

ONTARIO COURT OF JUSTICE

B E T W E E N :

Her Majesty The Queen

— AND —

Milinko Drljevic

Before Justice of the Peace Kenneth W. Dechert
Heard on July 16, 2009 and December 3, 2009
Reasons for Judgment released on May 6, 2010
Provincial Offences Court – Burlington, Ontario

A. Yantz for the prosecution
G. Serroul representative for the defendant

Statutes, Regulations and Rules Cited:

Highway Traffic Act, R.S.O. 1990, c. H.8, as amended to October 19th, 2008, sections 1(1), 62(14), 62(14.1), 62(15), 62(15.1), 62(32), 159.1(1), 159.1(2), 159.1(4) and 159.1(9).
Provincial Offences Act, R.S.O. 1990, c. P.33, as amended, section 47(3).

Cases Cited:

Regina v. Dillman, [2008] O.J. No. 1120 (Ont. C.J.).
Lévis (City) v. Tétreault; *Lévis (City) v. 2629-4470 Québec Inc.*, [2006] 1 S.C.R. 42 (S.C.C.).
Regina v. Raham, 2010 ONCA 206 (Ont. C.A.).
Regina v. Sault Ste. Marie (City), [1978] 2 S.C.R. 1299 (S.C.C.).

K.W. DECHERT, J.P. (orally):

INTRODUCTION

[1] Under Certificate of Offence no. 1260-95115133, the defendant, Milinko Drljevic, stands charged that he on the 19th day of October, 2008, at 12:50 p.m., at Highway 407 (just east of QEW Niagara ramp), in the municipality of Burlington, did commit the offence of “fail to move into another lane for emergency vehicle – if safe to do”, contrary to the *Highway Traffic Act*, section 159.1(2).

[2] The trial of this charge commenced before me on July 16th, 2009, in the Ontario Court of Justice – Provincial Offences Court in Burlington, Ontario. At that time, the defendant entered a plea of not guilty to the said charge, upon arraignment. The trial was not completed on that date and the matter was then adjourned to December 3rd, 2009, for trial continuation. The trial was completed on December 3rd, 2009 and the matter was then adjourned until May 6th, 2010, for my judgment.

[3] The prosecution was represented by Ms. A. Yantz. The defendant was represented by his representative, Mr. G. Serroul.

RELEVANT STATUTORY PROVISIONS

[4] As stated above, the defendant is charged with the offence of “fail to move into another lane for emergency vehicle – if safe to do”, contrary to subsection 159.1(2) of the *Highway Traffic Act*, R.S.O. 1990, c. H.8, as amended, (hereinafter referred to as the “H.T.A.”). The provisions of the H.T.A. which are relevant to this proceeding are those provisions contained in the said Act as it read on the date of the charge, being October 19th, 2008. In this regard, it is important to note that section 159.1 of the H.T.A. was repealed effective January 1st, 2010.

[5] Subsection 159.1(2) of the H.T.A. reads as follows:

Upon approaching an emergency vehicle with its lamp producing intermittent flashes of red light that is stopped on a highway with two or more lanes of traffic on the same side of the highway as the side on which the emergency vehicle is stopped, the driver of a vehicle travelling in the same lane that the emergency vehicle is stopped in or in a lane that is adjacent to the emergency vehicle, in addition to slowing down and proceeding with caution as required by subsection (1), shall move into another lane if the movement can be made in safety.

[6] The other parts of section 159.1 which are relevant to this matter, are set out below as follows:

159.1(1) – Upon approaching an emergency vehicle with its lamp producing intermittent flashes of red light or red and blue light that is stopped on a highway, the driver of a vehicle travelling on the same side of the highway shall slow down and proceed with caution, having due regard for traffic on and the conditions of the highway and the weather, to ensure that the driver does not collide with the emergency vehicle or endanger any person outside of the emergency vehicle.

159.1 (4) – Every person who contravenes subsection (1) or (2) is guilty of an offence...

159.1 (9) – In this section,

“emergency vehicle” means a vehicle described in subsection 62(15.1), except that it does not include a school bus.

[7] Subsection 62(15.1) of the H.T.A. reads as follows:

The following are vehicles to which subsection (15) applies:

1. An ambulance, fire department vehicle, police department vehicle, public utility emergency vehicle or school bus.
2. A ministry vehicle operated by an officer appointed for carrying out the provisions of this Act or the *Public Vehicles Act*, while the officer is in the course of his or her employment.
3. A vehicle while operated by a conservation officer, fishery officer, provincial park officer or mine rescue training officer, while the officer is in the course of his or her employment.
4. A vehicle while operated by a provincial officer designated under the *Environmental Protection Act*, the *Nutrient Management Act, 2002*, the *Ontario Water Resources Act*, or the *Pesticides Act*, while the officer is in the course of his or her employment.
5. A prescribed class or type of vehicle, driven by a prescribed class of persons or engaged in a prescribed activity or in prescribed conditions or circumstances.

[8] In addition to subsection (15.1), the following subsections of section 62 of the H.T.A. are relevant to this proceeding:

62(14) - Subject to subsections (14.1) and (15), no person shall use a lamp, other than the vehicular hazard warning signal lamps commonly known as four way flashers, that produces intermittent flashes of red light.

62(14.1) - In addition to the lighting requirements in this Part, a police department vehicle may carry lamps that cast red and blue lights, but no other motor vehicle shall carry any lamp that casts red and blue lights to the front.

62(15) - In addition to the lighting requirements in this Part, a vehicle described in subsection (15.1) may carry lamps that cast a red light only or such other colour of light that may, with the approval of the ministry, be designated by a by-law of the municipality in which the vehicle is operated, but no other motor vehicle shall carry any lamp that casts a red light to the front.

62(32) - No person shall operate a lamp that produces intermittent flashes of blue light on a highway except,

- (a) a person operating a road service vehicle in the circumstances described in subsection (31); or
- (b) a person operating a police department vehicle, together with a lamp that produces intermittent flashes of red light, as permitted by subsection (14.1).

[9] The definitions of the following terms, set out in subsection 1(1) of the H.T.A., are relevant to this proceeding:

1(1) – In this Act,

“driver” means a person who drives a vehicle on a highway; ...

“highway” includes a common and public highway, street, avenue, parkway, driveway, square, place, bridge, viaduct or trestle, any part of which is intended for or used by the general public for the passage of vehicles and includes the area between the lateral property lines thereof; ...

“motor vehicle” includes an automobile, motorcycle, motor assisted bicycle unless otherwise indicated in this Act, and any other vehicle propelled or driven otherwise than by muscular power, but does not include a street car, or other motor vehicles running only upon rails, or a motorized snow vehicle, traction engine, farm tractor, self propelled implement of husbandry or road building machine within the meaning of this Act; ...

“vehicle” includes a motor vehicle, trailer, traction engine, farm tractor, road-building machine, bicycle and any vehicle drawn propelled or driven by any kind of power, including muscular power, but does not include a motorized snow vehicle or a street car.

[10] The clause contained at the end of the text of subsection 159.1(2) of the H.T.A., which states “...shall move into another lane if the movement can be made in safety”, appears to establish a statutory qualification to liability for the offence herein. Accordingly, subsection 47(3) of the *Provincial Offences Act*, R.S.O. 1990, c. P.33, as amended, is relevant to the subject proceeding. That subsection reads as follows:

The burden of proving that an authorization, exception, exemption or qualification prescribed by law operates in favour of the defendant is on the defendant, and the prosecutor is not required, except by way of rebuttal, to prove that the authorization, exception, exemption or qualification does not operate in favour of the defendant, whether or not it is set out in the information.

THE ISSUES

[11] In this proceeding, the defendant is charged with an offence under subsection 159.1(2) of the H.T.A. That section is contained within Part X of the H.T.A., which sets forth “Rules of the Road” offences. In its decision in *Regina v. Raham*, 2010 ONCA 206 (Ont. C.A.), the Ontario Court of Appeal determined that offences created by Part X of the H.T.A., were *prima facie* offences of strict liability.

[12] In *Raham*, *supra*. Doherty J.A. noted that the offences contained in Part X “taken together, are designed to regulate and control conduct on the roads” and are, therefore, “properly regarded as public welfare offences”. He therefore determined that the “Rules of the Road” offences were *prima facie* strict liability offences and therefore “not subject to the presumption of full *mens rea*”, following the declarations made by Dickson J. in *Regina v. Sault Ste. Marie (City)*, [1978] 2 S.C.R. 1299 (S.C.C.).

[13] Accordingly, the subject offence is not one where the prosecution is required to prove the element of *mens rea* or “guilty mind”, beyond a reasonable doubt. The only remaining consideration is whether the offence should properly be classified as one of absolute liability, where the fault element of negligence is presumed but cannot be negated

through evidence which establishes that in committing the prohibited act the defendant took all reasonable care.

[14] In *Sault Ste. Marie (City)*, *supra.* the Supreme Court of Canada ruled that public welfare offences are presumptively strict liability offences and that “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”. As stated by the Supreme Court of Canada in *Lévis (City) v. Tétreault*; *Lévis (City) v. 2629-4470 Québec Inc.*, [2006] 1 S.C.R. 42 (S.C.C.), “absolute liability offences still exist, but they have become an exception requiring clear proof of legislative intent”.

[15] One of the factors set out in *Sault Ste. Marie*, *supra.* to be considered in an analysis as to whether an offence should be categorized as one of absolute liability, is that of the precision of the language used in the text of offence. In *Lévis (City) v. Tétreault*, *supra.* the Court was of the view that this factor was the most important factor to be considered, relative to the other indicia of absolute liability cited in *Sault Ste. Marie*.

[16] In reviewing the text of the subject offence, I am of the view that the language set out therein is not sufficiently precise to properly classify the offence as one of absolute liability. In reaching this conclusion I have adopted the reasoning of Duncan J. in his decision in *Regina v. Dillman*, [2008] O.J. No. 1120 (Ont. C.J.), dealing with the offence of “turn-not in safety” under subsection 142(1) of the H.T.A. In determining that the said offence was one of strict liability, Duncan J. stated that the “very concept of doing something ‘in safety’”, suggested to him “a fluid standard where what is required will vary according to the circumstances...”. He went on to state that the phrase “shall first see that the movement can be made in safety” as set out in subsection 142(1) of the H.T.A., is equivalent to saying “shall first take all reasonable steps to ensure that the movement can be made in safety”, words that do not suggest a guarantee but rather the exercise of reasonable care”.

[17] In examining the precision of the language used in creating the offence under subsection 159.1(2) of the H.T.A., and in particular the phrase “shall move into another lane if the movement can be made in safety”, I am of the view that the said language can, as stated by Doherty J.A. in *Raham*, *supra.*, “reasonably admit of a due diligence defence”. Accordingly, the language of the subject offence fails to provide clear proof that the Legislature of the Province of Ontario intended the subject offence to be one of absolute liability. The presumption in favour of the categorization of this public welfare offence as one of strict liability has not been rebutted.

[18] The subject offence is properly classified as a strict liability regulatory offence.

[19] Accordingly, in light of this ruling, the issues involved in this proceeding are as follows:

1. whether the prosecution has proven that the defendant committed all of the elements of the *actus reus* of the subject offence, beyond a reasonable doubt;

2. if the prosecution has proven the *actus reus* of the subject offence, beyond a reasonable doubt, whether the defendant has established, on a balance of probabilities, the statutory qualification relative to the safety of the requisite lane change movement, so as to excuse him from liability for the subject offence; or
3. if the prosecution has proven the *actus reus* of the subject offence, whether the defendant has established on a balance of probabilities, that in committing the prohibited act, he exercised due diligence by either acting on the basis of a reasonable mistake of fact or by taking all reasonable steps to avoid the particular event.

THE EVIDENCE

[20] During the trial of the subject charge, I received verbal evidence from Police Constable Deron Ellsworth tendered on behalf of the prosecution as well as from the defendant. In addition to the said testimony, I received four photographs, tendered by the defendant, which were admitted as evidence in this proceeding as exhibit nos. one to four.

(i) The Testimony of Police Constable Deron Ellsworth

[21] Constable Ellsworth testified that at the time of his testimony on July 16th, 2009, he was a police constable with the Halton Regional Police Service and had been so employed for 27 years. He advised that he was on duty as a police officer on the date of the subject offence, October 19th, 2008. The Court granted the officer permission to refer to his investigative notes during his testimony for purposes of refreshing his existing memory of the relevant events.

[22] Constable Ellsworth testified that on October 19th, 2008, he was on duty, operating an unmarked police car, in the City of Burlington. He advised that he was in uniform on that date. He stated that the weather conditions on that day were sunny and “nice” and that the roads were dry.

[23] The officer testified that at approximately 12:50 p.m., he was operating his police vehicle in a westerly direction on Highway 407, in the City of Burlington. He advised that he entered the westbound right hand or curb lane of the highway from the Dundas Street on-ramp and began to follow a Dodge van bearing licence plate number BDDD 472. Constable Ellsworth went on to advise that in the said area of Highway 407, there were three westbound lanes and that he and the said van were travelling in the lane situate “furthest to the right”.

[24] Constable Ellsworth testified that after entering the right hand westbound lane of Highway 407 at Dundas Street, he continued to follow the said Dodge van which was travelling in front of him in the right lane. The officer advised that he maintained a following distance behind the van of about 30 yards, noting that at this time he was travelling at a rate of speed of approximately 105 kilometres per hour. He indicated that he was able to determine the speed of his police vehicle at the relevant time, by referring to the speedometer on the vehicle which had been certified as being properly calibrated.

[25] Constable Ellsworth testified that as he continued to follow the subject Dodge van in the westbound curb lane, he noted the presence of “an unmarked police car with its emergency lights flashing intermittent flashes of red and blue”, located in front of the said van and his vehicle on the right-hand shoulder of the highway, “not far off the roadway”. The officer stated that the police vehicle was “clearly visible from a long way back”.

[26] During cross-examination, Constable Ellsworth stated that the unmarked police car which he observed to be located on the right-hand shoulder of Highway 407 was stopped at that location. He advised that this vehicle was being operated by Police Officer George Whitehouse, a member of the Halton Regional Police Service at the time.

[27] Constable Ellsworth testified that the police vehicle stopped on the right-hand shoulder was located fully on the shoulder, noting that no part of the vehicle was situated within the boundaries of “lane number one”, (being the right-hand or curb lane). He estimated that the left side of the said police vehicle would have been located approximately one metre from the white line marking the right-hand boundary of lane number one of the highway.

[28] During his testimony-in-chief, Constable Ellsworth stated that once he observed the police vehicle at the side of the highway, he noted that the lane to his left being the middle lane of the westbound highway was “wide open”. He determined that it was safe for him to move into the middle lane and he then signalled his lane change manoeuvre and turned into that lane.

[29] Constable Ellsworth testified that the Dodge van which had been travelling in front of him in the right lane remained in the right lane after he had made the lane change from the right lane into the middle lane. He advised that at the time that he moved into the middle lane of the highway he continued to travel at a speed of approximately 105 kilometres per hour, maintaining a distance of about 30 yards behind the said Dodge van as it continued to travel in the right lane.

[30] Constable Ellsworth testified that once he had turned into the middle lane from the right lane, the driver of the Dodge van had “ample opportunity” to execute a lane change from the right lane to the middle lane, but “did not do so”. He stated that the van remained in the right lane travelling at a rate of speed of 105 kilometres per hour, “and drove past the police car with its emergency lights flashing as it was on the shoulder of the roadway, just to the right of lane number one”.

[31] Constable Ellsworth testified that as the van approached the police vehicle stopped at the side of the roadway and as it passed the location of the police vehicle, it “did not slow down at all”, but continued to travel at a rate of speed of approximately 105 kilometres per hour. In this regard, the officer stated that the distance between the said Dodge van and his vehicle of about 30 yards remained constant at the time that the van was approaching the location of the police vehicle at the side of the highway, and as it was driving past the said location.

[32] Constable Ellsworth testified that upon observing the said van drive past the said police vehicle without moving from the right lane into another lane, he activated his emergency lights and stopped the van. Upon stopping the Dodge van, the officer determined that the vehicle was being driven by the defendant before the Court. The driver identified himself to Constable Ellsworth by means of a driver's licence, in the name of Milinko Drljevic of Mississauga, Ontario. Constable Ellsworth testified that upon determining the identity of the driver, he issued a provincial offence notice to the defendant for the charge before the Court, contrary to section 159.1(2) of the H.T.A.

[33] Constable Ellsworth testified that he followed the motor vehicle being driven by the defendant from the time that he first entered the right-hand westbound lane of Highway 407 from Dundas Street, until the time that he stopped the vehicle near the intersection of Highway 407 with Brant Street and just east of the off-ramp to the Queen Elizabeth Way (Niagara bound), a distance of "two or three kilometres". He advised that he never lost sight of the defendant's motor vehicle during this time.

[34] Constable Ellsworth testified that during the relevant period of time when he was behind the Dodge van being driven by the defendant, there were no cars located between his vehicle and the defendant's vehicle. He advised that at the relevant time, there were no obstructions to his view of the defendant's motor vehicle.

[35] Constable Ellsworth testified that at the time that he moved from the right-hand lane to the middle lane, he left room in the middle lane so that the defendant would be able to move into that lane from the right-hand lane. He stated that once he had moved into the middle lane there were no other vehicles in front of him in that lane. He noted, however, that at the relevant time, there were two or three cars travelling in lane number three, "the far outside lane" which had passed him.

[36] During cross-examination, Constable Ellsworth testified that he first observed the police vehicle stopped at the side of Highway 407, when he was approximately one-half of a kilometre east of its location as he was travelling in a westerly direction on the said highway. In response to Mr. Serroul's suggestion that he would not have been able to see the location of the police vehicle until he was situated approximately 200 metres from the vehicle, because of the grade of the highway at that location, Constable Ellsworth responded that he "would have pulled to that middle lane well in advance of 200 metres before we passed that unmarked police car that was stopped".

[37] During cross-examination, Officer Ellsworth acknowledged that a photograph shown to him by Mr. Serroul (exhibit #1) appeared to depict the general area on Highway 407 where the unmarked police car was stopped at the relevant time. In so acknowledging the area, the officer stated that the vehicle shown in the photograph stopped on the right-hand shoulder of the highway was situated "roughly" in the same location where the police vehicle would have been stopped at the material time. He noted, however, that the police vehicle would "possibly" have been located further to the west of the location of the vehicle in the photograph; a location closer to the off-ramps from Highway 407. He acknowledged that the police vehicle stopped at the side of the road was located on a part of Highway 407, where

there was a gradual downhill grade.

[38] During cross-examination, Constable Ellsworth reiterated his testimony in chief that when he first noticed the existence of the police vehicle stopped on the shoulder of the highway, he moved into the middle lane of the highway from the right-hand lane and continued to travel in that lane at a rate of speed of 105 kilometres per hour. He further stated that upon moving into the middle lane, he maintained a distance of approximately 30 yards behind the location of the defendant's vehicle which was travelling in the right-hand lane.

[39] In response to Mr. Serroul's suggestion that the officer was travelling too close to the defendant's vehicle to allow the defendant to execute a safe lane change manoeuvre from the right-hand lane to the middle lane, Officer Ellsworth stated as follows:

I felt the distance between, that I was behind his car, was safe. I certainly don't think I was following him too close, if that's what you're suggesting.

[40] Mr. Serroul then stated to the officer that if he was travelling in the middle lane at a distance of about 30 yards behind the defendant's vehicle in the right-hand lane, at a rate of speed of approximately 105 kilometres per hour, he would have been "less than one second" behind the defendant's vehicle. He suggested to the officer that in that circumstance it would have been unsafe for the defendant to change lanes in front of his police vehicle at the subject time.

[41] Constable Ellsworth responded to Mr. Serroul's suggestion as follows:

In my opinion there was plenty of room for him to pull out. That's my opinion. He could have – it was safe for him to change lanes. I changed lanes and anticipating that he was going to change lanes as well.

[42] Mr. Serroul then suggested to the officer that it would have prudent for him to have reduced his rate of speed by about 15 or 20 kilometres per hour, once he had completed the said lane change. Constable Ellsworth responded to this suggestion as follows:

I don't think I was too close to him that it prevented him to change lanes. He had ample opportunity to change lanes.

(ii) The Testimony of the Defendant

[43] The defendant testified in this proceeding, at the time of the continuation of the trial on December 3rd, 2009.

[44] During examination in chief, the defendant testified that on October 19th, 2008, he was driving his vehicle on Highway 407 westbound. He indicated that at that time, he was driving in the "right lane" at a speed of approximately 105 kilometres per hour. He stated that when he passed the junction of the highway with Dundas Street, he noticed that a police car had entered onto the highway from Dundas Street.

[45] The defendant testified that once the police officer entered onto the highway he began to travel in the right-hand lane behind the defendant. The defendant testified that he

continued to travel in the right-hand lane at a rate of speed of about 105 kilometres per hour, for a distance of approximately four and one-half to five kilometres, when he observed that a police car had stopped somebody on the right shoulder of the highway. He advised that he saw “the flashing light on the car”.

[46] The defendant testified that at the same time as he noticed the police car stopped on the shoulder of the roadway, he was watching the police car behind him, noticing that the police vehicle had changed the lane of its travel. The defendant stated that he would have also changed lanes, but he felt that he could not execute the lane change manoeuvre safely, noting that the “other police car” was “too close”. The defendant went on to state that he did, at that point “slow down a little bit, not much”.

[47] The defendant testified that at the point when he was approaching the police car, the grade of the highway changed such that he was “kind of coming up hill”. He stated that police car was located at a location where the grade of the highway was “downhill”. He advised that in light of the grade of the highway at the relevant location, one would not be able to see the location of the stopped police vehicle until one was approximately 100 metres away from its location.

[48] During the course of his examination in chief, the defendant identified and qualified four photographs of the relevant portion of Highway 407, which he took on July 12th, 2009. Even though these photographs were taken approximately nine months after the time of the alleged offence, the photographs were admitted into evidence as exhibit nos. one to four, on the basis that they would be afforded the appropriate weight given their date.

[49] In reference to exhibit no. three, the defendant stated that the photograph showed the grade of the westbound lanes of Highway 407 just prior to its exit onto Fairview Street and the Queen Elizabeth Way. In describing this photograph, the defendant pointed out the downhill grade of the highway at this location being the general area where the police car had stopped on the shoulder of the highway. In response to Mr. Serroul’s question as to the distance of the stopped police car from his vehicle at the time that he came over the “dip” in the roadway and began to travel downhill, the defendant responded, “I cannot be exactly sure but around 100 metres”.

[50] In describing exhibit no. four to this proceeding, the defendant testified that this photograph depicted the westbound lanes of Highway 407, just prior to the end of the highway. He advised that the “car” shown in the photograph was his car and that it was parked on the side of Highway 407 in the approximate location where the police car had been stopped at the material time. He stated that the photograph shows a “dip” in the highway, noting that it shows that the highway is “going down”.

[51] During his testimony-in-chief, the defendant stated that he agreed with the evidence of Constable Ellsworth that at the subject time the police car which was following him was travelling in the middle lane a distance of approximately 30 yards behind the location of his vehicle in the right-hand lane. In response to Mr. Serroul’s question as to his reaction when he looked in his rear-view mirror and noticed the police vehicle behind him,

the defendant stated as follows:

Like everybody else you feel some crap. Even you know that you don't do nothing you are always afraid that you are doing something that you're not supposed to.

[52] When asked why he didn't change lanes when he observed the police car behind him move from the right lane to the next lane, the defendant said that he had thought about it when he saw the police car stopped at the side of the road, but that the police car behind him then changed lanes. He stated that he did not move to the middle lane after the police car behind him had changed to that lane because the police vehicle in the middle lane was "too close", stating that if he attempted the change "it wouldn't be safe".

[53] The defendant went on to testify that he felt that if he had moved into the middle lane at the material time, he would have caused "the police officer to swerve or go away because travelling 100 kilometres per hour that's quite a speed".

[54] The defendant testified that he knew about certain rules governing the issue of a safe following distance when operating a motor vehicle. In describing his understanding of a safe following distance, the defendant stated as follows:

... From the country that I came from it was the braking distance that the count was the safe distance. If your car braking distance 100 metres that's a safe distance. Here we have a two second rule. In Quebec and on eastbound 401, there is marking on the road called chevrons. And I think that's how many chevrons is between the cars. That's how you count the distance.

[55] In describing the chevrons which he had observed on Highway 401 in the vicinity of the municipality of Oshawa, the defendant testified that the space between each chevron was about 10 metres. In the view of the defendant, a safe following distance at a rate of speed of 100 kilometres per hour would be a distance equivalent to two chevron markings on the highway.

[56] During cross-examination, the defendant testified that on the date in question he first observed the police officer who began to follow him when he was passing the Dundas Street on ramp while travelling in the westbound lanes of Highway 407. He advised that he first saw the "emergency vehicle" when he was about 100 metres away from it.

[57] In making reference to photographic exhibits nos. one and four, the defendant acknowledged that the position of his vehicle in the photographs was just an estimate of the location of the police vehicle stopped at the side of the road at the relevant time. He admitted that he did not take the photographs until approximately nine months after the time of the alleged offence and he acknowledged that his recollection as to the purported location of the police vehicle could have been inaccurate.

[58] During cross-examination, the defendant stated that when he was pulled over by Constable Ellsworth, he was not aware of the reason. He advised that he felt that he had not done anything wrong. When he was asked if he was, at the time of the offence, aware that it was an offence to not move over to the next lane or slow down when an emergency vehicle

was parked at the side of the road, the defendant responded as follows:

I did not know the law. I know that it's a common sense that you move and I always do if I can but I didn't know about the law.

[59] In response to the prosecutor's question as to how the defendant might explain Constable Ellsworth's evidence that he changed lanes anticipating that the defendant would be changing lanes in front of him and providing the defendant with that opportunity, the defendant stated as follows:

If I may say so nobody was behind the police officer and he was behind me and in my eye it was too close. I couldn't do it safely. I've been on the road for more than 30 years. It wasn't safe.

[60] In this regard, the defendant stated that when he noticed that the police officer had changed lanes from the right-hand lane behind him to the middle lane, his "first thought" was that the police officer was going to pass him. The defendant testified that he thought that the officer was "either on a call or something else". He advised that he was not sure as to whether the officer was going to pick up speed in the middle lane and that if he proceeded to turn from the right-hand lane into the middle lane at that moment, he would be interfering with the officer.

[61] The prosecutor then asked the defendant as to why he thought that it was unsafe to change from the right-hand lane to the middle lane, when he was in agreement with Constable Ellsworth's evidence that the officer's vehicle was travelling in the middle lane a distance of approximately 30 yards behind the location of his vehicle. The defendant responded to the prosecutor's inquiry in this regard as follows:

Your Honour, I saw him changing the lane. I thought he was passing me. I thought – because he was going pretty slow. I was going slow so I thought that he was going to pass me. That's why I didn't move. I didn't want to cut him off.

[62] During re-examination, the defendant was asked as to what his estimate would be as to the "time distance" between the police officer and himself at the relevant time, given that both he and the officer were travelling at a rate of speed of 105 kilometres per hour at the material time. In answer to this question, the defendant testified that he thought that he was about one second in front of the subject police vehicle at the time.

ANALYSIS

[63] Based on the undisputed evidence in this proceeding, I am satisfied that the following elements of the *actus reus* of the subject offence, as contained in subsection 159.1(2) of the H.T.A., have been proved to the standard of proof beyond a reasonable doubt:

- (i) that on the 19th day of October, 2008 at approximately 12:50 p.m., the defendant Milinko Drljevic was driving a motor vehicle on a highway, being Highway 407 westbound, between Dundas Street and the Queen Elizabeth Way (Niagara) off-ramp, in the City of Burlington;

- (ii) that the portion of Highway 407 westbound, between Dundas Street to the east and the Queen Elizabeth Way (Niagara) off-ramp to the west, is comprised of three lanes;
- (iii) that as the defendant was driving his motor vehicle in the right-hand westbound lane of Highway 407, between Dundas Street and the Queen Elizabeth Way (Niagara) off-ramp, he approached an emergency vehicle, being an unmarked police department vehicle, which was stopped on the right shoulder of the westbound lanes;
- (iv) that the defendant continued to drive his motor vehicle in the said right-hand lane, being the lane adjacent to the location of the stopped emergency vehicle, as he approached and drove past the said emergency vehicle and thereby failed to move his motor vehicle into another lane for westbound traffic.

[64] The prosecution has, however, failed to prove that the lamp of the subject emergency vehicle was producing intermittent flashes of red light while it was stopped on the right shoulder of Highway 407 westbound. The only evidence before me relevant to this element of the *actus reus* of the offence, is the testimony of Constable Ellsworth where he indicated that the unmarked police car which was stopped on the right-hand shoulder of the highway was equipped with “emergency lights” which were “flashing intermittent flashes of red and blue”. There is no evidence before me that the lamp of the subject emergency vehicle was, at the material time, producing intermittent flashes of red light only, as required by subsection 159.1(2) of the H.T.A.

[65] While I acknowledge that the evidence that the lamp of the subject emergency vehicle was producing intermittent flashes of red and blue light, could be interpreted by logical inference as incorporating the concept of intermittent flashes of red light, the wording of subsection 159.1(1) and the provisions of subsections 62(14), 62(14.1), 62(15), 62(15.1) and 62(32) considered in totality, lead me to the conclusion that there are substantive distinctions between emergency vehicles which are authorized to carry and operate a lamp or lamps which produce intermittent flashes of red light and emergency vehicles which are authorized to carry and operate a lamp or lamps which produce intermittent flashes of red and blue light.

[66] It would appear that the rules associated with the act of approaching a stopped emergency vehicle in subsection 159.1(1) and subsection 159.1(2) of the H.T.A., differ substantively. One of those differences is related to the type of emergency vehicle which is stopped on a highway as determined by the colour of the intermittent flashes of light produced by its lamp.

[67] According to subsection 62(14.1) of the H.T.A. only police department vehicles may carry lamps that cast red and blue lights. Furthermore, according to subsection 62(32) of the H.T.A., no person shall operate a lamp that produces intermittent flashes of blue light on a highway except a person operating a road service vehicle or a person operating a police department vehicle together with a lamp that produces intermittent flashes of red light, as permitted by subsection 62(14.1). It would appear that police department vehicles are the

only type of emergency vehicles which are authorized to carry lamps capable of producing intermittent flashes of red and blue light.

[68] The language contained in subsection 159.1(2) of the H.T.A. would appear to specifically exclude those emergency vehicles producing intermittent flashes of red and blue light. I am able to reach this conclusion in light of the language of subsection 159.1(1) of the H.T.A., which sets forth the rule applicable to drivers of vehicles approaching an emergency vehicle with its lamp producing intermittent flashes of red light or red light and blue light that is stopped on a highway.

[69] In my view, a driver of a vehicle on a highway which approaches an emergency vehicle stopped on the highway with its lamp producing intermittent flashes of red and blue light cannot be convicted of an offence under subsection 159.1(2) of the H.T.A. The rule of the road contained in that subsection seems to apply to the scenario where the lamp of the stopped emergency vehicle is producing intermittent flashes of red light only.

[70] In this proceeding the only evidence before me pertaining to the colour of the flashing lights being produced by the subject emergency vehicle is the testimony of Constable Ellsworth. His evidence is that the emergency lights of the unmarked police car were producing intermittent flashes of red and blue light. The prosecution has, therefore, failed to prove the element of the *actus reus* of the offence against the defendant, pertaining to the colour of the flashing lights being produced by the emergency vehicle, beyond a reasonable doubt.

[71] In light of my finding that the prosecution has failed to discharge its burden of proof relative to the *actus reus* of the offence, the remaining issues of whether the defendant has proven the statutory qualification contained in subsection 159.1(2) of the H.T.A. or the defences of due diligence or reasonable mistake of fact, on a balance of probabilities, need not be analyzed.

THE DECISION

[72] The prosecution has failed to prove all of the elements of the *actus reus* of the subject offence, beyond a reasonable doubt. The charge is therefore dismissed.

Released: May 6th, 2010

Signed: “Justice of the Peace Kenneth W. Dechert”