

ONTARIO COURT OF JUSTICE

CITATION: *Toronto (City) v. Russo*, 2024 ONCJ 476

DATE: 2024-09-24

COURT FILE No.: 999 00 7899038Z-00

B E T W E E N :

HIS MAJESTY THE KING (CITY OF TORONTO)

— AND —

ROBERTO RUSSO

Before Justice of the Peace Mary A. Ross Hendriks

Heard on May 31, 2024

Reasons for Judgment released on September 24, 2024

Mr. C. Oberle, Prosecutor, City of Toronto

Mr. P. Periti, Agent for Mr. Russo

JUSTICE OF THE PEACE ROSS HENDRIKS:

[1] The defendant, Roberto Russo, has been charged pursuant to section 78.1(1) of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (the “HTA”), with the offence of drive – handheld communication device, at the location of westbound Eglinton Ave. West, just east of Oakwood Ave, in the City of Toronto.

[2] The clerk read him the standard caution for this offence. He entered a plea of not guilty and I conducted a trial in this matter.

Testimony of Officer Blair:

[3] I heard the sworn testimony of P.C. Jeffrey Blair, badge 7685 of 13 division, Toronto Police Service (“TPS”).

[4] Officer Blair testified that at approximately 2:00 pm on May 25, 2023, he was operating a scout car in lane 1 of the westbound traffic on Eglinton Ave. West approaching Oakwood Ave. At this location, Eglinton Ave. West has two through lanes going west and two through lanes going east, and there is a left turn lane between lane 1 and the yellow dividing lane separating east and west traffic.

[5] The left turn lane at this location has a green arrow permitting left turns.

[6] Officer Blair was in lane 1, travelling very slowly westbound towards the intersection with Oakwood Ave., and was facing a stable red light.

[7] He looked to his left and saw a long line of traffic in the left-turn lane. Officer Blair observed the fourth car from the stop line in this lane, which was a black, sedan, 4-door Hyundai Sonata, bearing Ontario licence plate CERL241.

[8] This vehicle was stopped. Officer Blair observed through the passenger side window of this other vehicle, which was rolled up but contained clear glass, that it was driven by a sole occupant. The driver of this vehicle had his left hand on the steering wheel and his right hand on the middle side of the wheel. In his right hand, the driver was holding a communication device, which Officer Blair described as appearing to be a “smart phone”, being a rectangular-shaped cell phone with glass on the front of it and metal and plastic on the back.

[9] Officer Blair saw this driver looking down at this device in his right hand, which was tilted towards the face, at a 45-degree angle.

[10] Officer Blair waived at this driver with his left hand and observed the driver put the cell phone down on the empty passenger seat to his right. The glass screen was now facing the passenger seat.

[11] The driver rolled down his passenger window and Officer Blair had him pull over onto the north curb of Eglinton Ave. West just before Oakwood Ave. The driver crossed over lane 1 and stopped in lane 2.

[12] Officer Blair demanded his driver’s licence, ownership and insurance, which was produced. He was satisfied with the identity of the driver, and his documentation.

[13] Officer Blair testified that the traffic that day was moderate. He had a clear and unobstructed view, and the car’s windows were not tinted. The weather was clear, sunny and temperate.

[14] After he reviewed the driver’s documents, he issued him a notice under the *Provincial Offences Act*, R.S.O. 1990, c.P.33 (the “POA”) and served it on him personally.

[15] During cross-examination, Officer Blair indicated that the traffic in lane 1 was light in that lane, and moderate overall on Eglinton Ave. West at this time. He added, “it was not rush hour and not midnight.”

[16] When asked how he knew that the back of this device was made of plastic and metal when he could only see its face, he answered that Mr. Periti was correct, and was not certain if the back of the device was plastic and metal.

Testimony of Mr. Russo:

[17] Mr. Russo testified that on May 25, 2023, he was travelling westbound on Eglinton Ave. West, on the date and time in question, and he confirmed that he was stopped in the left-turn lane at the intersection identified by Officer Blair.

[18] He was unable to make his left-turn during the first light cycle and stated that he was there for “quite a while”.

[19] While he was waiting to turn left, he received a notification on his cell phone. He is a diabetic and explained that he has a sensor implanted in his arm. When he receives an alert, he needs to check his blood sugar immediately.

[20] Mr. Russo testified that this diabetic alert has a different sound than a normal ring-tone. He compared it to the noise made during an “Amber Alert”. He said that it “catches your attention”.

[21] He explained that when he hears this alert, he picks up the cell phone, opens the application (the “app”) and puts it to his arm. It runs on an app called “LibreLink”.

[22] This app tells him if he is “safe or not”. He stated that he already did not feel well when the alert went off.

[23] During a low blood-sugar event, he may experience confusion, feelings of being unwell or unsteady.

[24] Mr. Russo stated that he needed to know if his blood sugar was low. He takes Dexcom, which is a pill that quickly elevates his blood sugar levels. He testified that he picked up his phone when he heard the alert, and looked for the app. The police officer saw him and signalled to him. He put down his phone and had to wait for traffic to move to pull over to one side.

[25] When he was able to check, it was a low sugar event and he took a Dexcom pill.

[26] Mr. Russo was asked in chief what can happen if he ignores an alert. He said he could become confused or even pass out. This did not occur, but he typically acts very quickly. He has been a diabetic for 15 to 20 years. He has his doctor check his average sugar levels every few months. If it is high he needs to go to Emergency.

[27] He further explained that he has an Endocrinologist at Toronto General Hospital who modified his medication last year to manage his diabetes. He did this because he was having more low blood sugar events than before, but now it is quite well-controlled. He added later in his evidence that he takes his diabetes “seriously”.

[28] When asked in chief why it was not controlled before, he responded that he had put on weight, that his pancreas has weakened over time, and age can all be factors that impact swings in his blood sugar.

[29] Mr. Russo has had this device in his arm for one to two years. There are times when he also continues to prick his finger to check his blood sugar levels.

[30] Mr. Russo said that once the app on his phone is open, he only needs to touch the sensor and he is done. At that point, he receives a reading.

[31] Mr. Russo testified he does not normally pick up his phone while driving. He did so on this occasion for the safety of himself and others.

[32] During his cross-examination, Mr. Russo stated that he began driving at the age of 16 years, and that he is now 51 years old.

[33] At the time in question, he confirmed he was facing a red stop light. He reiterated that he felt unwell and reached for his phone to check the alert.

[34] Mr. Russo admitted that he did not offer this explanation to Officer Blair when he was pulled over, however. He attributed this lack of disclosure to the nature of their interaction, which he described as being “very brief and abrupt”. He provided the officer with the documents he sought, and had expected “more of a back and forth”.

[35] Mr. Russo testified that the officer had asked him if he had the phone in his hand, and that he replied, “yes”, and then he immediately left with the documents back to his squad car.

[36] When asked why he was driving if he felt unwell, Mr. Russo testified that he did not feel unwell when he start driving.

[37] When asked who produced this app, he responded Abbott Laboratories.

[38] The Prosecutor wanted to know how this app is calibrated. Mr. Periti asked the relevance of this question. I declined to permit this question, stating that I do not expect an ordinary person to know the calibration of an app.

[39] The Prosecutor asked Mr. Russo what he would do if his cell phone was “dead”? He asked if he has an alternative blood measuring device. He replied that he keeps his phone “always powered”. He added that he does carry a secondary device, which is in a bag on the floor. He admitted that he would have to search for it. Mr. Russo said that this secondary device is slower and takes more time. He relies on his cell phone and this app “99.9 percent of the time”.

[40] Mr. Russo said that he would have to pull over to use the secondary device.

[41] He was asked if he could not have waited for the light to turn green and pull over? He responded that he had been at a complete stop for a long while. His use of his cell phone and app would be “a second”. Later in cross-examination, he disagreed with the Prosecutor about pulling over before using the device, stating that he should not wait to use it.

[42] He was asked if putting his eyes on the phone creates a dangerous situation on the road? Mr. Russo responded that he would agree if the car was moving.

[43] Mr. Russo testified that he did not want to “get fuzzy”. He stated that he would not check it if travelling 100 km/hr but if he was at a stop, he would consider using it.

[44] When asked if this has happened before, Mr. Russo did not recall when it has occurred before, but said it has happened while at other events.

[45] He confirmed that when he obtained the reading it corresponded to how he felt.

[46] Mr. Russo testified that there were four to six cars ahead of him at the red light.

[47] He testified that he did not require EMS services in this situation.

[48] Once he received the reading, he took the Dexcom that he carries with him.

[49] In Re-examination, he was asked about the scenario raised during cross-examination, of what would happen if his cell phone was dead, and if the secondary device would provide an alert? He responded that the secondary device does not provide an alert.

FINAL SUBMISSIONS:

[51] Mr. Periti summarized the evidence, and argued that in this case, the use of the cell phone was not as a communications device as defined in the legislation.

[52] He admitted that he was not certain how to argue this case, because the signal from the medical device which communicates with the cell phone is not captured under the *Highway Traffic Act*.

[53] The legislation has an exemption for emergency use, and since this signal is akin to an Amber alert, he argued that it falls within the stated intent of that exemption.

[54] He further submitted that the use of this app with the cell phone falls within the defence of necessity. He asked that this matter be dismissed.

[55] Mr. Oberle also submitted that there is no dispute about the date, time and location of this matter, and that all parties agree that the defendant used his cell phone.

[56] He submitted, however, that the exemption under s. 78.1(5) does not include this usage, which would need to be stipulated within the exemption.

[57] He described the test for the defence of necessity flowing from criminal law jurisprudence as having three parts: (1) is there immediate peril (2) no legal alternative available to the defendant; and (3) a cost-benefit analysis, which means that the actions taken are proportional to the general public interest.

[58] Mr. Oberle submitted that the defence of necessity must fail, because Mr. Russo made a choice. He could have pulled over to use this device but he chose not to do so. The potential harm to others outweighed his immediate use of the device.

[59] His evidence that he would have to find his alternative device if his phone was not working flies in the face of the legal alternative branch of this test.

[60] Mr. Oberle asked for a conviction in this matter.

[61] In Reply, Mr. Periti argued that the defendant does not know if he is in an emergency situation until he receives his blood sugar reading.

[62] If Mr. Russo is forced to drive when his blood sugar drops, that can be perilous. He submitted that it would be worse to wait for the light to turn green, and move the vehicle, and take the risk he could faint.

[63] Since Mr. Russo was stuck in traffic at a red light, the vehicle was not moving, and so this eliminated the risk to others on the road.

ISSUES:

[64] Has the prosecutor established a *prima facie* case for the *actus reus* of this offence?

[65] Has the defendant established a defence based on either the exemption for emergencies under the legislation or the common law defence of necessity or both?

[66] Has this charge been proven beyond a reasonable doubt?

ANALYSIS:

[67] I have considered the credibility of each witness, as set out below.

Credibility of Officer Blair:

[68] In assessing the credibility of the officer, I am relying on the Supreme Court of Canada's direction in *R. v. Gagnon*, 2006 SCC 17 (CanLII), at para. 20:

Assessing credibility is not a science. It is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events...

[69] In *Faryna v. Chorny* (1951), 1951 CanLII 252 (BCCA), at page 357, O'Halloran, J.A., speaking for the majority of the British Columbia Court of Appeal described the approach to assessing credibility as follows:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but

he may be quite honestly mistaken. For a trial Judge to say “I believe him because I judge him to be telling the truth”, is to come to a conclusion on consideration of only half the problem. In truth it may be easily be self-direction of a dangerous kind. The trial judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial Judge with a divining insight into the hearts and minds of witnesses. And a Court of Appeal must be satisfied that the trial Judge’s finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can be tested in the particular case. [emphasis added]

[70] I find that the officer’s evidence is generally credible. He described the intersection in detail, and I accept that he had a clear and unobstructed view of Mr. Russo holding a cell phone while in the driver’s seat of a vehicle, while stopped in line to make a left turn at the intersection.

[71] During cross-examination, however, he admitted that he could not view the underside of the cell phone, which he had described in chief as being made of plastic and metal. This was a small embellishment, and of no consequence to this trial.

Credibility of Mr. Russo:

[72] In assessing Mr. Russo’s credibility, I am relying on the seminal judgment in *R. v. W. (D.)*, [1991] 1 S.C.R. 742, where Mr. Justice Cory held:

First, if you believe the evidence of the accused, obviously you must acquit.

Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[73] In *R. v. Kruk*, 2024 SCC 7 (CanLII), at paragraphs 59 to 62, Martin, J. provides excellent guidance, as follows:

[59] The overarching principle of the presumption of innocence, enshrined in s.11(d) of the *Charter*, and the correlative principle of the Crown’s burden of proof, must always govern the fact-finding process. The presumption of innocence- a “hallowed principle lying at the very heart of criminal law” (*R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103, at p. 119) – requires the Crown to bear the onus of proving all essential elements of the offence charged, beyond a reasonable doubt, before a conviction may be entered (*Osolin*). Closely related to the presumption of innocence is the accused’s right to silence as enshrined in s.11(c) of the *Charter*, which safeguards human dignity and privacy against processes or reasoning that would

compel an accused person to incriminate themselves with their own words (*R. v. Noble*, 1997 CanLII 388 (SCC), [1997] 1 S.C.R. 874, at paras. 69-78).

[60] Various protections relating to the assessment and weighing of evidence flow from the presumption of innocence and the right to silence. Notably, an accused's silence at trial may not be treated as evidence of guilt, as such reasoning would violate both principles (*Noble*, at para. 72). Likewise, it is improper to discount the credibility of accused persons on the basis that, because they face criminal penalties, they will say anything to protect themselves. Though considering the possibility that the accused may have a motive to lie will not necessarily offend this rule, courts should be wary of going further and drawing the "impermissible assumption" that they will do so in all cases (*R. v. Laboucan*, 2010 SCC 12, [2010] 1 S.C.R. 397, at para. 14). Such reasoning is premised on a supposition of guilt and therefore offends the presumption of innocence (para.12).

[61] The presumption of innocence also restricts how credibility is assessed in cases of conflicting testimony between defence and Crown witnesses. The analysis of testimony must never be treated as a contest of credibility, and triers of fact need not accept the defence's evidence or version of events in order to acquit (*R. v. Van*, 2009 SCC 22, [2009] 1 S.C.R. 716, at para. 23; *R. v. W.(D.)*, 1991 CanLII 93 (SCC), [1991] 1 S.C.R. 742, at p.757). The burden never shifts to the accused to establish their own innocence, and the onus always lies with the Crown to prove every essential element (*R. v. J.H.S.*, 2008 SCC 30, [2008] 2 S.C.R. 152, at para. 13).

[62] Reasonable doubt applies to credibility assessments such that if the evidence the Crown adduced does not rise to the level required of a criminal conviction, an accused cannot be found guilty simply because they are disbelieved (see *W.(D.)*). Some elements of the totality of the evidence may give rise to a reasonable doubt, even where much – or all – of the accused's evidence is disbelieved. Any aspect of the accepted evidence, or the absence of evidence, may ground a reasonable doubt. Moreover, where the trier of fact does not know whether to believe the accused's testimony, or does not know who to believe, they accused is entitled to an acquittal (*J.H.S.*, at paras. 9-13; *R. v. H. (C.W.)* (1991) CanLII 3956 (BC CA), 68 C.C.C. (3d) 146 (B.C.C.A.); *R. v. S. (W.D.)*, 1994 CanLII 76 (SCC), [1994] 3 S.C.R. 521, at p. 533; *R. v. Avetysan*, 2000 SCC 56, [2000] 2 S.C.R. 745, at para. 19). Finally, where the Crown relies on circumstantial evidence to establish guilt, the trier of fact may only convict if guilt is the only reasonable inference from the evidence (*R. v. Villaroman*, 2016 SCC 33, [2016] 1 S.C.R. 1000, at para. 30).

[74] Since *W.(D.)* has been decided, the Ontario Court of Appeal has interpreted *W.(D.)* principles in several important decisions, *R. v. J.J.R.D.*, [2006] O.J. No. 4749 (C.A.), leave to appeal refused, [2007] S.C.C.A. No. 69 and *R. v. C.L.*, 2020 ONCA 258, [2020] O.J. No. 1669.

[75] In *R. v. A.I.B.*, 2024 ONCA 557, at paragraph 12, it referred to paragraph 53 of *J.J.R.D.*, and stated:

...that an explanation for a trial judge's outright rejection of an accused's evidence was not limited to a rejection "based on a problem identified with the way the accused testified or the substance of the accused's evidence"; a rejection could also be based "on a considered and reasoned acceptance beyond a reasonable doubt of the truth of conflicting, credible evidence." In *C.L.*, this court accepted, at para. 30, that *J.J.R.D.* endorsed the proposition that a proper conviction could be arrived at even where exculpatory testimony had no obvious flaws if the Crown mounts a strong prosecution, but held that the "considered and reasoned acceptance" language of *J.J.R.D.* should not be included in a *W.(D.)* jury direction: see *R. v. C.G.*, 2021 ONCA 809, 158 O.R. (3d) 721, at paras. 53-54.

However, in *C.G.* this court pointed out, at para. 54, that *J.J.R.D.* does not provide "an answer to the failure of a trial judge to advert to exculpatory evidence that stands unchallenged" and that "[t]he failure to advert to such evidence, and to address it, means that the acceptance of the complainant's evidence is neither considered nor reasoned."

[76] Similarly, in *R. v. Ruthowsky*, 2024 ONCA 432 (CanLII) at para. 72, Copeland, J.A. urged caution and restraint in departing from the core principles of *W.(D.)*.

[77] I have considered Mr. Russo's evidence carefully.

[78] Mr. Russo's was also credible as a witness. His evidence was clear, and he was unshaken during cross-examination. His explanation of his struggles as a diabetic were compelling. Most of his testimony was in complete harmony with that of Officer Blair, with respect to the date, time, location, and most importantly, the fact that he was holding his cell phone in his hand while waiting in line to turn left into the intersection, facing a red light.

[79] During cross-examination, he admitted that he did not advise Officer Blair of his use of the LibreLink testing equipment as being the reason why he required his cell phone while driving. Nevertheless, I accept his testimony as true that his interaction with Officer Blair was very brief, and that they did not have a back-and-forth dialogue.

[80] I find that Mr. Russo falls within the first-prong of the test in *W.(D.)*.

[81] In *R. v. G.F.*, 2021 SCC 20 (CanLII), [2021] 1 S.C.R. 801, Karakatsanis, J. held at para. 82:

Credibility findings must also be assessed in light of the presumption of the correct application of the law, particularly regarding the relationship between reliability and credibility. The jurisprudence often stresses the distinction between reliability and credibility, equating reliability with the witness's ability to observe, recall and recount events accurately, and referring to credibility as the witness' sincerity or honesty...

[79] The hallmark of credibility is honesty, and I want to stress that I find that both witnesses were honest during this trial.

The Relevant Legislation:

[80] The *HTA* provides:

78.1 Hand-held devices prohibited

(1) Wireless communication devices – No person shall drive a motor vehicle on a highway while holding or using a hand-held wireless communication device or other prescribed device that is capable of receiving or transmitting telephone communications, electronic data, mail or text messages.

(4) Exceptions – Subsection (1) does not apply to,

(a) the driver of an ambulance, fire department vehicle or police department vehicle;

(b) any other prescribed person or class of persons;

(c) a person holding or using a device prescribed for the purpose of this subsection; or

(d) a person engaged in a prescribed activity or in prescribed conditions or circumstances.

(5) Same – Subsection (1) does not apply in respect of the use of a device to contact ambulance, police or fire department emergency services.

[81] Ontario Regulation 355/09 – *Display Screens and Hand-Held Devices* describes the classes of persons who, while engaged in their duties, may be exempt from s.78.1 of the *HTA*, and it also provides for exempt devices.

[82] Technology is making rapid advancements and the link between medical devices and cell phones is relatively new. It was not contemplated when this legislation came into force, since it did not exist. Nevertheless, I find that Mr. Russo does not fall within the enumerated exemptions listed under the *HTA* or O. Reg. 355/09.

[83] In *Mississauga (City) v. Kaddan*, 2021 ONCJ 530 (CanLII), on appeal, Justice Renwick considered whether an emergency physician responding to a page for service while on-call, fell within s.78.1(4)(a) of the *HTA*? His Honour determined, at para. 13 that while this doctor was trying to contact his work, he was not actually engaged in performing an emergency service. His Honour held at para. 19:

...I do not accept that a motorist calling an ER department to learn of patient backlogs, or to report their anticipated arrival time to the ER meets the spirit of the legislative intent in s. 78.1(5).

[84] I find that s.78.1 of the *HTA* is an absolute liability offence, see: *Libman on Regulatory Offences in Canada*, looseleaf, EarlsCourt Legal Press Inc., update 34-July 2023, at page 5-30, footnote #4, citing: *R. v. Chadwick* 2011 ONCJ 402; *R. v. Russo* 2013 ONCJ 438; *R. v. Grech-Vennare* 2013 ONCJ 278; *R. v. Peuker* 2016 ONCJ 864; *R. v. Srecko* 2016 ONCJ 499; *Contra: R. v. Petrovic* 2012 ONCJ 562; *R. v. Marrocco* 2012 ONCJ 535.

[85] Moreover, the Ontario Court of Appeal in *R. v. Kazemi*, 2013 ONCA 585 (CanLII) at para. 14 and its companion decision in *R. v. Pizzurro*, 2013 ONCA 584 (CanLII) at para. 13, signalled clearly that this legislation was meant to be a “complete prohibition” on having a cellphone in hand while driving as a matter of public safety to prevent distracted driving.

The Defence of Necessity:

Does it Apply to Regulatory Offences?

[86] The defence of necessity may negate the *actus reus* of an offence for an absolute liability offence, where the element of voluntariness is at issue, see: *Libman on Regulatory Offences in Canada*, at page 5-35. Also see: *R. v. Hale* [1995] OJ 735 (PD).

[87] The Ontario Court of Appeal has confirmed that necessity may be raised as a defence to an offence under a provincial statute, see: *R. v. Brennan* 1989 CanLII 7169 (ON CA); and *R. v. Kurtzman* (1991), 4 O.R. (3d) 417 (CA).

[88] The defence of necessity succeeded in *R. v. Breau* (1959) 124 CCC 84 (MB QB), but failed in *R. v. Vickers* (1959) 127 CC 315 (NB QB), which both involved shooting a charging moose.

[89] In short, the defence of necessity does apply to regulatory offences as well as criminal offences.

The Elements of the Defence of Necessity:

[90] In order to succeed, the following three elements must be established:

- (1) the defendant was in imminent peril or danger;
- (2) the defendant had no reasonable legal alternative to the course of action taken;
and
- (3) there must be proportionality between the harm inflicted and the harm avoided.

[91] Mr. Justice Dickson described the defence of necessity in *Perka v. The Queen*, 1984 CanLII 23 (SCC), [1984] 2 S.C.R. 232 at p. 248 as follows:

It rests on a realistic assessment of human weakness, recognizing that a liberal and humane criminal law cannot hold people to the strict obedience of laws in emergency situations where normal human instincts, whether of self-preservation or of altruism, overwhelmingly impel disobedience. The objectivity of the criminal

law is preserved; such acts are still wrongful, but in the circumstances they are excusable. Praise is indeed not bestowed, but pardon is...

[92] Did Mr. Russo find himself in a situation of “clear and imminent peril”, as per *Morgentaler v. The Queen*, 1975 CanLII 8 (SCC), [1976] 1 S.C.R. 616 at p. 678?

[93] In his testimony, Mr. Russo described the time he had spent in a line to turn left, testifying that the light had turned red once before, and that he remained in line. I accept the testimony of Officer Blair that Mr. Russo was four vehicles back in line. It was uncertain if he would be able to turn left when the light turned green, and his diabetic monitoring device inserted in his arm alerted him to an urgent medical event through his cell phone. Coincident with this alert, he was feeling unwell, although he had felt well when he began driving that day.

[94] I find that this was a situation of clear and imminent peril to his well-being. Mr. Russo knew that he needed to see this blood sugar reading immediately and determine his next course of action, which included taking medication. The situation in *Kaddan* was not one of clear and imminent peril to the defendant or anyone else for that matter, since other doctors are also available in the Emergency Room of a hospital and should be distinguished.

[95] In the alternative, I note that in *R. v. Ruzic*, 2001 SCC 24 (CanLII) [2001] 1 SCR 687 at para. 86, that there is a substantial consensus in Canada, England and Australia that the strict criterion of immediacy is no longer an accepted component of the defence, but rather, a requirement that the threat be “imminent” has been interpreted and applied in a more flexible manner. Certainly, the threat to Mr. Russo’s well-being was imminent and he needed to take urgent action to deal with it.

[95] The second requirement for necessity is that there must be no reasonable alternative to disobeying the law. I find that Mr. Russo also meets this part of the test.

[96] It would be dangerous to his health to require him to wait to make his turn, then find an opportunity to leave the road, in order to obtain this reading, since he could become dizzy, confused or otherwise incapacitated at the wheel of his car during this period of delay. I take judicial notice of the fact that diabetics in distress require urgent care, that normally stops short of needing an ambulance called. It is unconscionable to require a diabetic driver to become unwell to the point of calling 911 in order to avail himself of this defence.

[97] The third part of this test is the need for proportionality between the harm inflicted and the harm avoided. The harm inflicted must not be disproportionate to the harm the defendant sought to avoid, as per *Perka*, at p. 252.

[98] The harm that can result from distracted driving is serious, both in magnitude and frequency, which is why the Legislature included this provision in the *HTA*.

[99] Nevertheless, the harm avoided by having a diabetic driver tend to his urgent medical condition to avoid dizziness, disorientation, or even unconsciousness while at the wheel of a car surmounts the risk that must be taken to avoid it. In this regard, I am considering

the safety of the other drivers on the road, any pedestrians or cyclists as well as the safety of Mr. Russo. This is particularly true since Mr. Russo was stopped four cars back waiting to turn at an intersection facing a red light.

[100] I am satisfied that there is an “air of reality” to each of the three requirements of this test, see: *R. v. Latimer*, 2001 SCC 1 (CanLII), [2001] 1 S.C.R. 3 at para. 35-36, citing *R. v. Osolin*, 1993 CanLII 54 (SCC), [1993] 4 S.C.R. 595 at p. 676.

[101] In *R. v. Cinous*, 2002 SCC 29 (CanLII), [2002] 2 SCR 3 at para. 49, the majority held that the correct approach to the air of reality test was well-established. It held, “The test is whether there is evidence on the record upon which a properly instructed jury acting reasonably could acquit.”

[102] I find that Mr. Russo has successfully made out the defence of necessity.

ORDER:

[103] The matter is dismissed.

Issued in Toronto, this 24th day of September, 2024.

Mary Ross Hendriks