

**IN THE PROVINCIAL COURT OF SASKATCHEWAN
SITTING AT LOON LAKE, SASKATCHEWAN**

Between:

HER MAJESTY THE QUEEN

and

FRANK KYTWAYHAT

Cpl. Colleen Miller

for the Crown

Frank Kytwayhat with Emma Kytwayhat

for the Accused

24th February, 2004

J.A. NIGHTINGALE, PCJ

JUDGMENT AT TRIAL

I. THE CHARGE, THE EVIDENCE AND THE FACTS

[1] Believing that his stepdaughter, who was great with child, was going into labour, Frank Kytwayhat volunteered to transport her the sixty kilometres from home in Loon Lake to the Meadow Lake Health Centre on the afternoon of January 30th, 2003. He chose to make the trip at a speed of 151 kilometres per hour, which was detected on R.C.M.P. radar just east of the Village of Makwa. The officer who obtained the radar reading charged Mr. Kytwayhat with an offence of speeding, contrary to the Saskatchewan *Highway Traffic Act*, C. H-3.1, S.S. 1986.

[2] Happily for everyone the stepdaughter's abdominal pains that day proved not to be those of labour, and she was delivered of an healthy baby a week later, after an hopefully somewhat more serene journey to hospital. Unhappily, while he concedes that he exceeded the speed limit, Mr. Kytwayhat is outraged at being charged with speeding, and vehemently believes that the officer should have chosen compassion over law enforcement.

[3] At trial the constable was asked whether he had considered such an humanitarian approach to the situation. He replied that indeed he had, but that two factors suggested the harsher course: first, a week earlier (and in the absence of a pregnant passenger) he had caught Mr. Kytwayhat speeding on a different highway at 140 kilometres per hour, and second, to the officer's knowledge, even the drivers of ambulances and fire trucks responding to emergencies limit themselves to 130 kilometres per hour for safety reasons.

[4] For his part, Mr. Kytwayhat testified that he and his wife, who is the mother of the pregnant stepdaughter, had driven the mother-to-be to all of her prenatal appointments in Meadow Lake. Although he knew that there is a health care facility at Loon Lake, Mr. Kytwayhat believed that the medical staff there do not deliver babies. Neither did he call an ambulance.

[5] Helen Kytwayhat, spouse of the Accused and mother of the pregnant daughter, testified that she was not sure of the location of the nearest ambulance but believed it was St. Walburg, some fifty kilometres in a different direction from Loon Lake than Meadow Lake and anyway it did not even cross her mind to try to summon one, since the family was in the habit of driving her daughter to medical appointments. There is no evidence as to whether Helen Kytwayhat's knowledge and views regarding these matters were shared by the Accused or were communicated to him in the context of the speeding. Neither party presented admissible evidence as to the location of the nearest ambulance, as to the extent of medical services available at the Loon Lake health facility as of January 30th, 2003 nor as to whether there was a doctor in Loon Lake who could deliver a baby.

[6] Exceeding the speed limit is a strict liability offence; that is, in order to obtain a conviction the Crown need prove only that the act occurred. Defences to strict liability offences are limited, but include the defence of necessity. In my opinion, based upon Mr. Kytwayhat's testimony and the submissions of his representative, the defence of necessity arises.

II. THE LAW

[7] Once the defence of necessity arises for consideration in a criminal or quasi-criminal trial, the Crown bears the burden of proving that the facts do not justify the application of the defence. This was very recently discussed in the judgment of Deshayé, JPC in *R. v. Todd*, 2004 SKPC 9 (Sask. Prov. Ct.). At paragraph 15 of his decision, His Honour wrote:

... Put another way, when a consideration of the defence of necessity is called for by the particular facts of the case, the Crown has the onus to prove that it does not apply.

[8] The Supreme Court of Canada restated the principles or elements of the defence of necessity in its judgment in *Latimer v. The Queen* 2001 SCC 1. The Court wrote, *inter alia*:

29 To begin, there must be an urgent situation of "clear and imminent peril": *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616, at p. 678. In short, disaster must be imminent, or harm unavoidable and near. It is not enough that the peril is foreseeable or likely; it must be on the verge of transpiring and virtually certain to occur. In *Perka*, Dickson J. expressed the requirement of imminent peril at p. 251: "At a minimum the situation must be so emergent and the peril must be so pressing that normal human instincts cry out for action and make a counsel of patience unreasonable". The *Perka* case, at p. 251, also offers the rationale for this requirement of immediate peril: "The requirement . . . tests whether it was indeed unavoidable for the actor to act at all". Where the situation of peril clearly should have been foreseen and avoided, an accused person cannot reasonably claim any immediate peril.

30 The second requirement for necessity is that there must be no reasonable legal alternative to disobeying the law. *Perka* proposed these questions, at pp. 251-52: "Given that the accused had to act, could he nevertheless realistically have acted to avoid the peril or prevent the harm, without breaking the law? Was there a legal way out?" (emphasis in original). If there was a reasonable legal alternative to breaking the law, there is no necessity. It may be noted that the requirement involves a realistic appreciation of the alternatives open to a person; the accused need not be

placed in the last resort imaginable, but he must have no reasonable legal alternative. If an alternative to breaking the law exists, the defence of necessity on this aspect fails.

31 The third requirement is that there be proportionality between the harm inflicted and the harm avoided. The harm inflicted must not be disproportionate to the harm the accused sought to avoid. See *Perka*, per Dickson J., at p. 252:

No rational criminal justice system, no matter how humane or liberal, could excuse the infliction of a greater harm to allow the actor to avert a lesser evil. In such circumstances we expect the individual to bear the harm and refrain from acting illegally. If he cannot control himself we will not excuse him.

Evaluating proportionality can be difficult. It may be easy to conclude that there is no proportionality in some cases, like the example given in *Perka* of the person who blows up a city to avoid breaking a finger. Where proportionality can quickly be dismissed, it makes sense for a trial judge to do so and rule out the defence of necessity before considering the other requirements for necessity. But most situations fall into a grey area that requires a difficult balancing of harms. In this regard, it should be noted that the requirement is not that one harm (the harm avoided) must always clearly outweigh the other (the harm inflicted). Rather, the two harms must, at a minimum, be of a comparable gravity. That is, the harm avoided must be either comparable to, or clearly greater than, the harm inflicted. As the Supreme Court of Victoria in Australia has put it, the harm inflicted "must not be out of proportion to the peril to be avoided": *R. v. Loughnan*, [1981] V.R. 443, at p. 448.

32 Before applying the three requirements of the necessity defence to the facts of this case, we need to determine what test governs necessity. Is the standard objective or subjective? A subjective test would be met if the person believed he or she was in imminent peril with no reasonable legal alternative to committing the offence. Conversely, an objective test would not assess what the accused believed; it would consider whether in fact the person was in peril with no reasonable legal alternative. A modified objective test falls somewhere between the two. It involves an objective evaluation, but one that takes into account the situation and characteristics of the particular accused person. We conclude that, for two of the three requirements for the necessity defence, the test should be the modified objective test.

33 The first and second requirements -- imminent peril and no reasonable legal alternative -- must be evaluated on the modified objective standard described above. As expressed in *Perka*, necessity is rooted in an objective standard: "involuntariness is measured on the basis of society's expectation of appropriate and normal resistance to pressure" (p. 259). We would add that it is appropriate, in evaluating the accused's

conduct, to take into account personal characteristics that legitimately affect what may be expected of that person. The approach taken in *R. v. Hibbert*, [1995] 2 S.C.R. 973, is instructive. Speaking for the Court, Lamer C.J. held, at para. 59, that

it is appropriate to employ an objective standard that takes into account the particular circumstances of the accused, including his or her ability to perceive the existence of alternative courses of action.

While an accused's perceptions of the surrounding facts may be highly relevant in determining whether his conduct should be excused, those perceptions remain relevant only so long as they are reasonable. The accused person must, at the time of the act, honestly believe, on reasonable grounds, that he faces a situation of imminent peril that leaves no reasonable legal alternative open. There must be a reasonable basis for the accused's beliefs and actions, but it would be proper to take into account circumstances that legitimately affect the accused person's ability to evaluate his situation. The test cannot be a subjective one, and the accused who argues that he perceived imminent peril without an alternative would only succeed with the defence of necessity if his belief was reasonable given his circumstances and attributes. We leave aside for a case in which it arises the possibility that an honestly held but mistaken belief could ground a "mistake of fact" argument on the separate inquiry into mens rea.

34 The third requirement for the defence of necessity, proportionality, must be measured on an objective standard, as it would violate fundamental principles of the criminal law to do otherwise. Evaluating the nature of an act is fundamentally a determination reflecting society's values as to what is appropriate and what represents a transgression. Some insight into this requirement is provided by G. P. Fletcher, in a passage from *Rethinking Criminal Law* (1978), at p. 804. Fletcher spoke of the comparison between the harm inflicted and the harm avoided, and suggested that there was a threshold at which a person must be expected to suffer the harm rather than break the law. He continued:

Determining this threshold is patently a matter of moral judgment about what we expect people to be able to resist in trying situations. A valuable aid in making that judgment is comparing the competing interests at stake and assessing the degree to which the actor inflicts harm beyond the benefit that accrues from his action.

The evaluation of the seriousness of the harms must be objective. A subjective evaluation of the competing harms would, by definition, look at the matter from the perspective of the accused person who seeks to avoid harm, usually to himself. The proper perspective, however, is an objective one, since evaluating the gravity of the act is a matter of community standards infused with constitutional considerations

(such as, in this case, the s. 15(1) equality rights of the disabled). We conclude that the proportionality requirement must be determined on a purely objective standard.

III. ANALYSIS AND CONCLUSIONS

[9] Applying a modified objective standard to the first requirement - that there be an urgent situation of clear and imminent peril - I conclude that I am to objectively evaluate the circumstances of the case, taking into account Mr. Kytwayhat's situation and characteristics. At the same time, his belief in the urgency of the situation and the presence of imminent peril must be a reasonable belief. I find as fact that his wife telephoned him at work and told him that his stepdaughter was entering labour and that he was required immediately to drive her to the Meadow Lake Health Centre. In those circumstances I accept that an event - his stepdaughter giving birth to her first child - was unavoidable and imminent in Mr. Kytwayhat's mind such that, to borrow the words of the Supreme Court of Canada in its decision in *Perka v. The Queen* (1985), 14 C.C.C. 385, as quoted in its decision in *Latimer, supra*, "... normal human instincts cry out for action and make a counsel of patience unreasonable." This was an event which, according to the information available to Mr. Kytwayhat, would not wait.

[10] The unavoidable and imminent birthing event was not going to happen to Mr. Kytwayhat personally, however, and so a question arises as to whether he may claim the defence of necessity. The evidence is unclear as to whether he stood *in loco parentis* to his stepdaughter who, after all, at nineteen was a young adult. May Mr. Kytwayhat advance a defence of necessity when the perilous event is about to happen to someone to whom he does not owe a legal responsibility? As Deshayé, JPC mused in *Todd, supra*, at paragraph 19:

... It seems reasonable, nevertheless, that persons, who are by law responsible for the protection of others, should be able to claim the same legal status that would pertain if the act in question was for self-preservation. What, however, is the position of an accused *vis-a-vis* a stranger or an adult? If a stranger sees a child expiring from dehydration in a car on a hot day, is there a legal obligation to attempt to save the child? Or, more directly, was there a legal obligation on Mr. Todd to retrieve Ms. Emery from perceived perils on July 1, 2000? *Perka, supra*, seems to

stipulate a condition precedent that “the accused had to act.”

[11] Considering the principles of tort law it seems to me that even if Mr. Kytwayhat’s stepdaughter was not his legal charge, he would still owe her a duty to act, a duty of care. This is not to confuse the principles of tort law with those of criminal law, but in the circumstances I find that the Accused may assert a defence of necessity concerning his stepdaughter condition.

[12] Further, applying a modified objective test, I find reasonable Mr. Kytwayat’s view that it was necessary to obtain competent medical attention for his stepdaughter. Mr. Kytwayhat and his wife have testified that the closest source of such attention was Meadow Lake, and the Crown has led no evidence to suggest otherwise. The first branch of the *Latimer* test is met.

[13] Was there a reasonable legal alternative to breaking the law? There is no evidence on the point. There may well have been a fully equipped medical facility available at Loon Lake, with either a doctor or nurse-practitioner on duty, in which case a reasonable alternative would most certainly have existed. There may have been an ambulance available at Loon Lake, presenting yet another reasonable alternative to Mr. Kytwayhat’s decision to break the law by speeding. The Crown adduced no evidence about these topics and in the absence of such evidence it is not possible to conclude that there was a reasonable, legal alternative to breaking the law by speeding. All I have in evidence is Mr. Kytwayhat’s stated belief that he had no option. A modified objective standard applied to the evidence leads to the conclusion that the second branch of the *Latimer* test is met.

[14] The third consideration in determining whether the defence of necessity lies is that of proportionality; is the harm inflicted disproportionate to the harm which the Accused sought to avoid? Here the analysis is purely objective and has no resort to the characteristics and views of the Accused. See the comments of George Fletcher quoted with approval at paragraphs 31 and 34 of *Latimer, supra*. As the Supreme Court of Canada observed in *Latimer* (at paragraph 31) most situations fall into a grey area in which it is difficult to weigh proportionality and all that an accused need show is that the harms being weighed are, at a minimum, of a comparable gravity.

[15] There is some evidence in the testimony of the officer who issued the ticket to assist me in this analysis. As mentioned earlier in these reasons, the officer gave evidence that even the operators of emergency vehicles, as they respond to emergencies, limit the speed of their vehicles to 130 kph “for very good reasons.”

[16] It is on this branch of the *Latimer* formula that Mr. Kytwayhat’s defence of necessity cannot succeed, in my opinion. While I have found that he faced an imminent and urgent situation such as to permit him to speed and that he had no reasonable alternative to the speeding, the degree of that speeding is, in my view, out of proportion to the harm he was seeking to avoid. Since I drive from Meadow Lake to Loon Lake and back every Tuesday to conduct court I believe that I can take judicial notice of the fact that the distance each way is approximately 60 kilometres. Had Mr. Kytwayhat made the journey from Loon Lake to Meadow Lake at 130 kph he would have arrived in Meadow Lake in approximately twenty-eight minutes. By travelling at 151 kph he would have arrived in roughly twenty-four minutes, presuming a constant speed and without the delay caused by the procedures related to the speeding ticket.

[17] By travelling at a speed more than one and half times the posted limit over a distance of some 60 kilometres on a rural highway, Mr. Kytwayhat put himself and his passengers at significant risk of serious bodily harm or death. In driving at this speed, the most he could have achieved was a four minute reduction in the time it would have taken to make the journey at the elevated but still relatively safe speed of 130 kph. The harm risked is, in my opinion, grossly out of proportion to the harm avoided. In all of the circumstances I find that, even though some measure of speeding was justified, Mr. Kytwayhat’s speed was so high as to lift it out of the realm of proportionality contemplated by the Supreme Court of Canada in *Latimer*. On this branch of the analysis his defence cannot prevail and I find that the defence of necessity cannot assist him.

[18] The Crown having otherwise proven all of the elements of the offence beyond a reasonable doubt, I find Mr. Kytwayhat guilty of the offence of speeding at 151 kph.

[19] DATED at the Village of Loon Lake, Saskatchewan this 24th day of February, 2004.

Jeremy Nightingale, a Judge of the
Provincial Court of Saskatchewan.