

Commercial Drivers Held to Higher Standard of Care

Michael Duboff, Dutton Brock LLP¹

The Court of Appeal has held in *Gardiner v MacDonald*, 2016 ONCA 968, that commercial or professional drivers have a higher standard of care compared with other drivers.

In this case the Court of Appeal affirmed the trial judge's decision to hold the applicant bus driver (and City of Ottawa) 20% liable for injuries sustained by the respondents in a motor vehicular accident whereby a car, driven by a drunk driver and containing four other passengers, drove through a red light and collided with a city bus that had entered the intersection on a green light.

The result of this case seemingly creates a precarious precedent for similar outcomes in the future. It is important to recognize, however, that it was not the higher standard of care itself that led to the bus driver's resulting liability; but the content of the standard of care. As the trial judge stated in her decision, "the general standard of care of a professional... is a question of law, but the content of the standard of care in a particular case is a question of fact".

It is apparent upon reading the decision that the Court of Appeal's decision here was largely contextual and fact-based. The bus driver, Mr. Richer, was a professional driver with 27 years of experience prior to the date of the accident. He had a class "C" license with which he operated OC Transpo buses, weighing in excess of 12,000 kilograms.

During the course of the trial, evidence was put forward establishing that:

- upon approaching the subject intersection Mr. Richer was driving above the posted speed limit;
- Mr. Richer did not immediately look ahead/in front of the bus when entering the subject intersection but instead looked first to his left, right and in the bus's rear mirrors;
- the only passenger on the bus at the time (another off-duty bus driver) had the time to move to a safe location on the bus and brace for the impact as he and Mr. Richer foresaw the impending collision with the respondent's vehicle; and
- winter road and weather conditions were present at the time of the accident.

Mr. Richer conceded the relevance of his status as a professional driver and admitted that, according to the training and experience he had received as part of his course of employment, as well as pursuant to the Ministry of Transportation and Official Bus Handbook policies, there was a duty upon him to:

¹ Michael Duboff is an associate with Dutton Brock LLP developing a broad practice in civil litigation.

- Respect the provisions of the *Highway Traffic Act* by observing the posted speed limit;
- Drive defensively by giving up the right-of-way if by doing so he could avoid possible collision with other vehicles;
- Make allowances for conditions of the road, by driving in such a way and at such a speed as to maintain vehicle control; and
- Manoeuvre at a distance and in such a way so as not to preclude safe stopping or averting a collision.

The combination of the evidentiary facts surrounding the collision, along with the relevant rules from the Handbook (which seems to have been given high deference in this case), led to the much higher-than-normal standard of care being imposed on the bus driver.

This decision leaves a number of questions to be answered and likely will be fleshed out by the judiciary in upcoming cases. For example, when referring to Mr. Richer's applicable standard of care the decision makes mention of both 'the standard of care of a professional' as well as 'the standard of care of a reasonably prudent driver in like circumstances'.

The first term begs the question of what exactly constitutes 'a professional' - whether it is a commercial driver or employed drivers or some other larger class. The second term on the other hand creates an opening whereby the standard of care could seemingly be raised for drivers of all kind.

At first glance it might seem that Mr. Richer's driving did not breach any of his duties. His actions, however, were scrutinized closely by the court. When applied to the "new" standard of care, which stemmed largely out of the policies and Handbook of the MOT, and the potential harm that comes from driving a city bus (or other large-sized, professional vehicles), Mr. Richer ultimately failed to maintain that duty.

The question remaining is whether the same contextual circumstances will be required in future cases to impose this new standard of care on professional drivers. At the very least professional drivers across Ontario should be made aware of this new potential standard of care in operating a large commercial vehicle.