

[110] However, unlike the unnecessary slow driving offence under s. 132(1) of the H.T.A., the conduct of slow driving for the careless driving regime under s. 130 must be evaluated under the two heads of due care and attention and reasonable consideration for other persons using the highway. In other words, slow driving that is necessary for the safe operation of the vehicle in all the circumstances that is excusable under s. 132(1) may not automatically exclude a motorist from being found guilty of careless driving. As such, the prosecution would have to prove beyond a reasonable doubt that the defendant's slow driving had been without due care and attention or without reasonable consideration for other persons using the highway in consideration of the circumstances or factors surrounding the event.

[111] Furthermore, since the fault element for a strict liability offence is negligence or inadvertence, then the defendant's driving conduct must be viewed objectively, in which the lack of due care could be inferred from the conduct of the defendant as judged by the standard of a reasonable person in similar circumstances. Simply put, would a reasonable person in similar circumstances facing the defendant have continued driving at 50 k.p.h. with the vehicle's hazard lights engaged on a 400 series highway with a speed limit of 100 k.p.h. when it was dark out or would the reasonable person have taken the first exit to get off the highway or chosen another reasonable option?

(B) Has the prosecution proven beyond a reasonable doubt that the defendant's driving had been without due care and attention or without reasonable consideration for other persons using the highway?

[112] Clearly to determine whether the defendant's actions are reasonable, the circumstances surrounding the event must also be considered, along with alternatives, and the rationale behind the driving conduct.

[113] In a case where a motorist travelling at 100 k.p.h. without applying the brakes had struck a slow-moving logging truck from behind, Paperny J. at paras. 31, 32, 51, 52, 56, 57, 59, and 60 of Moseley v. Spray Lakes Sawmills (1980) Ltd., [1997] A.J. No. 30 (QL), 25 M.V.R. (3d) 92 (A.Q.B.), analyzed and discussed whether the conduct of driving slow by the driver of the logging truck had been an unreasonable risk and negligent conduct. The court, in finding that the decision of the driver of the slow-moving truck to continue driving was not negligent and the accident had been caused by the inattention of the other motorist who had been traveling at 100 k.p.h., took into consideration the following: the options that would have been available to driver of the slow-moving logging truck of parking the vehicle, or towing the vehicle, or continuing at a slow rate of speed; the visibility in regards to whether it was foggy or snowing or raining or whether there was anything impeding or obstructing other drivers from seeing the slow-moving vehicle such as winding roads in the mountains; the lighting at the time as to whether it was day or night and whether the conditions were dark or light out; the road conditions of whether they were dry or wet or ice covered; the length or distance travelled by the vehicle at that slow rate of speed; whether reasonable precautions were undertaken to alert the public about the logging truck's presence and of the slow movement of the logging truck, such as four-way flashers and vehicle lights being employed; and the other motorist's actions in either braking, decelerating or swerving or avoiding colliding with the slow moving vehicle to determine if the slow-moving logging truck had been visible to the motorist that struck the logging truck from behind and whether the other motorist had been paying attention and keeping a proper lookout for hazards ahead [*emphasis is mine below*]:

31. *I find that the risks were considered by the defendants, who concluded that continuing to drive the logging truck back to the shop at reduced speed did not create an unreasonable risk. In any event I do not find the decision to continue down the road to have been taken negligently. I accept the evidence of Mr. Walker and Mr. Houston that the decision was reasonable in the circumstances. ...*
32. *Upon review of all of the evidence, the decision to remain on the road, although one of several options available, was not taken negligently and was taken bearing in mind the safety of the travelling public. The Defendants testified that nightfall was approaching and that by simply parking the vehicle on the side of the road it would not be secure. They considered leaving the vehicle at night on the highway as an even graver hazard. They considered the possibility of calling a tow truck but recognized that a tow truck would not arrive for a considerable length of time and after nightfall. The Defendants then would have been faced with hooking onto the tow truck and being towed into the yard at night. They did not consider that to be desirable. While evidence was led of other alternatives available to them that might well have been sufficient to secure the vehicle, in my view the Defendants' decision was reasonable in the circumstances. Further, they took all reasonable precautions to alert traffic to their presence and their rate of speed. The day was clear, the roads were dry and bare, they had approximately one hour*

before nightfall and there was nothing impeding oncoming or following traffic from seeing the logging truck on the road.

51. I find there was no attempt on the part of the Plaintiff to take any evasive action including deceleration, swerving or braking. The head injury sustained is consistent with no attempt to avoid or duck the oncoming logs. This leads me to conclude that the Plaintiff did not see the logging truck in his path and this accident may have occurred regardless of the speed the Defendants were travelling.

52. I find there was no physical obstruction which would have impaired the Plaintiff's line of sight and no reason why the Plaintiff could not have taken some evasive action before the collision occurred. At 10 seconds before impact, upon seeing the four way flashers, the Plaintiff could have removed his foot from the gas pedal and avoided the collision. I accept Mr. MacInnis' evidence that the Plaintiff had ample time to brake and that even 2 seconds before impact, with full braking, he would have avoided a collision.

...

56. I have previously determined that the Defendants' decision to stay on the road was not a negligent decision, nor was the manner in which the logging truck was driven at the time of the accident. However, were I to have found negligence by the very presence of the logging truck on the road, the Supreme Court of Canada decision in the case of Mckee and Taylor v. Malenfant and Beecham, [1954] 4 D.L.R. 785 (S.C.C.), would apply. The case involved a motor vehicle stopped on the pavement of a highway with the motor running being struck from behind by another vehicle whose driver had seen the stopped vehicle in time to avoid the accident. The Supreme Court of Canada held that this was not a case of contributory negligence because a clear line could be drawn between the negligence of the driver of the moving car who had ample opportunity to avoid the accident and that of the driver in the stationary vehicle.

57. In Osbaldeston and Harvie v. Bechtold and Gibson (1952), 7 W.W.R. (N.S.) 253 (Alta. S.C.A.D.), aff'd [1953] 2 S.C.R. 177 (S.C.C.), the Supreme Court of Canada held that where the driver of an approaching car has time and opportunity or would have had it had he been driving at a proper speed and keeping a proper look out to avoid a collision and did not, he alone is responsible for the resulting damage notwithstanding the Contributory Negligence Act, even though the driver of the stationary car was at fault in putting it in a position which made the accident possible.

...

59. The inevitable conclusion based on the physical evidence at the scene of the accident and the demonstrative evidence prepared in an attempt to reconstruct the accident, is that the Plaintiff was not keeping a proper lookout or not paying proper attention to the road in front of him. There were no obstructions to his line of vision and while he may not have been able to perceive how quickly he was closing on the logging truck, he was able to note its hazard lights from at least 10 seconds before impact. Had he merely removed his foot from the gas at that point he could have avoided the

collision. He did not. There is no explanation for his failure to take any evasive action once he came upon the logging truck. In my view, whether or not the Defendants should have remained on the road with the logging truck or were driving it entirely properly is not the cause of this accident.

60. The Plaintiff had sufficient time to avoid the accident. Through inadvertence he did not see the logging truck, the four-way flashers, the streamers, or that the vehicle was travelling toward the side of the road. Other vehicles did and avoided the logging truck. He continued at a considerable rate of speed - likely at 100 kph - without slowing, thereby placing himself in a situation where the accident was inevitable. This is indeed a tragic case. The impact on the Plaintiff's life and that of his family is profound and permanent. However, the sole cause of this collision and the regrettable ensuing personal injury was the Plaintiff's inattention. There was no negligence on the part of the Defendants that caused or contributed to the accident. Accordingly, the Plaintiff's claim is dismissed.

[114] Accordingly, for the case at bar, the following relevant circumstances or factors will be considered in evaluating whether the defendant had committed the offence of careless driving beyond a reasonable doubt: the speed of the vehicles involved and of the surrounding traffic; the road conditions; the location and nature of the roadway; the speed limit for the highway; the weather; the time of day; the visibility and lighting conditions; the volume of traffic; the available options to the defendant, the actions of both drivers involved in the accident; and other relevant or intervening events. In addition, the credibility of the two drivers involved in the collision is at issue.

(1) Relevant Circumstances or Factors

(a) Speed of defendant's vehicle

[115] In Jivraj v. Fischer (1992), 124 A.R. 81, [1992] A.J. No. 133 (QL) (A.Q.B.), it was held that a motor vehicle travelling at 80 k.p.h. on a highway with a posted speed limit of 110 k.p.h. had been an unreasonable speed and represented a significant danger to highway safety if the vehicle were not operated extra carefully to take into account the effect of vehicle's slow speed may have on other vehicles operating at or near the speed limit [*emphasis is mine below*]:

While there is no minimum speed limit on Highway No. 1 at this location, I find that to travel at a maximum speed of 80 kph (approximately 72% of the speed limit) with a motor home unit of this length, weight and complexity represents, in the vernacular, "dawdling", and, having regard to other vehicles legally travelling at up to 110 kph, is an unreasonable speed under section 69 of the Highway Traffic Act, that represents a significant danger to highway safety, if the motor vehicle is not operated extra carefully to take into account the effect that its slow speed may have on other vehicles operating at or near the speed limit - this is especially so when travelling in or crossing into the left lane,

which is the "fast" or high speed lane, having regard to sections 73 and 74 of the Highway Traffic Act.

[116] Furthermore, in R. v. Chamberlain, [1999] N.B.J. No. 597 (QL), 49 M.V.R. (3d) 92 (N.B.Q.B.), the trial court's finding that a motor vehicle travelling at 60 k.p.h. in a 90 k.p.h. speed limit highway was guilty of the offence of slow driving had been upheld on appeal.

[117] In the case at bar, the defendant pointed out that Officer Korn's testimony regarding that he had been informed by an officer at the scene that the defendant's vehicle had been going 50 k.p.h. is hearsay and therefore inadmissible. However, this out-of-court statement made by an officer at the scene about the speed of the defendant's vehicle would not be hearsay if it is not being adduced for its truth, but for the fact that the defendant had said it. See the textbook by D.M. Paciocco and L. Stuesser, entitled, "The Law of Evidence, 5th ed." (Toronto, Ontario: Irwin Law Inc., 2008), at p. 105, in which the authors note that an out-of-court statement is not hearsay when it is offered simply as proof the statement had been made:

Only those statements offered for their truth offend the rule against hearsay. In other words, hearsay evidence is not identified by the nature of the evidence, but by the use to which the evidence is to be put. When an out-of-court statement is offered simply as proof that the statement was made, it is not hearsay, and it is admissible as long as it has probative value. The person relating that the statement was made is in court and can be cross-examined.

[118] Consequently, if the out-of-court statement is being adduced for the fact that it was said then it can be used to prove the defendant's state of mind at the time of the accident or that the defendant was aware of the potential hazard he had created by driving at a slow speed and that he knew he had been driving significantly slower than the posted speed limit or that he knew he had been driving at a slow speed. However, Officer Korn did not elaborate on whom that officer had been at the scene that provided the information or how that officer had obtained that information about the speed of the defendant's vehicle and the reason why that officer who knew this information about the speed had not been in court to relay that information. Hence, Officer Korn's testimony that he had been informed by another officer that the defendant's vehicle had been travelling at 50 k.p.h. carry's very little weight, and if it is being offered for its truth then it is hearsay and not admissible.

[119] However, despite the lack of direct evidence during the presentation of the prosecution's case of what speed the defendant's vehicle had been travelling at the time of the collision, there has been circumstantial evidence adduced that indicates the defendant's vehicle had not been going at the speed limit, but at a much slower speed. The charts below, derived from the testimony of prosecution witnesses and from the information recorded by the CDR device in the pickup truck and presented in Exhibit #1, will demonstrate that the defendant's vehicle

had been travelling at a slow speed relative to the speed of surrounding traffic just before the collision.

[120] The following chart indicates the distances that the pickup truck had travelled for the five-second period before the collision. It is based on the pickup truck's actual speed at different intervals for that period of five seconds before the collision that had been recorded by the CDR device from the pickup truck:

Chart #1

Distance pickup truck travelled for the five-second period before the collision

	5 seconds before collision	4 seconds before collision	3 seconds before collision	2 seconds before collision	1 second before collision	0 (point of collision)	Total distance travelled in 5 seconds.
Speed of pickup truck as recorded by CDR (in k.p.h. from Exhibit #1)	119 k.p.h.	119 k.p.h.	115 k.p.h.	114 k.p.h.	112 k.p.h.	112 k.p.h.	
Speed of pickup truck converted to meters per second (this number calculated by taking speed in k.p.h. and dividing by 60 min. per hour and dividing it again by 60 sec. per min. and then multiplying that by 1000 meters per one km.)	33.055 m/s	33.055 m/s	31.944 m/s	31.677 m/s	31.111 m/s	31.111 m/s	
Distance in meters or car lengths (where one car length is equal to 4 meters) In which pickup truck travelled in one second at the specific rate of speed.	33.056 metres	33.056 metres	31.944 metres	31.678 metres	31.111 metres	0 meters	160.845 meters or 40.211 car lengths

[121] The second chart that follows calculates the distances between the pickup truck and the defendant's vehicle at five seconds before the collision and at one second before the collision at various speeds that the defendant's vehicle could have been travelling at. The distance calculations are based on known parameters and from the speeds of the pickup truck recorded by the CDR device for the five seconds before the collision and speeds that the defendant's vehicle could have been travelling at five seconds and one second before the collision in which the defendant's vehicle's speed is assumed to be constant for the five seconds:

Chart #2

Distances between the two vehicles at five seconds before the collision and at one second before the collision at different speeds for the defendant's vehicle

	Column 1	Column 2	Column 3	Column 4	Column 5	Column 6
	Speed of defendant's vehicle in k.p.h.	Speed of defendant's vehicle in m/s. (calculated by taking speed in k.p.h. and dividing by 60 min./ hour and dividing it again by 60 sec./min. and then multiplying that by 1000 meters/km.)	Distance pickup truck would have travelled in 5 seconds from Chart #1 (where one car length is equal to 4 meters)	Distance defendant's vehicle would have travelled in 5 seconds at the indicated speed (column 2 times 5 seconds)	Distance in meters or car lengths between the two vehicles 5 seconds before the collision (column 3 minus column 4) (where one car length is equal to 4 meters)	Distance in meters or car lengths between the two vehicles one second before the collision where the pickup truck is travelling at 31.111 meters in one second (31.111 meters minus column 2) (where one car length is equal to 4 meters)
Where defendant's vehicle travelling at 100 k.p.h.	100 k.p.h.	27.78 m/s	160.845 meters or 40.211 car lengths	138.9 meters	21.945 meters or 5.49 car lengths	3.33 meters or 0.83 car lengths
Where defendant's vehicle travelling at 80 k.p.h.	80 k.p.h.	22.22 m/s	160.845 meters or 40.211 car lengths	111.1 meters	49.745 meters or 12.44 car lengths	8.89 meters or 2.22 car lengths
Where defendant's vehicle travelling at 60 k.p.h.	60 k.p.h.	16.67 m/s	160.845 meters or 40.211 car lengths	83.35 meters	77.495 meters or 19.37 car lengths	14.44 meters or 3.61 car lengths
Where defendant's vehicle travelling at 50 k.p.h.	50 k.p.h.	13.89 m/s	160.845 meters or 40.211 car lengths	69.45 meters	91.395 meters or 22.85 car lengths	17.22 meters or 4.31 car lengths
Where defendant's vehicle travelling at 40 k.p.h.	40 k.p.h.	11.11 m/s	160.845 meters or 40.211 car lengths	55.55 meters	105.295 meters or 26.32 car lengths	20 meters or 5.0 car lengths
Where defendant's vehicle travelling at 30 k.p.h.	30 k.p.h.	8.33 m/s	160.845 meters or 40.211 car lengths	41.65 meters	119.195 meters or 29.8 car lengths	22.78 meters or 5.7 car lengths

Where defendant's vehicle travelling at 20 k.p.h.	20 k.p.h.	5.66 m/s	160.845 meters or 40.211 car lengths	28.3 meters	132.545 meters or 33.14 car lengths	25.45 meters or 6.36 car lengths
Where defendant's vehicle travelling at 10 k.p.h.	10 k.p.h.	2.78 m/s	160.845 meters or 40.211 car lengths	13.9 meters	146.945 meters or 36.74 car lengths	28.32 meters or 7.08 car lengths
Where defendant's vehicle travelling at 5 k.p.h.	5 k.p.h.	1.39 m/s	160.845 meters or 40.211 car lengths	6.95 meters	153.895 meters or 38.47 car lengths	29.72 meters or 7.43 car lengths
Where defendant's vehicle travelling at 0 k.p.h. (or standing still)	0 k.p.h.	0.00 m/s	160.845 meters or 40.211 car lengths	0 meters	160.845 meters or 40.211 car lengths	31.1 meters or 7.8 car lengths

[122] To recap, at the point when the prosecution closed its case there had been no direct evidence that the defendant's vehicle had been travelling at an unreasonably slow speed. Instead, the evidence that had been adduced by the prosecution up to that point had been circumstantial proof that the defendant's vehicle had been going at a slow speed relative to the speed limit of 100 k.p.h. The circumstantial evidence that would point to the defendant's vehicle moving at a slower speed consists of: the pickup truck not braking before the collision, which would indicate the driver of the pickup truck had not realized how slow the defendant's vehicle had been going until it was too late to react and apply the truck's brakes to stop the pickup truck in time; the defendant's vehicle kept going in a relatively straight line after being struck, which would indicate that the pickup truck came up from behind at a greater speed and collided with the defendant's vehicle and pushed it ahead; the testimony from the accident reconstructionist that the pickup truck had been travelling at a greater speed than the defendant's vehicle and upon impact had pushed the defendant's rear tires downward, which would indicate the defendant's vehicle had been travelling at a slow speed; the driver of the pickup truck not seeing anything ahead of him in the slow lane when he made his first shoulder check, which indicates the defendant's vehicle had to be significantly ahead in the slow lane so that the driver of the pickup truck could not immediately see the defendant's vehicle; the driver of the pickup truck noticing brake lights in front of him just before the collision and testifying that after seeing the brake lights on in front of him the pickup truck travelled a further 100 feet (or 30.48 meters) before the collision occurred, which indicates that the defendant's vehicle had to be going significantly slower in order for the pickup truck to close

that distance between them of 100 feet (or 30.48 metres) so quickly for the time of one second. In other words, for that last second before the collision the pickup truck had been travelling at 112 k.p.h. or 31.111 meters per second, so it would have taken about one second for the pickup truck to cover that distance of 100 feet.

- [123] Furthermore, by using the values calculated in the two tables above and relying on the pickup driver's testimony and the speeds recorded on the pickup truck's CDR device it can be ascertained that the defendant's vehicle had to be necessarily travelling at a slow speed relative to the speed limit of 100 k.p.h. just before the collision. Since the speed of the pickup truck is known for the five-second period before the collision; and the distance travelled by the pickup truck for the five second period can be calculated; and that there had been a collision between the pickup truck and the defendant's vehicle at the end of that five-second period; and that the pickup truck had travelled about 100 feet further after the driver of the pickup truck had noticed the brake lights on in front of him; and the speed of the pickup truck had been recorded by the CDR device at one second before the collision had been 31.111 meters per second; and that the driver of the pickup truck did not see anything ahead of him in the slow lane when he first did his shoulder check before changing lanes, then as a consequence of that evidence it can be determined what the distance between the pickup truck and the defendant's vehicle were at five seconds before the collision and for one second before the collision at different speed scenarios for the defendant's vehicle. Those calculations will show that the defendant's vehicle could not have travelling at the speed limit, but at a speed considerably slower. However, these calculations are dependent on the reliability or accuracy of the testimony from the driver of the pickup truck, without any input from the defendant.
- [124] Therefore, according to the tables above, if the defendant's vehicle had been travelling at the speed limit of 100 k.p.h. then the distance between the pickup truck and the defendant's vehicle five seconds before the collision would have been 21.95 meters or about 5.49 car lengths apart. For that scenario of 100 k.p.h., the driver of the pickup truck ought to have seen the defendant's vehicle travelling ahead in the slow lane before he would have made his second shoulder check. And, if the defendant's vehicle had been travelling at the speed of 80 k.p.h. then the distance between the pickup truck and the defendant's vehicle five seconds before the collision would have been 49.475 meters or about 12.44 car lengths apart. For that scenario of 80 k.p.h., the driver of the pickup truck should have still been able to see the defendant's vehicle travelling ahead in the slow lane before he would have made his second shoulder check.
- [125] On the other hand, if the defendant's vehicle had been travelling at the speed of 50 k.p.h. then the distance between the pickup truck and the defendant's vehicle five seconds before the collision would have been 91.395 meters or about 22.85 car lengths apart. Remember that the distance of 100 meters is about the length of a football field. For that scenario of 50 k.p.h., the driver of the pickup truck may not

have seen the defendant's vehicle travelling ahead in the slow lane before he would have made his second shoulder check.

- [126] Moreover, based on the two tables above one can logically conclude that the scenarios where the defendant's vehicle would have been travelling closer to the speed limit of 100 k.p.h., the nearer in distance the two vehicles would have been to each other at five seconds before the collision and the more likely the driver of the pickup truck would have been able to see the defendant's vehicle ahead of him in the slow lane. Correspondingly, the slower the defendant's vehicle would have been travelling at the farther apart the two vehicles would have been five seconds before the collision and the more difficult it would have been for the driver of the pickup truck to see the defendant's vehicle travelling ahead in the slow lane and would have conceivably given the driver of the pickup truck a false sense that the lane change into the slow lane could be made safely.
- [127] Thus, based on the prosecution's evidence up to that point, without any evidence from the defendant, it could be inferred that the defendant's vehicle had not been travelling at the speed limit or the pickup truck would not have been able to travel a further 100 feet before the collision after the brakes lights were observed. In other words, based on Chart #2 above, the defendant's vehicle would have been travelling between five k.p.h. and standing still in order for the pickup truck to have travelled a further 100 feet after the sighting of the brake lights at 112 k.p.h. (or 31.111 metres per second) for the one second before the collision. Also, for this particular scenario of the defendant's vehicle travelling at 5 k.p.h. and standing still, the distance between the two vehicles would have been respectfully 29.72 and 31.1 metres apart at one second, but much further apart at five seconds before the collision at 153.895 metres or about 38.47 car lengths and 160.845 metres or about 40.211 car lengths respectfully.
- [128] Therefore, at any speeds higher than five k.p.h. as the possible speed for the defendant's vehicle, then the pickup truck would not have travelled the further 100 feet before the collision after the brake lights were observed, but would have travelled a lesser distance before the collision. Therefore, based on the prosecution's evidence at the close of its case and the two charts above, the defendant's vehicle would have to be travelling at a significantly slower speed than the speed limit of 100 k.p.h. However, in deciding whether to grant or dismiss the defence's no-evidence motion the prosecution's evidence was not weighed or evaluated for credibility. Accordingly, at that stage of the proceeding the prosecution had presented a prime facie case that the defendant's vehicle was moving at a much slower speed than the speed limit of 100 k.p.h., and had further established that this slow-driving conduct could be the basis for the offence of careless driving.
- [129] However, after the defence's no-evidence motion was dismissed the defendant took the witness stand and testified that he had been travelling at 50 k.p.h., which is a much faster speed than Chart #2 would suggest the defendant's vehicle had

been travelling at, if the pickup truck still travelled a further 100 feet after Giancarlo Micelli had seen the brake lights on in front of him.

(b) Speed limit of the 407 ETR highway

[130] The speed limit for the 407 ETR highway is 100 k.p.h., which means that motorists would be travelling at the speed limit or at a higher speed. The significantly slower speed of 50 k.p.h. being travelled at by the defendant's vehicle, which is half the speed of the 100 k.p.h. speed limit, would have created a hazard for other motorists who would have been travelling at the speed of 100 k.p.h.

[131] On the other hand, there is no evidence that there is a minimum speed requirement for motorists using the 407 ETR highway.

(c) Weather

[132] The weather at the time in question was not a factor in the cause of the collision. It had not been raining, snowing or a foggy night.

(d) Visibility

[133] To reiterate, there was no fog or snow that would have affected the visibility of motorists using the 407 ETR highway. And, although at 8:24 p.m. on the night in question it had been dark out, the highway had been illuminated with artificial lighting. Furthermore, Jason Kaye testified that he had no difficulties seeing around and Giancarlo Micelli also testified that he could see 500 yards ahead of him. In addition, Officer Colin Style said that motorists that evening would have been able to see several hundred meters in front of them. Thus, visibility had also not been a significant factor in the collision occurring.

[134] However, it should be pointed out that nightfall can create difficulties for motorists in that it becomes more difficult to judge the speed of vehicles travelling ahead when only the rear lights of a vehicle are visible against the dark background of the night sky and that it also creates difficulty in judging vehicle speed in relation to surroundings because the vehicle may not be as visible against its surrounding as it would during daylight, except for its rear lights, and at nightfall it make take longer for a motorist to process what the speed of a vehicle is that is travelling ahead.

(e) Road conditions

[135] The road was dry and clear, which would have not have caused motorists to travel at a lower speed than the speed limit of 100 k.p.h. Instead, the dry and clear road would have permitted vehicles to travel at the speed limit of 100 k.p.h. or at higher speeds. However, for these near perfect road conditions, slower moving vehicles, especially for vehicles travelling at 50 k.p.h., would have posed a hazard to other

motorists travelling at the speed limit or higher on the 407 ETR highway at the time and place in question.

(f) Character of highway

[136] The 407 ETR highway had been designed with four lanes eastbound and virtually straight in the area where the collision occurred. Logically, this design would facilitate motorists to travel at the speed limit or at a speeds higher than the speed limit. In addition, slower moving vehicles then would logically pose a hazard to vehicles going the speed limit or higher at this location on the 407 ETR highway. The straightness of the 407 ETR highway also would not have caused any visibility problems for vehicles travelling on it.

(g) Volume of traffic

[137] Jason Kaye testified that the traffic had been light. The defendant also said the traffic was light, but Giancarlo Micelli had testified there were a lot of vehicles on the highway. Furthermore, the defendant said that vehicles were still passing him even though the traffic had been light. However, if the traffic were heavy, then it would also mean there had been heavy traffic in the slow lane. As such, for the hypothetical that there had been heavy traffic, then one would expect there would have been many vehicles changing lanes from the slow lane over to the second lane from the right shoulder to get around the defendant's slow-moving vehicle. The more traffic there would have been on the highway at the time in question would have also caused more vehicles to change lanes. However, there is no evidence that there had been many vehicles changing lanes from the slow lane over to the next lane left of the slow lane, only that vehicles were passing the defendant's vehicle while he had been in the slow lane.

[138] Although Jason Kaye testified he observed brake lights go on ahead of the pickup truck, it is not evident that the brake lights going on in front of the pickup truck were the direct result of the defendant's slow-moving vehicle. Moreover, if the traffic had been heavy, then a slow-moving vehicle would be a hazard to other motorists, since it would force many vehicles in order to get around the slow-moving vehicle make a lane change into another lane that would also have heavy traffic that was likely travelling at a high speed. The presence of a slow-moving vehicle in the slow lane, although not unusual for the slow lanes on highways, would nevertheless be a hazard to vehicles in those two eastbound lanes of traffic on the 407 ETR highway.

(h) Speed of traffic on the 407 ETR highway

[139] For evidence on the speed of the traffic that evening, Jason Kaye testified he had been travelling at the speed limit of 100 k.p.h. as well as travelling at the same speed as the traffic around him. Kaye also said he been following the pickup truck for awhile at a distance of 100 meters behind it. The CDR device in the pickup

truck recorded that the speed of the pickup truck had been 119 k.p.h. five seconds before the collision and at 112 k.p.h. one second before the collision, which is when the pickup truck would have just entered the slow lane. Accordingly, it would not be unreasonable to surmise that traffic had been moving at 105 to 115 k.p.h. at the time of the collision for the conditions that night.

(i) Speed and driving conduct of the pickup truck that collided with the defendant's vehicle

- [140] The CDR device in the pickup truck driven by Giancarlo Micelli recorded its speed for the five seconds before the collision. The defendant contends that the excessive speed of the pickup truck along with Micelli's lack of due care and attention caused the collision and not the defendant's slow driving.
- [141] Furthermore, it is also puzzling why Micelli failed to see the defendant's vehicle travelling ahead in the slow lane before the pickup truck moved into the slow lane, considering that Micelli said he could see 500 yards in front of him and there had been no fog or weather that affected Micelli's visibility? On the other hand, the two charts above provide an explanation as to why Micelli ought to have seen the defendant's vehicle before he moved his pickup truck into the slow lane, as well as why he might have had some difficulty in realizing that the defendant's vehicle had been driving at a much slower speed than the speed limit considering it was nightfall and dark out, and that Micelli likely would have only been able to just see the rear lights of the defendant's vehicle against the dark surroundings. In other words, the faster that the defendant's vehicle would have been travelling at the closer in distance the defendant's vehicle would have been to the pickup truck five seconds before the collision and the more likely that Micelli would have seen the defendant's vehicle travelling ahead of him in the slow lane and the more visible the defendant's vehicle would have been in the headlight beam of the pickup truck; while conversely, the slower that the defendant's vehicle would have been travelling at the farther in distance the defendant's vehicle would have been to the pickup truck five seconds before the collision and the less likely that Micelli would have seen the defendant's vehicle travelling ahead of him in the slow lane and the less visible the defendant's vehicle would have been in the headlight beam of the pickup truck.
- [142] In addition, Jason Kaye testified that he had been behind the pickup truck at about 100 meters for some time and that there were no vehicles travelling beside the pickup truck nor between his vehicle and the pickup truck either in the slow lane or in the second lane from the right shoulder. Micelli also said he could not move into the slow lane when he did his first shoulder check because of the presence of vehicles beside him or close behind him in the slow lane and did not move into the slow lane until he did his second shoulder check. At the time of the second shoulder check, there should have been no vehicles in the slow lane that would have necessitated the pickup truck accelerating in order to pass or to keep in front of any vehicle in the slow lane.

- [143] Moreover, Micelli did not apply his brakes before he collided with the defendant's vehicle, which could be an indication of negligence on Micelli's part or that in fact the defendant's vehicle had been travelling at a significantly slower speed, which means that the defendant's vehicle would have been much farther ahead in the slow lane and Micelli simply did not realize how slow the defendant's vehicle had been travelling at before the collision occurred.
- [144] In addition, Micelli conceded that he did not look forward after he made his second shoulder check before moving his vehicle into the slow lane. However, Micelli surmises that if he would have looked forward again before changing lanes then he would have seen the defendant travelling in the slow lane. Micelli's conjecture is supported by the calculations in Chart #2. As such, if the defendant's vehicle had been travelling at 50 k.p.h., then at one second before the collision the defendant's vehicle would have been 17.22 metres or about 4.31 car lengths ahead in the slow lane, which means that if Micelli would have looked forward before he actually changed lanes then he should have seen the defendant's vehicle.
- [145] In short, Micelli should have seen the defendant's vehicle if he had been driving prudently and reasonably for the circumstances that night, if the defendant's vehicle had its four-way hazard lights on, since Micelli said he could see 500 yards in front of him and there had been no evidence that his view of the slow lane had been blocked by vehicles travelling in front him.

(j) Were they brake lights or four-way hazard lights that were seen by the driver of the pickup truck?

- [146] Giancarlo Micelli said he only noticed brake lights on in front of him just before his pickup truck collided with the defendant's vehicle. The defendant said he did not apply his brakes, but did engage his four-way hazard lights when he was travelling in the slow lane after the mechanical problems in his vehicle began.
- [147] Therefore, depending on the type and make of a motor vehicle there is the possibility that the four-way hazard lights on the defendant's vehicle are the same colour as the brake lights at the rear of the vehicle, and that what Micelli actually observed when he testified that he saw brake lights go on in front of him just before the collision, could have been the four-way hazards of the defendant's vehicle, but had erroneously believed they were brake lights, considering Micelli only had a second to discern what he had actually observed in front of him.

(k) Other relevant or intervening events

- [148] The defendant's vehicle had mechanical problems, which prevented the defendant's vehicle from going more than 50 k.p.h. It was an unforeseen event. However, if the defendant had continued driving at that slow speed of 50 k.p.h. for

between five to ten minutes, the defendant's vehicle would have travelled about 4.1665 kilometers in 5 minutes. As such, there is the possibility that the defendant may have passed an exit for leaving the highway after he had realized that his vehicle had been having mechanical problems and before the collision occurred. However, there is no evidence where the exits to get off the 407 ETR highway are located, west of the location where the collision occurred, and that the Highway 427 exit to get off the highway could have been the first reasonable opportunity for the defendant to leave the highway.

[149] Furthermore, the mechanical problem to his vehicle occurred when he was already on the 407 ETR highway and had not been the situation where he could not go more than 50 k.p.h. and then had entered the highway and continued at that slow speed, as had happened in R. v. Chamberlain, [1999] N.B.J. No. 597 (QL), 49 M.V.R. (3d) 92 (N.B.Q.B.), in which the accused had been convicted of slow driving. If the situation would have been similar to the situation in R. v. Chamberlain, where the defendant would have already been unable to travel at the speed limit and then had entered the 407 ETR highway while it was nightfall, then it would not have been a reasonable course of action.

(j) Alternatives or options available to the defendant

[150] The defendant had been acutely aware of the hazard or danger his slow-moving vehicle would pose to other traffic around him and had testified that he had immediately moved his vehicle into the slow lane and activated his hazard lights.

[151] However, it was dark out and nightfall and that time of the evening would have created a greater risk of harm to other motorists travelling at the speed limit of 100 k.p.h. Therefore, in the circumstances, did the defendant have other options or alternatives available to him then just continuing travelling forward at 50 k.p.h. with his four-way hazard lights on? From the options or alternatives that were considered in Moseley v. Spray Lakes Sawmills (1980) Ltd., [1997] A.J. No. 30 (QL), 25 M.V.R. (3d) 92 (A.Q.B.), the defendant could have pulled over right away onto the shoulder, turned on his four-way hazard lights, and then called for a tow truck or he could have immediately taken the first available exit after realizing his vehicle was having mechanical problems.

[152] The defendant testified that he had not decided on what to do, since he was still discussing what to do with his wife when the collision occurred.

[153] In addition, Officer Korn testified that the municipal boundary for the City of Vaughan was just beyond the exit ramp for Highway 427. However, there is no indication that the City of Markham would have been relatively close to where the collision had occurred on the 407 ETR highway, to provide a reasonable justification for the defendant to continue travelling at 50 k.p.h. on the 407 ETR highway at nightfall in order to get home.

[154] Furthermore, the defendant testified that consciously he did not recall planning to take the Highway 427 exit just before the collision occurred. However, the defendant's vehicle was still about 200 to 300 meters away and based on Chart #2 at 50 k.p.h. he would still have had at least 10 more seconds to make the decision to take that exit.

[155] As to the defendant's option of pulling over right away onto the shoulder and calling a tow truck, the defendant's vehicle was not completely inoperable and could have still moved forward, although at only 50 k.p.h., with his four-way hazards on to warn motorists approaching his vehicle of the hazard his vehicle posed to them. On the other hand, stopping on the shoulder of a high-speed highway where vehicles travel at 100 k.p.h. to wait for a tow truck may also not be the safest action for the defendant and his family, considering there have been instances in which other vehicles still crash into vehicles parked on the shoulder with their four-way flashers on.

[156] Therefore, the best option available to the defendant in the circumstances would have been to get off at the nearest exit and continue on home using side streets. Unfortunately, the defendant's vehicle was struck before he could have taken the exit at Highway 427.

(2) Credibility of the defendant

[157] In some aspects of his testimony, the defendant appeared evasive and not completely forthright, such as when he had been asked about how far or how long he had driven when he realized that his vehicle could not be driven faster than 50 k.p.h. and he replied he could not remember, but gave a range of five to ten minutes; or when he had been asked where he had entered the 407 ETR highway and he said he did not remember; or when he had been asked whether he had passed any exit ramps before the collision and he replied that he probably did but had still been discussing his options on what to do with his wife when the collision occurred. The defendant had likely passed an exit during those five to ten minutes of driving at 50 k.p.h.

[158] However, these aspects of his testimony do not completely undermine his credibility.

(3) Credibility of Giancarlo Micelli, the driver of the pickup truck

[159] Similarly, for Giancarlo Micelli there were some aspects of his testimony that appeared self-serving, contrived or understated, especially in any area where it would lessen his culpability, such as Micelli testifying that he had been going at the speed limit of 100 k.p.h. but then was contradicted by the CDR recording that he had been travelling between 119 and 112 k.p.h.; or that he observed many vehicles in the slow lane when he looked over his shoulder and before he moved into the slow lane, which was also contradicted by Jason Kaye, who had been

travelling about 100 metres behind Micelli's vehicle and had testified that there were no vehicles between Micelli's vehicle and Kaye's vehicle nor any vehicles to the right or left of the Micelli vehicle between the Micelli vehicle and the Kaye vehicle; or when he testified that there were lots of cars on the 407 ETR highway, which was also contradicted by Jason Kaye who had testified that the traffic was light at the time.

[160] Therefore, these aspects of Micelli's testimony have caused his credibility to be questioned, and as such, his testimony about what he had observed around him is highly suspect.

(4) Conclusion

[161] In R. v. Weedon (1987), 7 M.V.R. (2d) 21 (B.C. Co. Ct.), it was held that the failure of the accused to consider the risk which he was creating constituted the requisite inadvertence for a careless driving conviction. In other words, the accused in that case did not drive with reasonable care or consideration for other actual and potential users of the highway.

[162] Although the prosecution does not have to prove any mental element to obtain a conviction for careless driving, a failure by the defendant to consider the risk involved in driving a motor vehicle at a slow speed on a high-speed highway would constitute the requisite inadvertent negligence that may support a conviction. However, the defendant did consider the potential risk and consequences of his vehicle not being able to go more than 50 k.p.h. by immediately moving his vehicle into the slow lane and immediately putting on his four-way hazard lights to warn other motorists approaching his vehicle.

[163] Furthermore, even though it is inherent that a vehicle travelling at 50 k.p.h. on a highway with a speed limit of 100 k.p.h. when it is dark out would pose a hazard to other motorists travelling behind and around that vehicle, the defendant's conduct, in remaining on the highway while travelling at this significantly slow speed in the slow lane with the vehicle's hazard lights on, for the circumstances, was not unreasonable or a sufficient departure from what a reasonable person would have done in the same circumstances. Therefore, the defendant's conduct in the circumstances has not been proven by the prosecution to be without due care and attention or without reasonable consideration for other persons using the highway.

[164] Moreover, in using the risk analysis framework for the situation where the prosecution has to prove the lack of reasonable care as part of the *actus reus* of the offence, the defendant had reasonably assessed the risk and foreseeability of harm that his vehicle travelling at 50 k.p.h. would have posed to himself and to other motorists using the 407 ETR highway and immediately took precautions to prevent any foreseeable harm by immediately moving his vehicle to the slow lane and putting on his four-way hazard lights in order to warn other motorists about his vehicle's slower speed. Thus, in assessing the risk and foreseeability of harm

created by the defendant's conduct of which the defendant had been aware of, the prosecution has failed to prove the defendant's driving had been without due care and attention or without reasonable consideration for other persons using the highway.

- [165] In addition, there was no minimum speed requirement for the 407 ETR highway, so the defendant was also not in breach of any other rules of the road or provision of Ontario's *Highway Traffic Act*. Moreover, the defendant is permitted under the H.T.A. to drive in the slow lane under s. 147(1) if he is proceeding at a lower speed than other traffic and is also allowed to travel slower on highway if it is necessary in all the circumstances for the safe operation of the vehicle under s. 132(1). And, unlike the situation in R. v. Chamberlain, [1999] N.B.J. No. 597 (QL), 49 M.V.R. (3d) 92 (N.B.Q.B.), the defendant did not deliberately enter the 407 ETR highway knowing about the mechanical problem his vehicle had, but the unforeseen mechanical problem had arisen once he was already traveling on the 407 ETR highway. Furthermore, high-speed highways generally only have exits at certain points along its length and motorists encountering a similar problem may have to travel for some distance before they can reach the next exit.
- [166] Although the defendant had not been completely forthright in revealing how long he had been driving for after he became aware of the mechanical problem and whether he had passed an exit after becoming aware of the mechanical problem and before the collision occurring, the prosecution has not adduced any evidence that shows he had been driving for a long period at this slow speed and had passed several exits before the accident. The defendant had moved immediately to the slow lane, turned on his four-way flashers, and was still in discussions with his wife on deciding what to do when the collision occurred. Therefore, the defendant had acted reasonably as someone would have in his situation, although if the defendant had driven at that slow speed for significantly more than 5 to 10 minutes on the 407 ETR highway and had passed many exits he could have used to get off the highway and did not exit the highway, then it could reach the point of not being reasonable conduct for the circumstances. Even though the defendant had been driving for five to ten minutes after he realized there was a mechanical problem and may have passed at least one exit before the accident, there is no clear evidence the defendant had passed an exit.
- [167] Moreover, at the risk assessment stage the prosecution had the burden to prove the lack of reasonable care as part of the *actus reus* of the offence, while the defendant did not have any onus to prove that he did not go past an exit after the mechanical problem had surfaced. In other words, the defendant was not obligated to prove he took all reasonable steps at this stage, but only had to point to evidence already before the court or to adduce some evidence to create reasonable doubt about the *actus reus* of the offence being committed.
- [168] Only after the prosecution meets its burden of proving the *actus reus* of the offence beyond a reasonable doubt is the defendant then required to prove on a

balance of probabilities the absence of negligence or that he took all reasonable care for the circumstances to prevent the event to avoid liability. This would be the risk management stage. If the defendant would have been required to prove due diligence then he would have been required as part of his management of the risk to show how long he had been travelling at that slow speed and whether he had passed any exits after his vehicle began having mechanical problems to show that he had taken all reasonable care.

8. DISPOSITON

[169] Accordingly, based on the totality of the evidence, I find that the prosecution has not met its burden in proving beyond a reasonable doubt that the defendant has committed the offence of “careless driving”, contrary to s. 130 of the Highway Traffic Act, R.S.O. 1990, c. H.8. An acquittal will accordingly be entered for the defendant, Adam Cianchino.

Dated at the City of Mississauga on July 12, 2010.

QUON J.P.
Ontario Court of Justice