

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

DISTRICT COURT
SPRINGFIELD DIVISION
0323 CV 2974

SHEILA A. PECOR,
Petitioner

v.

JUDICIAL REVIEW OF DENIAL OF
VICTIM COMPENSATION, c. 258C.

COMMONWEALTH OF MASSACHUSETTS,
Respondent

BACKGROUND

This matter came on for hearing on January 21, 2004. The plaintiff was pro se, and the Commonwealth was represented by Assistant Attorney General Emily R. Paradise, Esq. The petitioner appeals from the Attorney General's denial of victim of violent crime benefits to pay for burial expenses for her son, who was killed by an uninsured motorist as he rode his bicycle. The Attorney General's Office Victim Compensation and Assistance Division determined that no crime was committed that resulted in the death. The petitioner has sought judicial review in this court. Judicial review is by a de novo hearing of the claim. c. 258C §9 (f).

FACTS

The facts are not really in dispute and are found from the materials presented and the reasonable inferences to be drawn therefrom. On January 13, 2003, at about 6:45pm, Kevin

Pecor, then 16, was riding his bicycle home after work at Dunkin' Donuts, going westbound on Amostown Road in West Springfield, a two lane road. It was dark, although there were some streetlights.¹ The lane width was about 11 feet, 6 inches. There were snowbanks along the fog lanes of the roadway jutting out onto the surface of the road about 2 feet. As a result of the snowbanks and the width of the bicycle, Pecor was riding about 2 - 2 ½ feet into the traveled lane.

At that time, two cars (Martinez followed at about 4-5 car lengths by Vasallo) approached Pecor from behind. Another motor vehicle (Wood) drove easterly toward them. Martinez, who could see Pecor, pulled to the left of the lane to go around Pecor as Wood was alongside going the other way. Pecor, apparently hearing the car, looked to his left and swerved about 2 ½ feet to the left. Martinez struck Pecor, "approximately 4 ½ feet from the edge of the road", "close to the middle of the westbound travel lane"² knocking him to the ground. Vasallo ran over him. Pecor was pronounced dead at the scene. At the time, Martinez was operating after suspension of his license and registration and was uninsured.

After consultation with the Victim Witness Advocate's Office of the District Attorney's Office, Ms. Pecor filed this claim pursuant to the Victim of Violent Crime Act, c.258C seeking recompense for her son's burial expenses. The petitioner must establish that her son was the victim not simply of a violation of law or even of a crime, but of a "violent" crime entailing physical force or bodily harm, or the threat thereof or other crime listed. ***Marshall v.***

¹The petitioner sought to introduce photos she had taken of the area after the accident. She had given them to the Hampden County District Attorney's Office which is unable to locate them.

²According to the West Springfield Police report.

Commonwealth, 413 Mass. 593, 596 (1992).

In order to seek benefits under the act, the victim must have suffered as a result of a crime.

c. 258C, § 1.

(a) No compensation shall be paid under this chapter unless the division finds that a crime was committed and that such crime directly resulted in personal physical or psychological injury to, or death of, the victim. c. 258C § 2.

What is a violent crime is defined in the regulation 940 CMR 14.03. It is

an act committed by a person which . . . would constitute a crime; provided, however, that such act involves the application of force, intimidation or violence or the threat of force, intimidation or violence by the offender upon the victim. The word "crime" shall include any violation of any provision of M.G.L. c. 90, §§ 24 through 24O, inclusive . . .

Among the possible crimes that are included in the statute are motor vehicle offenses enumerated in c. 90, §§ 24 through 24O in which another person is injured. These include: § 24G

(b), in effect at the time:³

whoever operates a motor vehicle recklessly or negligently so that the lives or safety of the public might be endangered and by any such operation causes the death of another person, shall be guilty of homicide by a motor vehicle. c. 90, § 24G, (b).

There is no question that the plaintiff's decedent was directly injured as a result of being hit by the Martinez, and/or, Vasallo vehicles. The issue is whether his death was the result of a crime by either. A sub-issue is whether the crime has to be charged.

Where there is conflicting evidence or at least some proof of the commission of a crime of violence, the issue of whether there has been a crime is one of fact for the trial court. *Rath v.*



³The statute was amended by 2003, 28, Sec. 22 effective June 30, 2003 to include a .08% per se violation.

Commonwealth, 1984 Mass.App.Div. 255, 265, *Plante v. Commonwealth*,

1994 Mass.App.Div. 74 (1994). The petitioner has suggested that there is ample evidence of a crime being committed because Mr. Martinez was charged with operation after suspension of his license and operating uninsured. A statutory violation cannot be considered as evidence of negligence unless there is a causal relationship between the violation and the harm suffered.


Falvey v. Hamelburg, 347 Mass. 430, 435 (1964), *Hullum v. Commonwealth*, 396 Mass. 1009 (1986). Under this scenario, the court must find not only that the operator was negligent, but that a death was caused as a result of his negligence.

According to District Court Jury Instruction 5.15, a motor vehicle is operated negligently so that the lives or safety of the public might be endangered when:

A person acts negligently when he fails to use due care, that is, when he acts in a way that a reasonable person would not act. This can happen either by doing something that a reasonably prudent person would not do under those circumstances, or by failing to do something that a reasonably prudent person would do. The defendant acted negligently if he (she) drove in a way that a reasonable person would not have, and by doing so created an unnecessary danger to other people, a danger that he (she) could have avoided by driving more carefully.

In determining whether the defendant drove negligently in a manner that might have endangered the public, you should take into account all the facts of the situation: the defendant's rate of speed and manner of operation, the defendant's physical condition and how well he (she) could see and could control his (her) vehicle, the condition of the defendant's vehicle, what kind of a road it was and who else was on the road, what the time of day, the weather and the condition of the road were, what any other vehicles or pedestrians were doing, and any other factors that you think are relevant.

The offense of vehicular homicide consists of a driver's recklessly or negligently operating motor vehicle on public way and thereby causing the death of person. *Aucella v. Commonwealth*, 406 Mass. 415, 416 (1990). Not all accidents are the result of negligence. "The mere happening of an accident between a motor vehicle and a pedestrian, where the circumstances immediately preceding it are left to conjecture, is not sufficient to prove negligence on the part of the operator of the vehicle." *Callahan v. Lach*, 338 Mass. 233, 235 (1958), *Aucella v. Commonwealth*, supra, at 418. In *Aucella*, the defendant hit persons crossing an unlighted roadway, but there was no evidence that he was either negligently inattentive or driving in an otherwise negligent manner. At 418.

A finding of ordinary negligence suffices to establish homicide by motor vehicle as  defined in c. 90, § 24G. *Commonwealth v. Jones*, 382 Mass. 387, 389 (1981). *Commonwealth v. Burke*, 6 Mass.App. 697, 700-701 (1978). *Commonwealth v. Geisler*, 14 Mass.App. 268 (1982). Cf. *Commonwealth v. Drew*, 11 Mass.App. 517, 523, 417 N.E.2d 53 (1981). *Commonwealth, v. Diaz* 19 Mass.App.Ct. 29, 36 (1984). The appropriate principles of causation to apply are those which have been explicated in a large body of decisions, and texts treating the subject in the context of the law of torts, see e.g., 2 Harper & James, Torts §§ 16.2, 16.9 [1956]; Prosser, Torts §§ 30-32 [4th ed. 1971]; Restatement [Second] of Torts §§ 282, 283 [1965]). *Commonwealth v. Geisler, supra*, 14 Mass.App. at 276, *Commonwealth, v. Diaz supra*, at 36.

Negligence, without qualification and in its ordinary sense, is the failure of a responsible person, either by omission or by action, to exercise that degree of care, vigilance and forethought which, in the discharge of the duty then resting on him, the person of ordinary caution and prudence ought to exercise under the particular circumstances. See, *Altman v. Aronson*, 231 Mass. 588, 591 (1919); *Gallier v. Stewart*, 310 Mass. 77, 80 (1941); *Carroll v. Bouley*, 338 Mass. 625, 627 (1959) *Beaver v. Costin*, 352 Mass. 624, 626 (1967); *Goldstein v. Gontarz*, 364 Mass. 800, 805 (1974); *Scott v. Thompson*, 5 Mass.App. 372, 374-375 (1977).

An operator of a motor vehicle is "bound to exercise reasonable diligence to anticipate and to provide against what was likely to happen." *Scott v. Thompson, supra* at 375, *Falk v.*



Finkelman, 268 Mass. 524, 527 (1929).

Bicycles traditionally have a recognized place on our highways. *Opinion of the Justices to the Senate*, 370 Mass. 895, 900 (1976). See, c. 85, § 11B for the proper operation of bicycles.

Cars owe a duty to a bicycle. "In approaching or passing a person on a bicycle the operator of a motor vehicle shall slow down and pass at a safe distance and at a reasonable and proper speed."

c.90 § 14.

Herein, Mr. Rodriguez was driving a Honda Civic which, according to the materials presented, is about 6 feet, 6 inches wide. That left Martinez about 5 feet of travel space in his own lane. Pecor was at least 2 - 2 ½ feet into the roadway. That left Martinez with 2 ½ to 3 feet to pass by Pecor on the left without striking him and without crossing into the opposite lane. That was not a safe distance by which to pass the bicycle. Bicycles cannot be expected to be ridden in a perfectly straight line. Bikes swerving in the roadway are not an unusual or unexpected occurrence. Martinez took a risk that the bike would not swerve. It was negligence to pass the bicycle without space if the bike swerved. The alternative was simple. Martinez should have



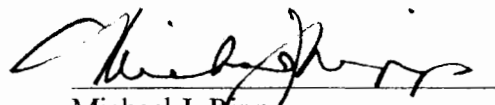
slowed his vehicle until the oncoming car passed and then he could have gone around the bicycle utilizing the opposite lane as necessary.

Even though Pecor may have swerved, his contributory negligence is not a defense to vehicular negligent homicide. *Commonwealth v. Campbell*, 394 Mass. 77, 87 (1985). And, District Court Jury Instructions 5.15 says: "The other driver's driving is irrelevant to the defendant's guilt or innocence on this charge unless the other driver was the sole cause of what happened." See also, *Commonwealth v. Galluzzo*, 25 Mass. App. Ct. 568 571-572 (1988) (judge must allow evidence of other driver's negligence if it would warrant a finding that the sole negligence was that of the other driver, but careful instructions are required to make clear that contributory negligence is not a defense). Pecor was not the sole cause of the collision. There was sufficient evidence that Mr. Martinez operated a motor vehicle negligently causing the death of Mr. Pecor. ✱✱

The statute requires that a violent crime be committed. It does not require that charges be brought. When the perpetrator of a violent crime is not apprehended, no charges are brought. So too, a crime can be committed and not charged. In neither situation, is the victim precluded from compensation. Herein, although no charges were brought, the court is satisfied that it is more likely than not that a crime was committed.

As a result, the decision of the Attorney General is reversed and judgment is to enter for the petitioner.

May 28, 2004


Michael J. Ripps
Justice of the District Court