

**** Unedited ****

Indexed as:

R. v. Sim (Ont. C.A.)

Between

Her Majesty The Queen, Respondent, and
Dwight Donald Sim, Appellant

Ontario Judgments: [1988] O.J. No. 2250
Action No. 1028/87

**Supreme Court of Ontario - Court of Appeal
Toronto, Ontario
Robins, Tarnopolsky and Finlayson JJ.A.**

October 11, 1988

(On appeal from Walneck D.C.J.)

Steven M. Barrett, for the Appellant.

Tim K. Power, for the Respondent.

The following was endorsed on the appeal record by

ROBINS J.A. :— There was evidence of the police officer that he tested the radar unit both before and after it measured the respondent's speed and there was evidence from which it can be concluded that that the police officer was familiar with the unit and the manner in which it was intended to be used. We accordingly cannot find any error in law on the part of the justice of the peace. The appeal will be dismissed.

ROBINS J.A.

It should be noted that **R. v. Bourque** was overturned on appeal and no longer represents the law in Alberta or elsewhere.

R. v. Bourque (1985), 38 M.V.R. 110 (Alta. Q.B.), reversed April 16, 1986 (unreported, Alta. C.A., noted in Index to Vols. 1-15, M.V.R. (2d) at xxx)

R. v. Owosu, (unreported, Ont. Prov. Court, Judicial District of York, August 18, 1986, per Babe P.C.J.)

R. v. Howe, (unreported, Ont. Prov. Court, Judicial District of Middlesex, October 27, 1988, per Walker P.C.J.)

Radar: Unit Capable of Accurately Measuring Speeds: The issue here is not whether the unit is operating properly (i.e. that it has been tested and found to be functioning correctly) or what the purpose of the unit is, but whether the Crown is required to establish that a radar device, when tested and found to be operating properly, is capable of accurately measuring the speed of a motor vehicle.

In **R. v. O'Reilly** (1979, Alta. Dist. Ct.), the Alberta District Court approved an unreported Provincial Court decision, **R. v. Jacobs**, holding that the court must be satisfied that the radar unit was capable of accurately registering speeds. This decision was followed in **R. v. Werenka** (1981, Alta. Q.B.) and was specifically approved in **R. v. Bourque** (1985, Alta. Q.B.). As **Bourque** was overruled by the Alberta Court of Appeal, this line of cases is no longer good law. While the Alberta Court of Appeal did not give reasons for overruling the decision of the Court of Queen's Bench, the Court of Queen's Bench had allowed the defendant's appeal on two separate grounds, one of which was this point. In order to allow the appeal, the Court of Appeal had to reject both grounds accepted by the Court of Queen's Bench.

In **R. v. Grainger** (1958, Ont. C.A.), the defence argued that the information supplied by the radar device amounted to nothing unless it was proved that the device, when properly used, was capable of accurately measuring the speed of a motor vehicle on the highway. The court dismissed the defendant's appeal; however, it is not clear whether this was done on the basis of the testimony that the device had been tested and shown to be in good working condition and was properly used, or on the basis of the officer's testimony that the data furnished by the machine was "extremely accurate" (although there is no indication of how the officer could know this). **Grainger** was recently considered in **R. v. Redmond** (1990, Ont. C.A.), dealing with the admissibility of results of instruments used to measure blood-alcohol content.

The court in **Redmond** held that the law regarding the admissibility of measurements derived from scientific instruments by experts trained in their use, as set out in **Grainger**, required the following (at 10):

...it [is] not necessary for scientific evidence to be given to explain precisely how the machine operated or to prove its capability and accuracy. It is sufficient if the expert operating the machine establishes

that the machine is capable of making required measurements or producing the required data; that the machine was in good working order at the required time; and that it was properly used. If these conditions are met, the evidence is admissible and the only question left to the trier of fact is the weight to be given to such evidence.

A series of Ontario cases predating **Redmond** considered whether evidence that radar devices are capable of accurately measuring the speed of a motor vehicle is necessary. In **R. v. Meyer** (1984, Ont. Prov. Ct.), the court held that it was essential for the Crown to lead evidence from the radar operator that the radar device was capable of measuring the speed of a vehicle across the full range of the set. This position was rejected in **R. v. Kilcup** (1987, Ont. Prov. Ct.). The court pointed out that unless the officer was an expert in radar itself (as opposed to being qualified in its operation) such a statement would require opinion evidence that the officer would not be qualified to give. Subsequently, in both **R. v. Bigioni** (1988, Ont. C.A.) and **R. v. Sim** (1988, Ont. C.A.) it was argued by the defendants that the Crown was required to lead evidence that the radar device was capable of accurately measuring speeds in order to establish a *prima facie* case. The Court of Appeal rejected both appeals, stating in a brief endorsement in **Sim**:

There was evidence of the police officer that he tested the radar unit both before and after it measured the [defendant's] speed and there was evidence from which it can be concluded that the police officer was familiar with the unit and the manner in which it was intended to be used. We accordingly cannot find any error in law on the part of the justice of the peace. The appeal will be dismissed.

It is submitted that on the basis of the principles set out in **Redmond** and the requirements of a *prima facie* case as set out in **Bigioni** and **Sim**, the Crown is not required to establish (at least in the absence of evidence to the contrary) that a radar set, when found to be working accurately and when properly used, is capable of accurately measuring the speed of motor vehicles.

R. v. O'Reilly (1979), 3 M.V.R. 228 (Alta. Dist. Ct.)

R. v. Jacobs, unreported, Alta. Prov. Ct.

R. v. Werenka (1981), 11 M.V.R. 280 (Alta. Q.B.)

R. v. Bourque (1985), 38 M.V.R. 110 (Alta. Q.B.), reversed April 16, 1986 (unreported, Alta. C.A., noted in Index to Vols. 1-15, M.V.R. (2d), at xxx)

R. v. Grainger (1958), 120 C.C.C. 321 (Ont. C.A.)

R. v. Redmond (1990), 54 C.C.C. (3d) 273, 21 M.V.R. (2d) 1 (Ont. C.A.)

R. v. Meyer, (unreported, Ont. Prov. Ct., Judicial District of York Region, Aug. 23, 1984, per Zimmerman P.C.J.)

R. v. Kilcup, (unreported, Ont. Prov. Ct., Judicial District of Ottawa-Carleton, Sept. 8, 1984, per Hutton P.C.J.).

**** Unedited ****

Indexed as:

R. v. DiGiuseppe (Ont. Ct. (Prov. Div.))

Between

Her Majesty the Queen, and
Dino DiGiuseppe, Appellant

[1991] O.J. No. 2514
DRS 95-09749

**Ontario Court of Justice - Provincial Division
Thunder Bay, Ontario
Fraser Prov. Div. J.**

November 14, 1991
(2 pp.)

Motor vehicles — Regulation of vehicles and traffic — Rate of speed, evidence and proof — By radar equipment — Accuracy of device — Tuning forks.

Appeal by the accused from conviction for speeding. The appellant argued that the Crown failed to show that the tuning forks used to test the accuracy of the radar equipment were themselves accurate and suitable for that purpose.

HELD: Appeal dismissed. The Crown was only required to prove that the radar equipment was tested before and after measuring the defendant's speed and that it worked accurately.

Mary Anne Mousseau, for the Crown
Appellant appearing in person.

FRASER PROV. DIV. J. :— The Appellant appeals a conviction for speeding on the grounds that the Crown has not made out a prima facie case because there was no evidence that the tuning forks used by the radar operator to test the accuracy of the machine were themselves accurate and suitable for the purpose *R. v. Bourque* (1985) 38 M.V.R. 110 (Alta. Q.B.). Secondly, the radar operator although he testified that "radar is an instrument which accurately measures the speed of moving vehicles" he did not say in addition to that 'across the full range of the set'. The Appellant submits omitting this additional phrase is fatal to the Crown's case *R. v. Meyer* (August 23, 1984) Zimmerman, J. (Ont. Prov. C.).

Bourque is not the law in Ontario considering the two unreported decisions of the Ontario Court of Appeal in *R. v. Sim* and *R. v. Bigioni* both of which can be found in the Ontario Judgement data base of Quick Law and are commented on at length in the second edition of Manraj/Haines *The Law on Speeding and Radar* at pp. 36-38. In Ontario it is sufficient to establish a prima facie case that the Crown adduce evidence that the radar unit was tested both before and after measuring the defendant's speed and that it was found to be working accurately, and that the radar operator was qualified in the use of the radar device. A further difficulty with Bourque is that it appears to create an impossible evidentiary treadmill. If it is necessary to prove the accuracy of the tuning forks then surely it becomes necessary to prove the accuracy of whatever devices are used to measure or test those forks and so on. I am in my view not good law and I disagree with it. The conclusion reached by the learned Judge was not justified by the caselaw or the submissions of the Appellant and is not in accord with the subsequent judgements of

The Ontario Court of Appeal referred to above.

There will be cases in which the cross-examination of the radar operator will generate such admissions which raise a doubt as to the accuracy of the radar or the qualifications of the operator. A review of the transcript of the case at bar reveals no such admissions which could give rise to such reasonable doubts. I find no error in law and the appeal is dismissed.

FRASER PROV. DIV. J.

DRS/DRS