

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
V.	)	DEF. I.D.: 0010010795
	)	
MICHAEL LEPORE,	)	
	)	
Defendant.	)	

Date Submitted: February 22, 2002
Date Decided: March 5, 2002

OPINION AFTER TRIAL

Sean P. Lugg, Deputy Attorney General, Attorney for State of Delaware.

Eugene J. Maurer, Jr., Esquire, Attorney for the Defendant.

SLIGHTS, Judge

I. INTRODUCTION

Defendant, Michael Lepore, was indicted by the Grand Jury on one count of Vehicular Assault First Degree (“Vehicular Assault”) and one count of Driving a Vehicle While Under the Influence of Alcohol (“DWI”). After defendant waived his right to trial by jury, the matter was tried to the Court over three days ending February 22, 2002. At the conclusion of the evidence and after closing arguments, the Court entered a verdict of guilty as to Count II (DWI) for reasons stated on the record. The Court reserved its verdict on Count I (Vehicular Assault) pending further review of the evidence and applicable law. This is the Court’s written findings of fact and conclusions of law in support of its verdict with respect to Count I. For the reasons that follow, the Court finds the defendant GUILTY of Vehicular Assault First Degree.

II. APPLICABLE LAW

“A person is guilty of vehicular assault in the first degree when while in the course of driving or operating a motor vehicle and under the influence of alcohol or drugs ... the person’s negligent driving or operation of said vehicle causes serious physical injury to another person.”¹ “A person acts with negligence ... when the person fails to exercise the standard of care which a reasonable person would observe

¹Del. Code Ann. tit. 11, § 629 (1995). The citation form herein shall follow Delaware Supreme Court Rule 14(g), as amended December 13, 2001.

in the situation.”² And “[negligent] conduct is the cause of a result when it is an antecedent but for which the result in question would not have occurred.”³ The “but for” causation test is limited in the context of negligent causation by a requirement that the “actual result” be one of which the defendant was or should have been aware.⁴ Absent proof of foreseeability in these terms, the State cannot prove negligent causation.⁵

It is against this legal framework that the Court will consider the evidence presented at trial.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. The Undisputed Facts

In the early morning of June 30, 2000, Mr. LePore was traveling home after having been out with a friend at a local bar. He had consumed between 7-8 beers. He turned left on to Delaware Route 7 (Limestone Road) from Valley Road and proceeded north. He noticed some construction barrels near the intersection of Valley

²Del. Code Ann. tit. 11, § 231(e) (1995).

³Del. Code Ann. tit. 11, § 261 (1995).

⁴*Bullock v. State*, 775 A.2d 1043, 1049 (Del. 2001)(citing Del. Code Ann. tit. 11, § 263(1995))(hereinafter “Section 263”). Section 263 provides, in relevant part: “The element of . . . negligent causation is not established if the actual result is outside the risk of which the defendant is aware or . . . of which the defendant should be aware....”

⁵*Id.* at 1050.

Road and Route 7 and sporadically along both the east and west shoulder area along Route 7.

He also observed two construction signs as he traveled north on Route 7. The first sign warned “One Lane Closed 1000 Feet;” the second warned “Flagger Ahead.”

When the road changed from two to three lanes (two northbound and one southbound), Mr. Lepore changed from the right to the left northbound lane although he could not say what prompted this move. He was traveling 45 miles per hour.

As he approached the entrance to the Stenning Woods development he came upon a road construction site with work in progress. At the south end of the construction site, reflective barrels marked a tapered but rather abrupt closing of both northbound lanes. A female flagger was positioned several feet in front (south) of the barrels holding a reflective “STOP” sign and wearing a reflective vest. Mr. Lepore’s vehicle struck the flagger and the impact threw her approximately 71 feet.⁶ She suffered serious injury as a result.

Prior to impact, Mr. Lepore’s vehicle left twenty feet, six inches of skid marks. After impact, the vehicle left another seventy feet of skid marks, struck a light truck which was parked at the site and pushed it another twenty six feet.

Delaware State Police troopers arrived on the scene shortly after the incident. One officer, Trooper Nancy Skubik, was assigned to determine whether Mr. Lepore

⁶It is not clear to the Court whether the flagger actually was thrown this distance or whether her body was carried by Mr. Lepore’s truck.

was intoxicated. She asked Mr. Lepore to produce his license and registration. He exhibited impaired motor skills as he attempted to locate the requested information. Trooper Skubik detected a strong odor of alcohol and noted that Mr. Lepore spoke with slurred speech. She then asked Mr. Lepore to exit his vehicle so he could attempt to perform field sobriety tests. He had some difficulty exiting the vehicle and failed several of the field tests. Trooper Skubik then transported Mr. Lepore to Christiana Hospital so that blood could be drawn for testing. The tests later revealed a blood alcohol content of .16.⁷

B. The Parties' Contentions

The State contends that Mr. Lepore, while under the influence of alcohol, operated his vehicle in a negligent manner when he struck the flagger.⁸ It contends that Mr. Lepore's negligence caused serious injury to the flagger and that Mr. Lepore should have anticipated the eventual consequences of his negligent behavior.

Mr. Lepore does not contest, at least not seriously, that he was operating his vehicle while under the influence of alcohol. Nor does he contest that the flagger sustained serious physical injury as a result of the accident. He argues, however, that

⁷See Del. Code Ann. tit. 11, §4177(a)(5)(1995) ("No person shall drive a vehicle when the person's alcohol concentration is, within 4 hours after the time of driving, .10 or more"). The blood was drawn from the defendant within 4 hours of his operation of his vehicle.

⁸Del. Code Ann. tit. 11, §629 (1995).

the negligence of others intervened in a manner which rendered the impact with the flagger unforeseeable. Specifically, he contends that he could not reasonably be expected to be aware that a flagger would position herself directly in his lane of travel, well in front of any protective construction barrels. He also alleges that he could not reasonably anticipate that the construction company in charge of this project would be negligent in the manner in which it set up the construction site. Specifically, he contends that the construction company: (1) did not adequately warn of the lane closures; (2) did not adequately taper the roadway with construction barrels in advance of the lane closures; and (3) did not properly position the lights which illuminated the site when it positioned them such that they would shine directly into oncoming traffic. In support of these contentions of intervening negligence, Mr. Lepore presented the expert testimony of Raymond S. Pusey, the former Director of the Division of Highway Operations for the Delaware Department of Transportation. Mr. Pusey explained that both the flagger and the construction company violated several regulations promulgated by the Department of Transportation and published in the Delaware Traffic Controls for Streets and Highways Construction, Maintenance Utility and Emergency Operations Manual. In addition, Mr. Pusey explained that the construction company had violated certain provisions of the contract documents specifically applicable to this project. He

identified as examples the deficient manner in which the construction company had set up warning signs along the roadway leading up to the site and the haphazard manner in which the construction barrels were placed at the site. Also, Mr. Pusey was critical of the fact that a police cruiser with activated emergency lights was not at the scene at the time of the accident as required by the construction documents. According to the employees who were working at the site that evening, a police cruiser had been at the site but inexplicably left approximately two hours before the collision occurred.

The State responded to Mr. Lepore's claims of intervening negligence by arguing that notwithstanding any acts of negligence by the flagger or the construction company, Mr. Lepore still should have been aware of the risk that a flagger may be in or near his lane of travel as he approached the construction site. The State and the defense acknowledged at the close of the evidence that the foreseeability of the risk was at the heart of the controversy and that the resolution of this issue, in essence, would resolve the case.

C. Factual Findings and Legal Conclusions In Support of the Verdict

The Court already has concluded that Mr. Lepore was operating his vehicle while under the influence of alcohol. Based on the facts presented and the Court's interpretation of the applicable law, the Court also concludes that Mr. Lepore was

negligent in the operation of his vehicle and that this negligence caused the collision with the flagger and the resulting serious physical injuries sustained by her. The Court further concludes that this result was one of which Mr. Lepore should have been aware as he approached this construction site. Each of these conclusions will be addressed *seriatim*.

1. Mr. Lepore Was Negligent In the Operation Of His Vehicle

Turning first to Mr. Lepore's negligence, the Court initially considered his intoxicated state at the time he was operating his vehicle. This was a situation of his own making and one which, by all credible accounts, clearly impaired his ability to appreciate the road conditions and attendant risks. Indeed, Mr. Lepore's intoxicated state is the most plausible explanation for his failure to slow his vehicle as he approached the construction site.⁹

Two warning signs were placed well in advance of this construction site to warn Mr. Lepore to slow his vehicle. While Mr. Pusey is critical of the placement of the signs and the fact that they were not equipped with flashing lights, these criticisms ring hollow in view of Mr. Lepore's acknowledgment that he saw and read both signs as he approached the construction site. Thus, Mr. Lepore knew that: (1) a dramatic

⁹See Del. Code Ann. tit. 21, §4168(a)(1995) ("No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions and without having regard to the actual and potential hazards then existing").

change in the traffic pattern was coming in the next 1000 feet (a lane closure); and (2) a flagger would be present near the roadway to regulate traffic. The reflective construction barrels which lined the east and west shoulders of Route 7 also warned oncoming traffic that it was approaching a construction zone. And, of course, the highly reflective “STOP” sign affixed to the top of a six foot high pole and held by the flagger admonished oncoming drivers to slow their vehicles. Yet Mr. Lepore did nothing in response to these warnings but change his lane of travel from the east to the west northbound lane. And this maneuver was initiated for reasons still known only to Mr. Lepore.¹⁰

The Court rejects Mr. Lepore’s testimony that the construction site appeared in his path suddenly as he crested a hill just south of the entry to the Stenning Woods development. Both the video presented by the State and Mr. Lepore’s own video of the scene demonstrate clearly that the construction site was positioned well north of the crest of the hill. There was ample distance to allow a prudent driver to slow his vehicle upon observing the upcoming construction site even after the vehicle crested the hill. And the distance was such that the construction lights, even if they were

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¹⁰This action on Mr. Lepore’s part did nothing to lessen the risk of trouble as he approached the construction site. As Mr. Lepore acknowledged during his testimony, he had no idea which lane(s) would be closed ahead. The adjusted traffic pattern was completely unfamiliar to him.

towards oncoming traffic, would not immediately have blinded the driver as Mr. Lepore described.¹¹

Mr. Lepore also operated his vehicle with both a common law and statutory duty of lookout.¹² This duty required Mr. Lepore to appreciate and adjust to the traffic and road conditions then existing and to give full time and attention to the operation of his vehicle. The Court concludes he did neither.

2. Mr. Lepore's Negligence Caused the Collision and Resulting Injuries

Of course, the Court's analysis cannot end with a conclusion that Mr. Lepore was negligent. The Court also must consider whether his negligence was the cause of the impact with, and the resulting injuries to, the flagger. In this regard, the Court has considered, as it must,¹³ the allegations of negligence directed towards the

¹¹It should be noted here that the Court finds Mr. Bolin's testimony with respect to the positioning of the lights to be credible and consistent with the evidence. There was no real controversy with respect to the positioning of the southern-most light truck. Both parties seemed to agree that the truck was positioned south of the construction site facing easterly in a manner which would have illuminated the flagger's position. Mr. Bolin testified that the second light truck was positioned north of the first light truck and also facing easterly ("towards the neighborhood" - referring to Stenning Woods). The drawing of the scene prepared by Sergeant Phillips indicates that this light truck was positioned directly adjacent to the concrete patches which had been poured earlier that evening. The patches were to the east of the light truck which is consistent with Mr. Bolin's testimony that the lights were meant to illuminate the area where he and his crew had been working that evening.

¹²Del. Code Ann. tit. 21, §4176(a) & (b) (1995).

¹³*See Bullock*, 775 A.2d at 1149-50.

construction company in charge of this site and the flagger involved in the collision. And, for purposes of the causation analysis, the Court will accept defendant's allegations that these parties both were negligent in a manner which contributed to the collision.¹⁴ But their negligence does not necessarily relieve Mr. Lepore of criminal responsibility. In order to support a verdict of guilty, it is not required that the Court find Mr. Lepore's negligence to be the sole cause of the collision; "it is sufficient that his negligence was one of the ... causes."¹⁵ Stated differently, there may be more than one legally cognizable cause of a collision.¹⁶

The Court is satisfied that the collision would not have occurred but for Mr. Lepore's negligence. Had he slowed his vehicle as a reasonable driver would have done in approach to this construction site, he would have had ample time to appreciate the danger ahead and avoid it.

¹⁴The Court must note that neither of these third parties were represented in these proceedings. The Court does not intend, therefore, that its acceptance of defendant's contention that the construction company and the flagger were negligent shall have any issue or claim preclusive effect in the event this controversy is litigated in a civil context. *See Betts v. Townsends, Inc.*, 765 A.2d 531, 534 (Del. 2000)(explaining the doctrine of collateral estoppel); *Bailey v. City of Wilmington*, 766 A.2d 477, 481 (Del. 2001)(explaining the doctrine of *res judicata*).

¹⁵*State v. Vannicola*, 1991 WL 138419, at *2 (Del. Super.).

¹⁶*Id.*

3. Mr. Lepore Should Have Been Aware Of The Risk Of A Collision With A Flagger

The Court next turns to the heart of Mr. Lepore's defense: that he could not have been aware of the risk that a flagger would be positioned where she was not supposed to be and in the midst of a negligently designed construction site. The Court finds that the State proved beyond a reasonable doubt that Mr. Lepore should have been aware generally of a dangerous condition ahead and specifically of the flagger's presence in the roadway well before he actually encountered the site. The warning signs, along with the other reflective warnings present on the way to and at the scene, while perhaps not optimal, were more than adequate to warn Mr. Lepore of potential danger if he had reacted to them as a reasonable person (as opposed to an intoxicated person) would have reacted. The evidence revealed that Mr. Lepore had more than adequate time to perceive the situation, including the flagger's location, and to react in a way which would have allowed him to avoid the very unfortunate result which has brought him before the Court.

Bullock does not require a different result. There the Court held that the trial court erroneously failed to instruct the jury on Section 263.¹⁷ The Court concluded that by failing to instruct the jury with respect to the concept of foreseeability (as set

¹⁷*Bullock*, 775 A.2d at 1054.

forth in Section 263), and its interaction with the concept of causation, the trial court may have improperly limited the jury's ability to draw exculpatory inferences from the evidence. Specifically, the failure to instruct on Section 263 may have deprived the jury of the opportunity to determine that the defendant could not reasonably have anticipated that another vehicle would enter an intersection in disregard of a red light as the defendant's vehicle entered the intersection on a yellow light.¹⁸

Here, the parties focused their trial presentations on the issue of foreseeability (or "awareness") of the risk from their opening statements, through the presentation of evidence, and in their summations. And the Court focused much of its deliberative efforts on this issue as well. Thus, the Court has honored *Bullock's* mandate that neither the trial court nor the fact-finder may ignore Section 263. The Court has considered Section 263 in both capacities and has determined that the State's causation case passes unchanged through the filter of a Section 263 inquiry.

¹⁸*Id.* at 1052. Significantly, the Court did not conclude that the risk of another vehicle disregarding a red light was, as a matter of law, a risk of which the defendant could not have been aware as he entered the intersection on a yellow light. *Id.* Rather, the Court simply held that it was error for the trial court not to explain to the jury that it must consider that issue when determining the defendant's criminal culpability. *Id.*

IV. CONCLUSION

Based on the foregoing, the Court finds the defendant GUILTY of Vehicular Assault First Degree. The Prothonotary is directed to enter the verdict. The defendant will be sentenced on April 26, 2002, after a presentence investigation is completed.

IT IS SO ORDERED.

Judge Joseph R. Slights, III

Original to Prothonotary