

*Case Name:*  
**R. v. Newbury**

**IN THE MATTER OF the Provincial Offences Act R.S.O.  
1990**

**Between  
Her Majesty the Queen, and  
Timothy Newbury**

**[2008] O.J. No. 5700**

Ontario Court of Justice  
Toronto, Ontario

**J.R. Cottrell J.P.**

Heard: September 22, 2008.  
Oral judgment: September 22, 2008.

(15 paras.)

Charges: S. 128 - Highway Traffic Act - Speeding

**Counsel:**

Ms. P. Liu, Municipal Prosecutor.

Mr. M. Riddell, Agent for the Defendant.

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**1 J.R. COTTRELL J.P.** (orally):-- Thank you, alright, Timothy Newbury, was charged on July 8, 2007 with the offence of speeding 84 kilometres an hour in a 50 kilometre per hour zone on eastbound Danforth Avenue in the City of Toronto. The Defendant pleaded not guilty and the matter proceeded to trial.

**2** The defendant who was the driver of the motor vehicle was identified by the police officer as

Timothy Newbury. This motor vehicle was observed by the officer apparently travelling at a high rate of speed sufficient enough to encourage the officer to activate the laser to obtain a reading from the motor vehicle. This resulted in a determination that the vehicle was travelling at 84 kilometres per hour. This is in a posted 50 kilometre per hour zone.

**3** From the time the officer took the reading to the time the vehicle was pulled over and the driver identified, the officer gave evidence that he never lost sight of the motor vehicle. He identified the driver by a valid Ontario driver's license.

**4** The officer also testified that he is a trained and qualified laser operator and tested the laser both before and after operation on the day in question. However in this case, virtually none of the evidence the officer gave in-chief was contained in his notes. The defence also questioned the officer regarding which tests he performed with the laser device and how he performed them to determine that the laser unit was reliable and accurate. The officer testified he tested the laser device to the manufacturer's specifications.

**5** However, Mr. Riddell during cross-examination eventually showed the testing procedures of the manufacturer's manual to the officer. This was provided in disclosure to the defence and was also made an exhibit. The way that the officer described how he conducted many of the tests was in fact contrary to the way the manufacturer sets out how to perform them.

**6** In the cases that the defence has provided to the Court, *R. v. Niewiadomski*, N-I-E-W-I-A-D-O-M-S-K-I, [2004] O.J. No. 478, and also in *R. v. Wilkins*, [2006] O.J. No. 5366, and *R. v. Martin*, [2008] O.J. No. 1803, all those POA appeal court decisions held that absence of full compliance with the testing and operational process should make the reading suspect.

**7** The officer's notes were also made an exhibit at the request of the defence. I have noted that they were very brief and quite sparse. They are only about two and a half sentences in length. Also, on the front of the officer's copy of the certificate of offence there appears to be various symbols and abbreviations which were not transcribed in his notes.

**8** Now dealing with the issue pertaining to the brevity of the officer's notes; Mr. Riddell, on behalf of the defendant, submits that not only does the officer have virtually nothing meaningful contained in his notes to allow him to refresh his memory of important details, but he submits that the prosecution is essentially disclosing its entire case to the defence during the course of examination-in-chief of the officer. Mr. Riddell further submits that virtually all of the officer's oral testimony here today was not disclosed in disclosure and that it infringes his client's section 7 Charter rights.

**9** In support of this particular argument, Mr. Riddell relies upon the case of *R. v. Karunakaran*, [2008] O.J. No. 3468, that's K-A-R-U-N-A-K-A-R-A-N. In that case Justice Armstrong was dealing with this same issue as it pertained to an impaired driving case. Justice Armstrong had this to say:

"When I compare the lack of detail in the officer's notes with the detailed testimony he gave in court, the contrast is startling. He basically disclosed the case during his examination-in-chief. His notes were little more than cryptic jottings. There were significant omissions."

**10** Madam prosecutor submits that if the disclosure provided to the defendant was not adequate then the defence should have acted more diligently and made a request for additional disclosure. I disagree and apparently so do Justice Armstrong. Mr. Riddell's office made a written request to the prosecutor's office for disclosure which included the text "we are hereby requesting full and complete disclosure." This was acknowledged by madam prosecutor as having been received on February 12, 2008. Justice Armstrong also ruled on this particular issue in *R. v. Karunakaran*:

"However, in my opinion, the officer's notes were too sparse. They were woefully inadequate, and it was not up to the defence to supplement them by contacting the officer to obtain more detail, as was implied."

**11** Therefore I find that the police officer must have notes not only adequately enough to refresh his memory but also sufficient enough to allow the defendant to make full answer and defence as well as to fulfill to prosecutions disclosure obligations.

**12** Also, in the cases of *R. v. Zack*, [1999] O.J. No. 5747, that's an Ontario Court of Justice matter and also in *R. v. Hayes*, [2005] O.J. No. 5057, that's an Ontario Court of Justice POA decision, both those cases found that in this day of full and complete disclosure it cannot be acceptable for a police officer to say I did not note it because I would remember it. I think it is important as well to quote what Mr. Riddell just read into the record in his submissions pertaining to the case of *R. v. Lozanovski*, [2005] O.J. No. 1322, and that is spelled L-O-Z-A-N-O-V-S-K-I which is a decision of Justice Feldman:

"It is important to the proper functioning of the judicial fact finding role that significant facts be recorded by police and not left to the whim of memory."

**13** This Court has taken into consideration the cross-examination of the officer as well as reviewing the testing procedures which are part of the manufacturer's manual, along with the officer's notes and both were made exhibits. I find that all the evidence in totality shows non-compliance with the manufacturer's specifications as relates to the testing of the laser unit.

**14** I am also concerned about the reliability of the officer's testimony because of his failure to note the important information of his evidence in his notes. I am therefore left with a reasonable doubt as to the accuracy and reliability of the laser unit the officer used as I find it was not tested in accordance with manufacturer specifications.

**15** Accordingly the charge of speeding is dismissed

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