

Case Name:
R. v. Bedard

**IN THE MATTER OF an appeal under s. 116(2)(a) of the
Provincial Offences Act, R.S.O. 1990, c. P.33, as amended
Between
Her Majesty the Queen, Appellant, and
Kimberly Bedard, Respondent**

[2009] O.J. No. 4720

Court File No.: 999-07-1984-00

Ontario Court of Justice
Hamilton, Ontario

J.D. Takach J.

Heard: December 8, 2008.
Judgment: October 22, 2009.

(21 paras.)

Counsel:

S. Hattie, for the prosecution.

I. Fournier, for the defendant Kimberly Bedard.

1 J.D. TAKACH J.:- This is an appeal brought by the Crown under s. 116 of the *Provincial Offences Act* on account of the dismissal of a charge under s. 2(1)(b) of the *Compulsory Automobile Insurance Act*, alleging that the defendant, being the owner or lessee of a motor vehicle, did permit the operation of a vehicle on a highway, with said vehicle not being insured under a contract of automobile insurance.

THE FACTS

2 Trevor Greenidge, a transportation officer with the Ministry of Transportation, stopped one Paul Jonathan in the City of Hamilton while operating a 1992 Ford pick-up truck. The driver was

unable to produce valid insurance for the vehicle and produced only a photo identification health card identifying himself. Registration was produced for the vehicle signifying the owner to be one Kimberly Bedard of the City of Hamilton. Officer Greenidge gave Mr. Jonathan his business card with a fax number and requested proof of insurance be given within 24 hours. No proof of insurance was provided over the next two days with the result that Officer Greenidge took steps to have an information sworn and a summons issued to Ms. Bedard.

3 Ms. Bedard was personally served with the summons by Officer Greenidge commanding an appearance before the Provincial Offences Court.

4 The matter came on for trial in Hamilton before Her Worship Justice of the Peace W. Casey. The accused was present for her trial and was represented by an agent. The accused did not testify on her own behalf. In addition to the testimony of the Ministry of Transportation official, the Crown produced a certified copy of the registration for the vehicle that was stopped by Officer Greenidge and said certified copy matched the plate number of the vehicle as well as the registration produced by Mr. Jonathan.

5 A motion for non-suit brought by the agent for the defendant was dismissed. The defence called no evidence but the Justice of the Peace dismissed the charge on the basis that the Crown had produced no evidence that the accused permitted the driver in question to operate the motor vehicle, citing the fact that the officer had not attempted to interview the accused and that insufficient investigation had been done as to her state of knowledge. Her Worship's brief reasons also noted:

"Well it's been a long time since I have been told that the defendant has to prove the case and the Crown doesn't have to prove the case. It's up to the Crown to prove its case".

ANALYSIS AND THE LAW

6 In my view, this case can be disposed of on the basis of *R. v. City of Sault Ste. Marie* 40 C.C.C. (2d) 353, 1978 C.L.B. 365, [1978] 2 S.C.R. 1299, [1978] 2 R.C.S. 1299, 21 N.R. 295, 85 D.L.R. (3d) 161, 3 C.R. (3d) 30, 7 C.E.L.R. 53, 2 W.C.B. 321.

7 Dickson, J. at p. 373-4 (C.C.C.) in delivering judgment of the court, after a lengthy analysis of traditional offence categories such as *mens rea* and absolute liability offences, concluded that there were, in fact, three categories of offences.

"I conclude, for the reasons which I have sought to express, that there are compelling grounds for the recognition of three categories of offences rather than the traditional two:

1. Offences in which mens rea, consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed, or by additional evidence.

2. Offences in which there is no necessity for the prosecution to prove the existence of mens rea; the doing of the prohibited act prima facie imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have

done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability. Mr. Justice Estey so referred to them in Hickey's case.

3. Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault.

Offences which are criminal in the true sense fall in the first category. Public welfare offences would, prima facie, be in the second category. They are not subject to the presumption of full mens rea. An offence of this type would fall in the first category only if such words as "wilfully", "with intent", "knowingly", or "intentionally" are contained in the statutory provision creating the offence. On the other hand, the principle that punishment should in general not be inflicted on those without fault applies. Offences of absolute liability would be those in respect of which the Legislature had made it clear that guilt would follow proof merely of the proscribed act. The over-all regulatory pattern adopted by the Legislature, the subject-matter of the legislation, the importance of the penalty, and the precision of the language used will be primary considerations in determining whether the offence falls into the third category".

8 The trial justice of the peace made no reference to the three categories of offences and, accordingly, made no attempt to address the issue of which type of offence s. 2(1)(b) of the *Compulsory Automobile Insurance Act* in the context of *R. v. City of Sault Ste. Marie*.

9 In my view, the only issue is whether said section is a strict liability offence. Do the words "permit the operation of a motor vehicle on a highway..." create a positive state of mind such as intent, knowledge, or recklessness as spoken of in *R. v. Sault Ste. Marie*? In my view they do not. Had the legislature chosen to use the words "knowingly" or "wilfully" it could have easily done so. "Permit" is a broader term and does not embrace intent or recklessness. One may permit without being wilful or reckless, for example, simply by failing to take reasonable care. The use of uninsured motor vehicles on the highway is clearly a public welfare issue because of the financial and physical damage that can be inflicted on innocent and law-abiding users of the road. Notwithstanding the evil to be remedied, one may escape liability, as noted by way of a mistake of fact defence or by showing that he took reasonable steps to avoid the operation of such motor vehicle that was not insured. One may imagine a whole host of scenarios of taking care to ensure that such vehicle was not operated that would afford a defence.

10 The Supreme Court dealt with the words "permit" in *R. v. Sault Ste. Marie*. In that case the accused corporation was charged under s. 32(1) of the Ontario Water Resources Act which made it an offence to discharge, cause to be discharged or permit to be discharged deleterious materials.

11 Dickson, J. stated at (C.C.C.) p. 375-6:

"The present case concerns the interpretation of two troublesome words frequently found in public welfare statutes: "cause" and "permit". These two words are troublesome because neither denotes clearly either full mens rea nor abso-

lute liability. It is said that a person could not be said to be permitting something unless he knew what he was permitting. This is an over-simplification. There is authority both ways, indicating that the Courts are uneasy with the traditional dichotomy. Some authorities favour the position that "permit" does not import mens rea: see Millar v. The Queen (1953), 107 C.C.C. 321, [1954] 1 D.L.R. 148, 17 C.R. 293; R. v. Royal Canadian Legion (1971), 4 C.C.C. (2d) 196, 21 D.L.R. (3d) 148, [1971] 3 O.R. 552; R. v. Teperman & Sons Ltd., [1968] 4 C.C.C. 67, [1968] 2 O.R. 174; R. v. Jack Cewe Ltd. (1975), 23 C.C.C. (2d) 237; Browning v. J.W.H. Watson (Rochester) Ltd., [1953] 1 W.L.R. 1172; Lyons v. May, [1948] 2 All E.R. 1062; Korten v. West Sussex County Council (1903), 72 L.J.K.B. 514. For a mens rea construction see James & Son Ltd. v. Smee, [1955] 1 Q.B. 78; Somerset v. Hart (1884), 12 Q.B.C. 360; Grays Haulage Co. Ltd. v. Arnold, [1966] 1 All E.R. 896; Smith & Hogan, Criminal Law, 3rd ed. (1973), p. 87; Edwards, Mens Rea and Statutory Offences (1955), pp. 98-119. The same is true of "cause". For a non-mens rea construction, see R. v. Peconi (1907), 1 C.C.C. (2d) 213; Alphacell Ltd. v. Woodward, [1972] A.C. 824; Sopp v. Long, [1969] 1 All E.R. 855; Laird v. Dobell, [1906] 1 K.B. 131; Korten v. West Sussex County Council, supra; Shave v. Rosner, [1954] 2 W.L.R. 1057. Others say that "cause" imports a requirement for a mens rea: see Lovelace v. D.P.P., [1954] 3 All E.R. 481; Ross Hillman Ltd. v. Bond, [1974] 2 All E.R. 287; Smith and Hogan, Criminal Law, pp. 89-90.

The Divisional Court of Ontario relied on these latter authorities in concluding that s. 32(1) created a mens rea offence.

The conflict in the above authorities, however, shows that in themselves the words "cause" and "permit" fit much better into an offence of strict liability than either full mens rea or absolute liability. Since s. 32(1) creates a public welfare offence, without a clear indication that liability is absolute, and without any words such as "knowingly" or "wilfully" expressly to import mens rea, application of the criteria which I have outlined above undoubtedly places the offence in the category of strict liability.

Proof of the prohibited act prima facie imports the offence, but the accused may avoid liability by proving that he took reasonable care. I am strengthened in this view by the recent case of R. v. Servico Ltd. (1977), 2 Alta. L.R. (2d) 388, in which the Appellate Division of the Alberta Supreme Court held that an offence of "permitting" a person under 18 years to work during prohibited hours was an offence of strict liability in the sense which I have described. It also will be recalled that the decisions of many lower Courts which have considered s. 32(1) have rejected absolute liability as the basis for the offence of causing or permitting pollution, and have equally rejected full mens rea as an ingredient of the offence.

12 See also *R. v. Hussain* [2003] O.J. 3793, where DeFilippis, J. held the section under the *Compulsory Auto Insurance Act* was a strict liability offence. Similarly in *R. v. Fode-Ibrahim Dansoko*, unreported, December 11, 2006 (O.C.J.) Ray, J. came to the same conclusion.

13 Accordingly, in the case at bar, I am of the view that the section in question of the Compulsory Automobile Insurance Act is a strict liability offence. It was open to the defendant to demonstrate that she took reasonable care to prevent the operation of the motor vehicle that was uninsured, that it was operated without her permission, or that she believed in a set of facts which, although mistaken, if true would afford her a defence under the section. Although the defendant was fully aware of the trial and was present in court, she chose not to do so. Accordingly, on the evidence, she ought to have been found guilty. The appeal of the Crown is allowed and a finding of guilt is entered on that basis alone.

14 The Crown has further submitted that production of the ownership is some evidence that the driver was the agent of the owner. I agree with this contention. The driver had no difficulty producing the ownership and, apparently, knew where to find it with ease.

15 Long before the Compulsory Automobile Insurance Act courts dealt with issues imputing agency in both civil and what are now categorized as strict liability cases. See *Joyce v. Capel and Slaughter* [1838] 3 C.A.R. 370, *Hibbs v. Ross* [1866] 1 L.R. 534, *Barnard v. Sully* [1931] T.L.R. 557 to name a few.

16 More directly the Crown relied on *Herron v. Langford* [1949] O.W.N. 753, [1949] O.J. No. 262 which involved s. 192 of the *Highway Traffic Act* where Mackay, J. stated at (O.J.) para. 11-12:

"With reference to Question No. 2, I have reviewed the authorities cited by Mr. Phelan Phipson, 8th Ed. P. 27; Abrath v. The North Eastern Railway Company, 11 Q.B.C. 440 at 456, all of which are helpful, but, with respect, I find Thompson v. Bouchier, [1933] O.R. 525 more directly in point - Fisher, J.A.: "For the owner to escape liability under this amendment (now s. 47, ss. 1 of the Highway Traffic Act) he must establish that the motor vehicle was without his consent in the possession of some person other than the owner or his chauffeur".

I am respectfully of the opinion that when the ownership of the motor vehicle is established by evidence or admitted, that the onus then passes to the owner to satisfy the Court that such motor vehicle was, without the owner's consent, in the possession of some person other than the owner or his chauffeur before he can avoid liability."

17 Although it was argued that *R. v. Arbon* [1981] O.J. No. 846 is authority for the same proposition, it is clear that that case was premised, in part, of provisions of the *Summary Conviction Act* in force at the time which the Crown has not argued have been replicated in the *Provincial Offences Act*.

18 In my respectful opinion, the section in question is a strict liability offence. The nature of the charging section is not changed by the word "permits". Possession of the motor vehicle in the factual context of the case at bar, by the driver in question, and production of the ownership was *prima facie* evidence of the fact, the fact that he was the agent of the owner and had the vehicle with her consent. Apparently at the outset the Justice of the Peace agreed as she dismissed the motion for a directed verdict.

19 Agent for the defendant relied on *R. v. James*, unreported, February 24, 2006 (O.C.J.) where Wake, J. came to a different conclusion holding that the section in question obligated the Crown to

prove knowledge beyond a reasonable doubt. With all due respect to Wake, J., in light of *R. v. Sault Ste. Marie*, supra, where words such as "permitting" were considered, I am not persuaded that the section in question is elevated to the status of a *mens rea* offence.

20 Accordingly, the appeal is allowed and the finding in the court below is set aside.

21 I impose the minimum fine of \$5,000.00 and appropriate fine surcharge and give six months to pay.

J.D. TAKACH J.

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