COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Laine, 2015 ONCA 519
DATE: 20150709
DOCKET: C58184

Laskin, MacFarland and Rouleau JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Robert Laine

Appellant

Joseph Di Luca and Erin Dann, for the appellant

Greg Skerkowski, for the respondent

Heard: May 26, 2015

On appeal from the convictions entered on July 12, 2013 and the sentence imposed on January 15, 2014 by Justice Myrna L. Lack of the Superior Court of Justice, sitting without a jury.

MacFarland J.A.:

A. OVERVIEW

[1] This appeal arises out of a tragic motor vehicle accident that took place on June 29, 2009. The appellant, who was then 21 years old, was driving home from his family's cottage with five friends. He was travelling southbound on Baseline

Road in the City of Kawartha Lakes. As he approached the third curve on Baseline Road, a gradual curve to the left, he lost control of his vehicle and ultimately crashed into a hydro pole. Two of his passengers were killed and a third was seriously injured.

[2] The appellant was convicted of two counts of criminal negligence causing death and one count of criminal negligence causing bodily harm. He was sentenced to four years' imprisonment.

[3] He appeals both his convictions and sentence.

[4] For the following reasons, I would dismiss the conviction appeals. I would grant leave to appeal sentence and allow the sentence appeal.

B. THE FACTS

[5] The appellant and five friends had been at his family's cottage, outside of Coboconk on Shadow Lake Road #8. The route home from the cottage travels along Shadow Lake Road #8 to Baseline Road, and then continues south on Baseline Road.

[6] Baseline Road, where the accident occurred, is an asphalt road without painted lane markings or fog lines. There are small gravel shoulders on either side. It is narrow: Baseline Road is 5.48 meters wide in the vicinity of the accident, whereas a regular two-lane highway road is generally about 7.2 meters

wide between the painted fog lines. At the time of the collision, the speed limit on Baseline Road was 80 km/h.[1]

[7] The appellant's vehicle travelled approximately 1.7 km, or one mile, from the point where it entered Baseline Road to the accident location. In that stretch of Baseline Road, there are three curves. The first curve is a sharp, almost ninety degree, curve to the right ("Curve 1"). The second curve ("Curve 2") and the third curve ("Curve 3") are more gentle curves to the left.

[8] When the appellant turned onto Baseline Road, he accelerated. According to Kassandra Sheppard, one of the backseat passengers in the appellant's vehicle, he accelerated so they could get "the rush feeling" when they went over hills, like on a roller coaster.

[9] The appellant nearly had an accident at Curve 1. He was driving too quickly to clear it. To negotiate the curve, he encroached on the opposite lane, and had to swerve off the road onto the gravel shoulder to avoid an oncoming car. Coming out of Curve 1, however, he accelerated, and reached a speed of approximately 140 km/h. The passenger seated in the front, Carlito, egged him on and videotaped the events. At least one of his other passengers urged him to slow down.

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[1] The speed limit has since been reduced to 60 km/h.

[10] As the appellant entered Curve 3, he lost control of his vehicle. Just before the accident, the appellant's vehicle had been passed by a northbound vehicle occupied by the Meyer family. At Curve 3, the appellant ran off the west (right) side of the road, turned back onto the pavement and crossed over the road to the east side, where his vehicle flipped over and ultimately crashed into a hydro pole.

[11] The positions of the parties were clearly set out by the trial judge at the beginning of her reasons as follows:

> The prosecution's theory of criminal liability rests on establishing that Mr. Laine engaged in a pattern of driving so fast along the Baseline Road that he exceeded the critical curve speed on the third curve on the road and lost control of his vehicle, which was foreseeable in the circumstances, and caused the injuries and deaths.
>
> The defence position is that there is no criminal liability. The defence contends that the collision was not caused because of Mr. Laine's speed. Instead, the defence says Mr. Laine was forced off the road by the passing Meyer vehicle and when Mr. Laine was attempting to get back on the road, he tried to avoid a hydro pole at the west side of the road and lost control of his vehicle and hit the hydro pole on the east side of the road.

[12] Officer Brad Pearsall, an expert called by the Crown, explained that the critical curve speed is the maximum speed at which a motor vehicle can negotiate a corner and remain centered within its own lane. The critical curve speed on Curve 3 was 107 km/h, though Officer Pearsall observed that a vehicle with a higher centre of gravity, like the appellant's SUV, could have a lower

critical curve speed. A vehicle that exceeds the critical curve speed through Curve 3, a left-hand curve, will go off onto the west (right) side of the road way. The vehicle may be able to stay on the road by moving to the east (left) side of the road, into the opposite lane, as it enters the curve.

C. THE REASONS BELOW

[13] In lengthy and careful reasons, the trial judge thoroughly canvassed the evidence of each of the witnesses, including the appellant. After reviewing the evidence, the trial judge noted:

> An overriding issue in this case is the credibility and reliability of all of the witnesses. I have considered each witness's testimony for those features in the context of all of the evidence.

[14] The trial judge then went on to analyze the evidence each of the witnesses had given. She considered the frailties alleged, inconsistencies with earlier statements, the conflicting evidence given by other witnesses, and the physical evidence at the scene, including grass patterns where the appellant's vehicle left the road and the brake markings left on the asphalt. She explained why she accepted some evidence and rejected other evidence. She concluded:

> I find that the Laine vehicle left the road because Mr. Laine drove at such an excessive speed that he exceeded the critical curve speed on Curve 3 and could not negotiate the curve, and that alone accounted for the ultimate impact with the pole. No reasonable doubt arises about this on any of the evidence, including

> Mr. Laine's testimony. I am satisfied of this beyond a reasonable doubt on all of the evidence.

[15] The trial judge then set out the test for criminal negligence and reviewed authorities involving charges of criminal negligence in the operation of a motor vehicle. There is no issue raised on this appeal that she misstated the law in any way.

[16] She then applied the law to the facts as she found them and concluded:

> Mr. Laine was familiar with Baseline Road to the extent that he had travelled on it many times throughout his life, albeit as a passenger. The trip on which the accident took place was at least the fourth time he had driven the road in two days, either coming or going. He had his driver's licence for less than a year. The marked speed limit of 80 kilometers an hour was too fast for Curve 1, but Curve 3 could have been safely travelled at that speed. The curves were marked. Curve 1 was very sharp, and two other curves followed it. The road was narrow, but not untypical of roads in cottage country. Mr. Laine only drove on the Baseline Road for a very short period of time, under two minutes. His manner of driving from the time he entered Baseline Road with five passengers in his care was a performance for the benefit of and at the encouragement of one of his passengers. He described his actions in speeding at various times as stupid. He felt that way at the time. He had a near-miss at Curve 1 when he had to swerve off the road to miss an oncoming car. Instead of heeding this as a warning of the consequences of his speeding, he sped up coming out of Curve 1 and reached a speed of at least 140 kilometers an hour. He knew what the road ahead was like. He drove into Curve 3 at a speed that exceeded the speed limit and the critical curve speed. He could not stay in his own lane, first driving in the oncoming lane and then going off the road. I am

> satisfied beyond a reasonable doubt that a person in similar circumstances would have been aware of the risk and danger involved in driving at the speed at which Mr. Laine drove on that road. His driving at the time was a marked departure and a substantial departure from the standard of care that a reasonable person would have exercised at the time.
>
> The risks of what Mr. Laine was doing were very obvious to him and would have been obvious to anyone. By the time he went into Curve 3, he had already had a near-miss just moments before. He knew that it was stupid to listen to Carlito. He knew that his manner of driving was making at least one of his passengers uncomfortable. I find that he was told to slow down. No reasonable doubt arises on any of the evidence, including Mr. Laine's evidence, and I am satisfied beyond a reasonable doubt on all of the evidence that Mr. Laine's conduct in driving on Curve 3 as he did amounted to a wanton and reckless disregard for the lives or safety of others.

D. THE GROUNDS OF APPEAL

[17] The appellant raises five grounds of appeal. First, the appellant submits that the trial judge erred in her assessment and acceptance of the evidence of Kassandra Sheppard, one of the passengers in his vehicle. He says her evidence was unreliable.

[18] Second, the appellant submits that the trial judge applied a more exacting standard of scrutiny to his evidence than she did to the evidence of other witnesses, particularly Ms. Sheppard.

[19] Third, the appellant submits that the trial judge erred in failing to allow the defence's application to re-open the trial following the Crown's closing submissions.

[20] Fourth, the appellant submits that the verdicts are unreasonable.

[21] Fifth and finally, the appellant appeals his sentence and submits that the trial judge erred in overemphasizing general deterrence.

E. DID THE TRIAL JUDGE ERR IN ASSESSING MS. SHEPPARD'S EVIDENCE?

(a) Overview of Ms. Sheppard's evidence

[22] In her testimony, Ms. Sheppard described the appellant's driving from the moment he entered Baseline Road.

[23] She said he was speeding so they could get "the rush feeling" when they went over hills. As the appellant turned into Curve 1 – a nearly 90 degree right-hand curve – they met a vehicle coming in the opposite direction. Both vehicles were over the middle line by about a foot, she estimated, and the appellant swerved sharply to the right to avoid a collision.

[24] The appellant's arguments on appeal focus on three aspects of Ms. Sheppard's evidence about the near-miss at Curve 1.

[25] First, Ms. Sheppard testified that, when the appellant swerved sharply to the right at Curve 1, it felt like the driver's side of the vehicle lifted and that they

were going to roll over to the right. Second, Ms. Sheppard testified that, after they left Curve 1, she put on the middle seatbelt in the backseat because she feared an accident. Third, she testified that she looked at the speedometer shortly after they cleared Curve 1, and observed that the vehicle was travelling at about 140 km/h.

(b) The tilting evidence

[26] Officer Pearsall testified that, on Curve 1, the weight of the vehicle would have shifted to the driver's side and the driver's side would not feel like it was about to lift. That would only happen if the driver suddenly steered back the other way.

[27] The appellant argues that Ms. Sheppard's evidence cannot, on this point, be reconciled with that of Officer Pearsall. Again, Ms. Sheppard said it felt like the driver's side of the vehicle lifted when the appellant swerved to the right to avoid the oncoming vehicle.

[28] The trial judge concluded that Ms. Sheppard's evidence about the driver's side of the vehicle lifting was "a perception" on her part. Ms. Sheppard testified that she did not know whether the driver's side tires in fact left the ground; it merely felt that way. The trial judge concluded that, after steering off the road to the right to avoid the oncoming vehicle, the appellant would have had to re-enter the roadway to continue the journey. This would necessarily involve steering to

the left as a matter of common sense. As Officer Pearsall testified, a sudden turn back to the left could have caused a sensation of the driver's side tires lifting.

(c) The seatbelt evidence

[29] Next, the appellant submits that the trial judge erred in accepting Ms. Sheppard's evidence that she put on the middle backseat lap seatbelt. Officer Boyd testified that the middle backseat lap belt was found tucked in under the seat and retracted after the accident, without any loading marks. Had the seatbelt been worn, Officer Boyd testified, it would have locked into place after the accident and not retracted. Officer Boyd concluded that the middle backseat seatbelt was not in use at the time of the accident.

[30] There were four people in the backseat of the appellant's vehicle and only three seatbelts. Ms. Sheppard's evidence was that she put on the middle seatbelt only after the near-miss at Curve 1, because she feared an accident. She also testified that, when she regained consciousness after the accident, she was no longer wearing her seatbelt. She found herself on the ceiling of the vehicle, pinned underneath the seat.

[31] The appellant submits that, despite the evidence that Ms. Sheppard was not wearing a seatbelt at the time of the accident, the trial judge wrongly concluded that Ms. Sheppard was in fact wearing a seatbelt. This error is important, the appellant argues, because Ms. Sheppard testified that she put on

the seatbelt because she was scared of the appellant's driving. If Ms. Sheppard's evidence about her seatbelt use was unreliable, all of her evidence about what occurred at Curve 1 is called into question.

[32] I disagree with the appellant's characterization of the trial judge's reasons. In my reading of the relevant passage, the trial judge never concluded that Ms. Sheppard in fact put on the middle seatbelt. Rather, the trial judge concluded that, although Ms. Sheppard *thought* she put on the middle seatbelt, she in fact did not. What the trial judge said was:

> I am convinced [Ms. Sheppard] took some action and thought she put on a seatbelt although she did not put on the middle seatbelt, as she thought.

[33] Accordingly, I do not agree that the trial judge misapprehended this aspect of Ms. Sheppard's evidence.

(d) The speedometer evidence

[34] Finally, the appellant submits that the trial judge erred in accepting Ms. Sheppard's evidence that, when she looked at the speedometer shortly after the near-miss at Curve 1, she noted the speed registered at "a notch above 140 [km/h]". Ms. Sheppard was firm on this point and was not budged in cross-examination. She had no doubt and had "seen [the speedometer] with my own two eyes."

[35] The trial judge accepted that after Curve 1, Ms. Sheppard looked at the speedometer and at that time it read between 140 and 145 km/h. Ms. Sheppard thought the vehicle was about fifty feet beyond Curve 1 when she looked at the speedometer. In view of Officer Pearsall's evidence, the vehicle would likely not have achieved such a speed until it was further along the straightaway between Curves 1 and 2.

[36] While Ms. Sheppard, who said several times during her evidence that she was not good at estimating distances, was mistaken about how far the vehicle was beyond Curve 1 when she observed the speedometer, it does not follow that her observation was inaccurate. Indeed, Officer Pearsall confirmed that it "would be possible" to reach 140 km/h on the straightaway between Curves 1 and 2.

[37] In my view, the trial judge did not err in assessing Ms. Sheppard's evidence. She weighed it, compared it with other evidence, considered inconsistences, accepted some and rejected some.

[38] This is the role that trial judges have in our system of justice. It is for them to weigh and consider the evidence and make findings of fact. Absent a palpable and overriding error, and there is none here, this court will not interfere.

F. DID THE TRIAL JUDGE APPLY A STRICTER STANDARD OF SCRUTINY TO THE APPELLANT'S EVIDENCE THAN TO THE CROWN'S EVIDENCE?

[39] It is an error of law for a trial judge to subject the accused's evidence to a stricter standard of scrutiny than the Crown's evidence: *R. v. J.S.W.*, 2013 ONCA

593, 301 C.C.C. (3d) 252, at para. 56; *R. v. H.C.*, 2009 ONCA 56, 241 C.C.C. (3d) 45, at para. 62.

[40] The appellant argues that the trial judge was not "troubled" by problems with Ms. Sheppard's evidence but, by contrast, found the appellant neither credible nor reliable, even when his evidence was in part supported by Ms. Sheppard's evidence.

[41] For example, Ms. Sheppard testified that, at Curve 3, the Meyer vehicle was partly in the appellant's lane as it approached from the opposite direction.

[42] The appellant also testified that the Meyer vehicle was in his lane and was the cause of the accident. The appellant said he had to turn off the road, to the right, to avoid a collision with the Meyer vehicle. This set in motion the chain of events that ended with the appellant's vehicle crashed into the hydro pole.

[43] As to Ms. Sheppard's evidence on this point, the trial judge said:

> I found her evidence that the Meyer vehicle was at least partially on Mr. Laine's side of the road on Curve 3 to be confusing. She was uncertain about the extent of the overlap and her testimony changed. She appeared confused. In the end, she said she did not know where either vehicle was on the road.
>
> […]
>
> Ms. Sheppard's evidence was that the Meyer vehicle was in the oncoming lane. Over the course of her testimony, she showed that she was confused about the location of the Meyer vehicle. In the end, she said she

> did not know exactly where the Laine or Meyer vehicles were on the road. In any event, I found her evidence on the issue of the location of the Meyer vehicle was not reliable. Her confusion perhaps is explained by the crowding phenomenon that Officer Pearsall spoke about.[2]

[44] In dealing with the appellant's evidence on this point, the trial judge said:

> Mr. Laine testified that he was forced off the road by the Meyer vehicle, which he said was driving in the middle of the road.
>
> Mr. Laine testified that his action in leaving the road was a swerve. Later he said it was gradual and smooth. Later he said the movement was "pretty decent big". His evidence was inconsistent. He could not seem to get it straight. It would make sense to me that a driver would swerve, make a pretty decent big movement to get out of the way of a vehicle encroaching in its lane. However, Officer Pearsall's evidence was that the tire marks he observed showed a gradual run-off of the Laine vehicle from the road and not the sharper angle of divergence that he would have expected if there had been a sharp steering manoeuvre to get off the road. Mr. Laine's evidence did not accord with the physical evidence on the road.

[45] The appellant submits that the trial judge rejected one aspect of Ms. Sheppard's evidence – the evidence about the location of the Meyer vehicle – that could support the appellant's version of events. However, the trial judge nonetheless accepted other aspects of Ms. Sheppard's evidence, while she

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[2] Officer Pearsall described the crowding phenomenon in his evidence: in a narrow curved roadway, it may appear to a driver that an oncoming car is encroaching onto the driver's lane.

concluded the appellant was neither credible nor reliable. This demonstrates uneven treatment of the appellant's evidence.

[46] I do not accept this submission. There was more than simply the evidence of Ms. Sheppard and the appellant on the location of the Meyer vehicle. Mr. Meyer and Ms. Davis (Mr. Meyer's spouse and passenger) both testified that the appellant's vehicle approached theirs, initially in their lane of travel, and returned to its own lane as it passed the Meyer vehicle. Mr. Meyer estimated that the appellant's vehicle was travelling at around 120 km/h. Officer Pearsall testified about the physical evidence at the scene, including the tire marks the appellant's vehicle left as it ran off the west side of the road. Office Pearsall also remarked on the way the grass appeared along the west side of the highway and the tire marks that the appellant's vehicle left on the asphalt as it crossed from the west to the east side of the road. This evidence did not support the appellant's version of events.

[47] A trial judge is entitled to accept some, none or all of a witness's evidence. It was open to the trial judge to accept some of Ms. Sheppard's evidence but to reject her evidence on the point about the location of the Meyer vehicle before the crash.

[48] Similarly, it was open to her to reject the appellant's evidence. His evidence was internally inconsistent, as is demonstrated by the brief passage

referenced in the trial judge's reasons noted above. Furthermore, the trial judge was "astound[ed]" by the appellant's lack of recall at trial. She concluded that he was evasive on key issues, including his driving speed on Baseline Road, and when he lost control of the vehicle.

[49] These were matters for the trial judge to decide. Her job was to weigh and assess the evidence. That she preferred the evidence of certain witnesses over others does not demonstrate uneven treatment, nor does the fact that she accepted some of Ms. Sheppard's evidence but not all. This is the prerogative of the trial judge.

[50] I would dismiss this ground of appeal.

G. DID THE TRIAL JUDGE ERR IN REFUSING TO PERMIT THE DEFENCE TO RE-OPEN THE TRIAL?

[51] The appellant submits that the trial judge erred in refusing to allow his application to re-open the trial following the Crown's closing submissions.

[52] The appellant testified that, after he went off the west side of the road at Curve 3, he accelerated in order to get back onto the road. In her closing submissions, the Crown said that the appellant's evidence on his acceleration was fabricated and "specifically intended in order to undermine [Officer Pearsall's] speed calculation."

[53] Officer Pearsall had provided an estimate of how quickly the appellant was travelling when he entered Curve 3. His estimate was based on an assumption

about how fast the appellant was travelling after he left the road. If the appellant in fact accelerated after he left the road, the effect would be to reduce Officer Pearsall's estimate of how quickly he was travelling when he entered Curve 3.

[54] There was evidence available (a prior statement the appellant had given to police) that the appellant had said he accelerated while off the road, before he knew of Officer Pearsall's report – that is, before he had a motive to lie.

[55] Prior consistent statements are generally inadmissible. However, they can be admitted in order to rebut an allegation of recent fabrication: *R. v. Jackson*, 2013 ONCA 632, 301 C.C.C. (3d) 358, at para. 85, aff'd 2014 SCC 30, [2014] 1 S.C.R. 672. Where it is alleged that a witness recently fabricated his or her testimony, the prior consistent statement has probative value because it indicates that the witness's story was the same before the motive to fabricate arose: *Jackson*, at para. 85.

[56] After closing submissions, the defence brought an application to re-open the trial. The defence sought to lead evidence of the appellant's prior consistent statement in order to rebut the Crown's allegation of recent fabrication.

[57] The appellant submits that, while the application to re-open would have been more compelling with a proper record that included the evidence of the prior consistent statement, and a transcript of the relevant portion of the Crown's

closing submissions, the absence of those materials should not have been fatal to his application.

[58] The record discloses that the Crown's allegation was fully and openly discussed. The appellant is correct that the allegation of recent fabrication arose for the first time during the Crown's closing submissions. The Crown's submission was improper. However, after a protracted discussion, the Crown agreed to withdraw her submission, as the following exchange indicates:

> THE COURT: I have not misunderstood the Crown's position on this, is that correct, that there is no allegation here of recent fabrication?
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> THE CROWN: That is correct. That is, that I did not make any allegation of recent fabrication in my submissions, and nor was the issue raised at trial during cross-examination of Mr. Laine. That is correct.
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> THE COURT: And if you said something that could be interpreted that way in your final submissions, I am not to interpret it that way.
>
> THE CROWN: That's correct, yes.

[59] The trial judge then concluded this discussion with the following:

> This is a judge alone trial. Submissions are not evidence. I have not and will not consider this as a case of alleged recent fabrication. It does not arise on the evidence. What is alleged is fabrication, pure and simple. The application is therefore dismissed.

[60] The appellant can point to nothing in the trial judge's reasons to suggest that she did not do what she said she would do.

[61] I do not accept this submission. As the trial judge herself noted, this was a judge-alone trial and she would not consider the case as one of recent fabrication. Her reasons demonstrate that she did not do so. I would not give effect to this ground of appeal.

H. ARE THE VERDICTS UNREASONABLE?

[62] The appellant submits that the trial judge's finding of criminal negligence was unreasonable.

[63] He submits that the trial judge concluded that he exceeded the critical curve speed on Curve 3, and that is why he crashed into the pole. The appellant submits that this finding is not supported by the evidence. The expert evidence was that the appellant's vehicle slightly exceeded the critical curve speed and did not need to slow down much to get back onto the road. The evidence was also that the appellant braked hard after returning to the road. Braking hard after returning, and losing control of the vehicle, were poor decisions by an inexperienced driver – not a wanton disregard for human life. Taking the expert evidence at its highest, the collision occurred after the appellant was driving 20 or 30 km/h over the speed limit and failed to make a turn properly. This is not, he submits, criminal negligence.

[64] A verdict is unreasonable or cannot be supported by the evidence if it is one that a properly instructed trier of fact, acting judicially, could not reasonably have rendered: *R. v. W.H.*, 2013 SCC 22, [2013] 2 S.C.R. 180, at para. 26. Appellate courts have somewhat broader scope to review the verdicts of trial judges, as opposed to juries, for unreasonableness, because trial judges give reasons for their conclusions: *W.H.*, at para. 26. The appellate court must consider whether there is evidence in the record to support the verdict, and whether the verdict conflicts with the bulk of judicial experience: *W.H.*, at para. 28; *R. v. F.C.*, 2015 ONCA 191, [2015] O.J. No. 1437, at para. 38.

[65] Furthermore, the test for criminal negligence requires the Crown to show that an accused's conduct or omission constituted a "marked and substantial departure" from the conduct of a reasonably prudent person in the circumstances: *R. v. M.R.*, 2011 ONCA 190, 275 C.C.C. (3d) 45, at para. 28. The "marked and substantial departure" standard applies to both the physical and mental elements of the offence: *M.R.*, at para. 29.

[66] I would not give effect to this ground of appeal. In my view, the verdicts were not unreasonable.

[67] The difficulty with the appellant's position is that it focusses only on his conduct at Curve 3. However, in assessing whether criminal negligence is made out, the trier of fact should consider all of the circumstances surrounding the

activity, including the manner in which the appellant drove, his age, and the instigation and encouragement of the activity he received from others: *R. v. J.L.* (2006), 204 C.C.C. (3d) 324 (Ont. C.A.), at para. 21.

[68] The trial judge's finding of criminal negligence was based on the appellant's entire course of conduct while driving on Baseline Road. He began to speed and drove recklessly as soon as he got onto Baseline Road. He knew the road well: he had travelled on it many times throughout his life, albeit as a passenger on visits to his family cottage. The road was signed and he had personally driven it several times over the course of this visit.

[69] The trial judge considered the appellant's youthfulness and the fact that he was egged on by his front-seat passenger who was recording the event on video. However, the appellant had also been asked to slow down at least once and he knew that at least one of his passengers was uncomfortable with his speeding. Even the appellant concedes that his conduct was "stupid".

[70] This is not a case of an inexperienced driver who made a bad turn while going slightly over the speed limit. His speed was grossly excessive, 140 km/h at the time Ms. Sheppard observed the speedometer, on a narrow two-lane highway. Even after the near-miss at Curve 1, the appellant continued his wanton conduct without regard for the lives of those passengers in his vehicle or indeed

others using the road. He was not chastened by the near-miss; instead, he increased his speed.

[71] I see no basis to interfere with the trial judge's conclusion that the appellant's conduct constituted a marked and substantial departure from the conduct of a reasonably prudent person in the circumstances. The criminal negligence verdict is not unreasonable and is in accordance with the facts as the trial judge found them.

[72] I would dismiss this ground of appeal.

I. THE SENTENCE APPEAL

[73] The appellant was sentenced to four years' imprisonment, concurrent, on each of the three criminal negligence convictions.

[74] He submits that the trial judge over-emphasized general deterrence in imposing these sentences.

[75] The appellant's wanton course of conduct likely occurred in less than two minutes, over a stretch of highway 1.7 km in length. Neither the distance nor the time involved were long, but the consequences were utterly devastating.

[76] The families of the two young women who were killed as the result of the appellant's conduct have lost their loved ones forever. Society has been deprived of all they might have been. Ms. Sheppard will always suffer from the serious

injuries she sustained. Nothing the court can do will change or alleviate this suffering.

[77] However, the court must fix the proper sentence for this offender, who committed these offences in these circumstances.

[78] The appellant was 21 years of age at the time of the offences. He had had his G2 driver's licence for about one year. No alcohol or drugs were involved in the offences. He had a minor highway traffic record, which the trial judge described as "of no consequence". He had no criminal record.

[79] In her reasons, the trial judge noted:

> The case law shows that the predominant objectives in sentencing an individual for crimes of this nature are deterrence and denunciation.
>
> […]
>
> I have serious concerns about imposing a penitentiary sentence on a first offender such as Mr. Laine who is relatively young and obviously immature. Nevertheless, these are the very people who could be deterred by the prospect of a substantial sentence for recklessly disregarding the safety of others while driving.

[80] The appellant is a first offender who has never been incarcerated prior to these offences. In *R. v. Priest*, (1996), 30 O.R. (3d) 538 (C.A.), at p. 545, Rosenberg J.A. said:

> [I]t is a well-established principle of sentencing laid down by this court that a first sentence of imprisonment should be as short as possible and tailored to the individual circumstances of the accused rather than solely for the purpose of general deterrence.

[81] While the appellant was not, strictly speaking, a youth at the time of the offence, he was nevertheless still youthful, in that he was only 21 years old. As Rosenberg J.A. noted at p. 545 of *Priest*:

> [T]he term "youthful offender" refers not simply to chronological age and must include some consideration of the offender's maturity.

[82] The trial judge specifically noted the appellant's immaturity.

[83] Furthermore, at p. 546, Rosenberg J.A. commented that:

> [T]his emphasis on individual deterrence rather than general deterrence [is] particularly applicable in the case of a youthful first offender.

[84] In her reasons noted above, the trial judge emphasized the principles of deterrence and denunciation. While she had concerns about imposing a penitentiary term on a first offender, she concluded that people in the appellant's position are "the very people who could be deterred" by a substantial sentence.

[85] As this court recently noted in *R. v. Brown*, 2015 ONCA 361, [2015] O.J. No. 2655, at para. 7:

> The primary objectives in sentencing the youthful first time offender remained individual deterrence and rehabilitation. In balancing the factors, the sentencing judge still had to impose the shortest term of imprisonment that was proportionate to the crime and the responsibility of the offender, given his young age.

[86] As the trial judge noted, the appellant was, according to his stepmother, “an honest, good kid with little ambition who is immature and disorganized”. At the time of his sentencing, he was enrolled at Seneca College full-time taking a digital media course.

[87] The appellant’s crimes are serious and a custodial sentence is required. However, the sentence imposed by the trial judge appears to have been mainly intended to deter others who might be inclined to drive as the appellant had driven. It appears that general deterrence was overemphasized, and this was an error that permits this court to intervene: *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 90.

[88] In my view, given the appellant’s youth, the circumstances of the offence, the fact that no alcohol or drugs were involved, the appellant’s efforts to rehabilitate himself, and the support offered by his family, the appropriate sentence would be two years less a day. I would vary the sentence accordingly.

J. DISPOSITION

[89] In the result, I would dismiss the conviction appeal. I would grant leave to appeal sentence and allow the sentence appeal in accordance with these reasons.

Released: July 9, 2015 “JL”

“J. MacFarland J.A.”
“I agree John Laskin J.A.”
“I agree Paul Rouleau J.A.”