CITATION: R. v. Raham, 2010 ONCA 206
DATE: 20100318
DOCKET: C51094

COURT OF APPEAL FOR ONTARIO

Doherty, Feldman and Blair JJ.A.

BETWEEN

Her Majesty the Queen

Appellant

and

Jane Raham

Respondent

Robert Gattrell and S. Zachary Green, for the appellant

Paul Burstein, *amicus curiae*

Heard: January 20, 2010

Pursuant to leave to appeal granted by Lang J.A. on October 2, 2009, on appeal from the order of Justice Geoffrey Griffin of the Ontario Court of Justice dated September 4, 2009, with reasons reported at 2009 ONCJ 403, allowing an appeal from a conviction by His Worship Justice of the Peace Jack Chiang, dated August 17, 2008, and entering an acquittal.

Doherty J.A.:

I. OVERVIEW

[1] The respondent was clocked at 131 km per hour in an 80 km per hour zone. The police officer charged her with an offence under s. 172(1) of the *Highway Traffic Act*, R.S.O. 1990, c. H.8. That offence, commonly referred to as stunt driving or racing is punishable by a fine, a term of imprisonment or both.

[2] The respondent argued at trial that the offence with which she was charged was an absolute liability offence and that, as imprisonment was a possible punishment, the section violated her constitutional rights under s. 7 of the *Charter*. At trial, the Justice of the Peace interpreted the offence as one of strict liability, rejected the constitutional argument and convicted the respondent. On appeal, Justice G.J. Griffin of the Ontario Court of Justice held that the offence charged was an absolute liability offence. He went on to hold that, as the offence was punishable by imprisonment, it was contrary to s. 7 of the *Charter* and unconstitutional. He acquitted the respondent.

[3] This court granted leave to appeal to determine the constitutionality of the charge as laid in this case.[1] The respondent did not take part in the appeal. However, her

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[1] The constitutionality of this charge has been considered in a number of cases: see *R. v. Drutz*, 2009 ONCJ 537 (unconstitutional); *R. v. Van Der Merwe*, 2009 ONCJ 386 (unconstitutional); *R. v. Raham*, 2009 ONCJ 403 (unconstitutional); *R. v. Tavukoglu*, 2009 ONCJ 260 (unconstitutional), rev'd 2009 ONCJ 606 (constitutional); *R. v. Aftab* (2009), 189 C.R.R. (2d) 197 (Ont. Ct. J.) (constitutional); *R. v. Sgotto*, 2009 ONCJ 48 (constitutional); *R. v. Brown*, 2009 ONCJ 6 (constitutional); *R. v. Venckus*, [2009] O.J. No. 1307 (Ct. J.) (constitutional); *R. v. Bond*, [2008] O.J. No. 5582 (Ct. J.) (constitutional); *R. v. Mongeon* (2008), 78 M.V.R. (5th) 123 (Ont. Ct. J.) (constitutional); *R. v. Araujo*, 2008 ONCJ 507 (constitutional); *R. v. Piette* (2008), 77 M.V.R. (5th) 83 (Ont. Ct. J.) (constitutional); *R. v. Vanioukevitch*, 2009 ONCJ 185 (constitutional); see also *R. v. Luo*, 2008 ONCJ 478 (the court

position was fully and effectively advanced by Mr. Burstein, who appeared as *amicus*. The court is indebted to Mr. Burstein for his submissions.

II. THE FACTS

[4] On April 29, 2008, the respondent was driving westbound on Highway 7, a two-lane highway. The speed limit was 80 km per hour. The respondent drove up behind a large tractor trailer that was moving at about 90 km per hour. The respondent pulled out to pass the truck and while in the eastbound lane was recorded on radar travelling at 131 km per hour. She testified that as she attempted to pass the tractor trailer, it seemed longer than it had when she pulled out into the passing lane. The respondent also testified that the truck seemed to pick up speed as she attempted to pass it. The respondent indicated that she became afraid, and sped up to get around the truck and back into the westbound lane.

[5] The police officer who was operating the radar from a police car behind the respondent's car testified that there was nothing unsafe or remarkable about her driving apart from the speed. He clocked the respondent at between 129 km per hour and 131 km per hour as she passed the truck. The respondent slowed to about 110 km per hour after she had passed the truck.

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held that the charge violated s. 7 of the *Charter* but that it was saved by s. 1); *R. v. Goonoo*, 2009 ONCJ 248 (the court did not consider the constitutionality of the charge, but followed other judgments holding that it is a strict liability offence).

[6] The officer could have charged the respondent with speeding. Instead, based on the single radar reading of 131 km per hour, which was 51 km per hour over the speed limit, the officer elected to charge the respondent with stunt driving. Had the respondent been clocked at 2 km per hour less, as she was seconds before, the charge would not have been available.

III. THE LEGISLATION

[7] The present s. 172 of the *Highway Traffic Act* came into force on June 4, 2007 as part of the *Safer Roads for a Safer Ontario Act, 2007*, S.O. 2007, c. 13. Section 172, and its immediate predecessor are set out below:

Section 172, R.S.O. 1990, c. H.8, as am. by, S.O. 2007, c. 13, s. 21	**Section 172, R.S.O. 1990, c. H.8, as rep. by, S.O. 2007, c. 13, s. 21**
(1) No person shall drive a motor vehicle on a highway in a race or contest, while performing a stunt or on a bet or wager. (2) Every person who contravenes subsection (1) is guilty of an offence and on conviction is liable to a fine of not less than $2,000 and not more than $10,000 or to imprisonment for a term of not more than six months, or to both, and in addition his or her driver's licence may be suspended, (a) on a first conviction under this section, for not more than two years; or (b) on a subsequent conviction under this section, for not more than 10 years.	(1) No person shall drive a motor vehicle on a highway in a race or on a bet or wager. (2) Every person who contravenes this section is guilty of an offence and on conviction is liable to a fine of not less than $200 and not more than $1,000 or to imprisonment for a term of not more than six months, or to both, and in addition his or her licence may be suspended for a period of not more than two years.

[8] The *Highway Traffic Act* does not define "race", "contest" or "stunt", but instead provides in s. 172(20)(c) that those words may be defined by regulation. Ontario Regulation 455/07 (the "Regulation") defines "race" and "contest" in s. 2 and "stunt" in s. 3. The definitions are not exhaustive. Certain exceptions to the definition of "race" and "contest" are found in s. 4. Sections 2, 3 and 4 of the Regulation are set out in full as Appendix "A" to these reasons.

[9] The respondent was charged under the definition of stunt driving found in para. 7 of s. 3. That provision defines stunt driving as including "[d]riving a motor vehicle at a rate of speed that is 50 kilometres per hour or more over the speed limit."

[10] Section 172(2) provides that persons who contravene s. 172(1) are liable to a fine of not less than $2,000 and not more than $10,000. Offenders are also liable to a term of imprisonment of up to six months or to both a fine and a term of imprisonment. In addition to these sanctions, the driver's licence may be suspended for up to two years on a first conviction and for up to ten year on a subsequent conviction

[11] The penalties imposed upon conviction for an offence under s. 172 are, however, only a part of the sanction scheme created by that section. A person charged under s. 172 is required to surrender his or her licence to the police officer at the scene and is subject to an automatic seven-day administrative licence suspension. The officer shall also impound the driver's vehicle for seven days at the cost of and risk to its owner: see ss.

172(5)-(8). The respondent was required to surrender her licence at the scene and her vehicle was impounded. The validity of these sanctions is not in issue in this case.

IV. THE PROPER INTERPRETATION OF SECTION 172

[12] Before turning to the constitutional argument, I will address a statutory interpretation argument put forward by Mr. Burstein. He submits that s. 172 does not create the stand-alone offence of stunt driving, and that, consequently, the information charging the respondent with "stunt driving by speeding" does not allege an offence known to law. Counsel submits that properly read s. 172 creates two offences:

- Driving a motor vehicle on a highway in a race or contest while performing a stunt; and
- Driving a motor vehicle on a highway in a race or contest on a bet or wager.

[13] On this reading of the section, stunt driving, as defined in the Regulation by, for example, driving more than 50 km per hour over the speed limit, must occur during a race or contest before driving at that speed can constitute an offence under s. 172. Mr. Burstein observes that "race" and "contest" are defined in a non-exhaustive manner in s. 2 of the Regulation. Those definitions expand the normal meaning of the words "race" or "contest" to include activities that involve only one vehicle and one driver. Consequently, driving 50 km per hour or more above the posted speed limit (stunt driving) could constitute an offence under s. 172, even if it did not occur in what would

commonly be understood as a race or contest so long as it occurred in the course of a "race" or "contest" as those words are defined in s. 2 of the Regulation.

[14] Mr. Burstein explained how the prohibition created by s. 172, as he interprets it, could be applied in a fact situation like that presented in this case. The Crown could have charged the respondent with driving a motor vehicle on a highway in a race or contest while performing a stunt. The Crown could rely on the definition of stunt in s. 3(7) of the Regulation for one component of the offence – a stunt. The Crown could also rely on the definition of "race and contest" set out in para. 3 of s. 2(1) of the Regulation. That paragraph includes the following definition of race:

> Driving a motor vehicle without due care and attention … by …
>
> driving a motor vehicle at a rate of speed that is a marked departure from the lawful rate of speed….

[15] Mr. Burstein argues that, on a proper interpretation of s. 172, the respondent could only have been convicted had the Crown been able to prove not only that she was driving 50 km per hour or more above the speed limit, but also that her driving constituted a "marked departure from the lawful rate of speed". He adds that the charge as worded in the information would have to be amended to add the reference to race or contest.

[16] Mr. Burstein makes the further point, correctly I think, that on his interpretation the potential constitutional problem disappears. He submits that the various definitions

of race found in the Regulation all include elements that would place an offence requiring proof of those elements into the strict liability category. On his interpretation, the legislation does not present the possibility of a constitutionally unacceptable mix of absolute liability and potential imprisonment.

[17] The Crown interprets s. 172 as creating three offences:

- Driving a motor vehicle on a highway in a race or contest;
- Driving a motor vehicle on a highway while performing a stunt; and
- Driving a motor vehicle on a highway on a bet or wager.

[18] Crown counsel submits that those responsible for putting forward the legislation containing the amendments to s. 172 in 2007 identified both racing and stunt driving as presenting pressing and serious danger to public safety on the highways. Crown counsel refers to several comments in Hansard both on second and third readings of the legislation that refer to both racing and stunt driving: see Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, No. 160 (19 April 2007), at p. 8202 (Hon. Donna H. Cansfield); Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, No. 161A (23 April 2007), at pp. 8243-44 (Linda Jeffrey); Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, No. 173A (14 May 2007), at pp. 8821-22 (Hon. Donna H. Cansfield).

[19] *Amicus* makes two arguments in response. First, he submits that a review of Hansard demonstrates that street racing was the real concern and that almost all of the references to stunt driving were in combination with concerns about racing. Second, counsel contends that the Crown's interpretation of s. 172 leads to an absurdity: *amicus* observes that on the Crown's interpretation driving a motor vehicle on a highway on a bet or wager is a stand alone offence under s. 172. *Amicus* suggests the example of a person who bets another person that he or she can drive to a certain location without disobeying any rule of the road. On the Crown's interpretation of s. 172, if that person takes the bet and drives in accordance with all the rules of the road, he or she has committed an offence and is liable to a large fine, a potential jail sentence, a suspension of his or her driver's licence, an immediate administrative suspension of that licence and the immediate impoundment of their vehicle. *Amicus* argues that this absurd result is avoided if, for there to be an offence, the bet or wager must occur in the context of a race or a contest.

[20] The interpretation of s. 172 put forward by *amicus* was not advanced at trial or on the first level of appeal. It has been accepted by at least one trial judge: see *R. v. Luo*, 2008 ONCJ 478, at paras. 45-46. There is arguably an absurdity flowing from the Crown's interpretation, if the words "bet" and "wager" are given their normal everyday meaning. I would not, however, be prepared to accept that the absurdity put forward actually exists without fuller argument on the meaning of "wager" and "bet". I am also

not sure that a prohibition against any driving that is motivated by a bet or wager is necessarily absurd. Making decisions while driving based on a prior bet or wager rather than based on the circumstances encountered by the driver may well present a danger. In any event, despite the persuasive arguments by Mr. Burstein, I accept the Crown's interpretation of s. 172. I do so for three reasons.

[21] First, it is beyond doubt that when the Legislature unanimously amended s. 172 of the *Highway Traffic Act* as part of the *Safer Roads for a Safer Ontario Act, 2007*, it intended to broaden and toughen the prohibition found in the former s. 172. That section made no reference to stunt driving. The inclusion of stunt driving along with the previously prohibited driving activities expanded the reach of the section to catch types of inherently dangerous driving activity that were not encompassed within the concept of racing, even under the expanded definition in the Regulation. For example, para. 3(1) of the Regulation defines stunt to include what are commonly known as "wheelies". It is certainly arguable that "wheelies" are inherently dangerous. However, on the appellant's interpretation, they are prohibited only if done in the context of a race or contest.

[22] The interpretation favoured by *amicus* would defeat the clear intention of the Legislature by shrinking the scope of the prohibition in s. 172. Under the former provision, all racing was prohibited. If *amicus* is correct, the new provision only prohibits racing that involves stunt driving or betting or wagering. An interpretation that narrows the prohibition would fly in the face of clear legislative intent to the contrary.

[23] I also accept the Crown's submission that from a grammatical point of view, the insertion of the comma after the word "contest" in s. 172 supports the Crown's interpretation. The placement of the comma suggests that the three prepositional phrases, "in a race or contest", "while performing a stunt" or "on a bet or wager", all modify the verb "drive". The section effectively sets out a list of three ways in which the offensive driving may be committed: see *R. v. Brown*, 2009 ONCJ 6, at paras. 27-28; *R. v. Araujo*, 2008 ONCJ 507.

[24] While the two arguments advanced by the Crown are persuasive, the interpretative debate is put to rest in favour of the Crown by reference to the French version of s. 172:

> Nul ne doit conduire un véhicule automobile sur une voie publique pour y disputer une course ou un concours ou y exécuter des manoeuvres périlleuses ou pour tenir un pari.

[25] The French version makes it clear that s. 172 sets out three ways in which the offence may be committed, one of which is stunt driving. Stunt driving is defined in s. 3 of the Regulation and includes driving at 50 km per hour or more over the speed limit. The charge as laid against the respondent properly alleged a violation of s. 172.[2]

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[2] The French and English versions of the legislation are equally authoritative: the *Legislation Act, 2006*, S.O. 2006, c. 21, Sch. F, s. 65.

IV: THE CONSTITUTUIONALITY OF SECTION 172

[26] Counsel agree that if the offence as charged is one of absolute liability, it is unconstitutional as it is potentially punishable by a term of imprisonment. They also agree that if the offence is one of strict liability, it is constitutional: see *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486.

[27] In addressing the constitutional question, one must focus on the specific offence alleged. The various definitions set out in the Regulation create many different ways in which the offence under s. 172 can be committed. The different language used in the various definitions of "race" and "contest" and "stunt" could mean that some of the ways in which the offence created by s. 172 may be committed are properly characterized as absolute liability offences while others are properly characterized as strict liability offences. The respondent is alleged to have violated s. 172 by driving at 50 km per hour or more over the speed limit. By virtue of the definition in s. 3(7) of the Regulation, driving at that rate of speed constitutes driving while performing a stunt. The information charged that the respondent unlawfully:

> [D]id drive a motor vehicle on a highway while performing a stunt, to wit: driving at a rate of speed that was 50 kilometres per hour or more over the posted speed limit….

[28] The conduct component (*actus reus*) of the offence under s. 172 as charged against the respondent under s. 3(7) of the Regulation consists of driving a motor vehicle on a

highway at 50 km per hour or more over the speed limit. There is no additional conduct requirement. This same conduct also constitutes the offence of speeding contrary to s. 128 of the *Highway Traffic Act*. The offence committed by the respondent is, in essence, a speeding offence, no matter what the Legislature may choose to call it.

[29] This court and other provincial appellate courts have held that the offence of speeding *simpliciter*, as prohibited for example by s. 128 of the *Highway Traffic Act*, is an absolute liability offence: see *R. v. Hickey* (1976), 12 O.R. (2d) 578 (Div. Ct.), rev'd (1976), 13 O.R. (2d) 228 (C.A.); *London (City) v. Polewsky* (2005), 202 C.C.C. (3d) 257 (Ont. C.A.), leave to appeal to S.C.C. refused, [2006] 1 S.C.R. xiii; *R. v. Harper* (1986), 53 C.R. (3d) 185 (B.C.C.A.); *R. v. Lemieux* (1978), 41 C.C.C. (2d) 33 (Q.C.A.); *R. v. Naugler* (1981), 49 N.S.R. (2d) 677 (C.A.). Not surprisingly, the Crown does not ask the court to reconsider those authorities.

[30] The Crown submits, however, that there is nothing inherent in the act of speeding that dictates that all speed-based offences must be characterized as offences of absolute liability. The Crown submits that, as was recognized in the dissenting judgment of Estey C.J.H.C. in the Divisional Court in *R. v. Hickey*, at pp. 582-84, the act of speeding can involve a wide variety of circumstances, some significantly more dangerous to the public than others. The Crown contends that the Legislature may choose to address various forms of "aggravated" speeding by creating discrete offences which can coexist with the generic offence of speeding. The Crown further contends that where the Legislature

chooses to create specific offences targeting some form of "aggravated" speeding, the proper characterization of that offence as absolute, strict or perhaps even criminal in the true sense, must be determined using the analysis first set down in *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299.

[31] I accept the thrust of the Crown's submissions. The nature of the prohibited conduct, in this case speeding, while certainly germane to the determination of the proper characterization of the offence created, cannot be determinative. To take an extreme example, if the Legislature were to create an offence of "wilfully and intentionally driving at over 50 km per hour above the speed limit", I do not think that it could be argued that despite the *mens rea* language used by the Legislature, the offence would be one of absolute liability because it was a speeding based offence. The proper categorization of speed-based offences as absolute, strict, or full *mens rea* offences will depend on the outcome of the *Sault Ste. Marie* analysis.

[32] In *Sault Ste. Marie*, at pp. 1325-26, Dickson J. recognized three categories of offences, one requiring *mens rea*, consisting of a positive state of mind, a second requiring proof of the doing of a prohibited act and leaving it open to the accused to avoid liability by showing he took all reasonable care to avoid committing the prohibited act (strict liability), and a third, offences of absolute liability where a conviction follows proof of the commission of the prohibited act. Dickson J. went on at p. 1326 to declare:

> *Public welfare offences would* prima facie *be in the second category* [*strict liability*]. They are not subject to the presumption of full *mens rea*. An offence of this type would fall in the first category only if such words as "wilfully," "with intent," "knowingly," or "intentionally" are contained in the statutory provision creating the offence. On the other hand, the principle that punishment should in general not be inflicted on those without fault applies. Offences of absolute liability would be those in respect of which the Legislature has made it clear that guilt would follow proof merely of the proscribed act. *The overall regulatory pattern adopted by the Legislature, the subject matter of the legislation, the importance of the penalty, and the precision of the language used will be primary considerations in determining whether the offence falls into the third category* [*absolute liability*]. [Emphasis added.]

[33] The *Highway Traffic Act* is public welfare legislation designed to protect those who use the roads of the province. The Act, and in particular Part X, "Rules of the Road", creates a wide variety of offences, including the offence in s. 172. Those offences, taken together, are designed to regulate and control conduct on the roads. The offences are properly regarded as public welfare offences: see *R. v. Kanda* (2008), 88 O.R. (3d) 732 (C.A.); *R. v. Kurtzman* (1991), 4 O.R. (3d) 417 (C.A.). On the authority of *Sault Ste. Marie*, these offences, including s. 172, are *prima facie* strict liability offences.

[34] The analytical template described in *Sault Ste. Marie* sets out four "primary considerations" to be used when determining the proper categorization of an offence:

- the overall regulatory pattern of which the offence is a part;
- the subject matter of the legislation;

- the importance of the penalty; and
- the precision of the language used.

[35] The appeal judge performed the *Sault Ste. Marie* analysis. I agree with most of his analysis. The appeal judge concluded that the overall regulatory pattern of the *Highway Traffic Act* did not assist in classifying the offence as either strict or absolute liability. I agree: see *Kanda*, at paras. 20-26. The appeal judge next concluded that the subject matter of the offence – speeding – suggested a classification as an absolute liability offence. I agree.

[36] The appeal judge next turned to the significance of the penalty provision that provided for potential incarceration. He held that the risk of incarceration supported a classification of the offence as one of strict liability.

[37] I agree that within the *Sault Ste. Marie* analysis, the availability of incarceration suggests strict liability. However, in the post-*Charter* era, the potential for incarceration is much more than simply one of the factors to be considered in categorizing an offence. An absolute liability offence that provides for incarceration as a potential penalty is unconstitutional and of no force and effect, subject to an argument based on s. 1 of the *Charter*. Courts, when interpreting legislation, will presume that the Legislature acted within the limits of its constitutional powers and not in violation of the *Charter*: *R. v. Bernshaw*, [1995] 1 S.C.R. 254, at para. 29; *R. v. Rube*, [1992] 3 S.C.R. 159, at p. 160; *R.*

v. Nickel City Transport (Sudbury) Ltd. (1993), 14 O.R. (3d) 115 (C.A.), at p. 138, Arbour J.A. This presumption does not entitle a court to rewrite legislation to avoid a finding of unconstitutionality. It does dictate, however, that if legislation can be reasonably interpreted in a manner that preserves its constitutionality, that interpretation must be preferred over one which would render the legislation unconstitutional. Because of the presumption of constitutionality, it will take very clear language to create an absolute liability offence that is potentially punishable by incarceration.

[38] In this case, the presumption in favour of a constitutional interpretation means that if the offence charged against the respondent can reasonably be interpreted as a strict liability offence, it must be so interpreted even if it could also reasonably be interpreted as an absolute liability offence.

[39] The appeal judge also addressed the fourth and final *Sault Ste. Marie* factor – the precision of the language used. He observed that some parts of the Regulation used words suggesting an absolute liability classification and others used language inconsistent with such a classification. He ultimately determined that the language used throughout the Regulation did not point clearly in the direction of either absolute or strict liability. He described this factor as "neutral" in the *Sault Ste. Marie* analysis. I agree that the language does not clearly point to a categorization of the offence as either strict or absolute liability.

[40] I think it is fair to say that had the appeal judge based his conclusion exclusively on the factors identified in *Sault Ste. Marie*, he would have decided that s. 3(7) of the Regulation created a strict liability offence. However, the appeal judge went on to consider whether, as a practical matter, a due diligence defence could be available to the charge. In examining the practical availability of a due diligence defence as a component of the classification exercise, the appeal judge relied on *R. v. Pontes*, [1995] 3 S.C.R. 44, at paras. 27-28, where Cory J. observed:

> There are, I believe, two methods of determining whether an offence is one of absolute liability. First, as suggested in *Sault Ste. Marie*, *supra*, regard may be had to the overall regulatory pattern adopted by the legislature, the subject matter of the legislation, the importance of the penalty and the precision of the language used.
>
> Second, the availability of a due diligence defence must be considered. An absolute offence denies an accused the opportunity to put forward a defence of due diligence. Conversely, in order for an offence to be one of strict liability, the defence of due diligence must be available. [Emphasis in original.]

[41] Cory J. reiterated the point at para. 32:

> By definition, a strict liability offence requires that the defence of due diligence be available. Put another way, if the offence does not permit a due diligence defence, then it cannot be a strict liability offence.

[42] In considering whether a due diligence offence could realistically be available to a charge of stunt driving by speeding at 50 km per hour or more over the speed limit, the

appeal judge proceeded on the basis that the defence could not be available to a person who knowingly or negligently drove over the speed limit. The appeal judge put it this way, at para. 40:

> It is simply not realistic to say that a person could reasonably advance a defence that they did not know they were speeding when they would have to have been travelling 50 percent above the speed limit. *Accordingly, the person would have to admit speeding, just not at the extreme level of 50 percent over the limit, which would defeat a due diligence defence. The defence would fail because it is impossible to reconcile an admission of speeding with the idea of taking all reasonable steps to avoid speeding at a rate of speed 50 kilometres per hour over the speed limit.* The notion that a broken or malfunctioning speedometer could give rise to a mistaken set of facts is simply untenable. When charged under s. 3(7), the person would have to be speeding 50 percent or more over the posted speed limit. The point is that at a speed 50 percent or more over the posted speed limit, the person would have to have some knowledge that they were speeding. [Emphasis added.]

[43] Mr. Gattrell, for the Crown, submits that the appeal judge erred in law in relying on the approach articulated in *Pontes* as a second method, distinct from the *Sault Ste. Marie* analysis, for distinguishing between absolute and strict liability offences. He relies on the subsequent decision in *Lévis (City) v. Tétreault; Lévis (City) v. 2629-4470 Québec Inc.*, [2006] 1 S.C.R. 420, at para. 19. I accept Mr. Gattrell's submission. In *Lévis*, the court made it clear that the analysis set down in *Sault Ste. Marie* was *the* approach to be used in categorizing an offence as one of strict or absolute liability. LeBel J., for the

court, described the analysis in *Pontes* as an unhelpful refinement on the *Sault Ste. Marie* analysis.

[44] I, of course, accept what was said about *Pontes* in *Lévis*. In my view, however, that does not preclude a consideration of whether the language used to create the offence can reasonably admit of a due diligence defence. I think that this consideration is simply one way of examining "the precision of the language used", one of the four factors identified in *Sault Ste. Marie*. Language that expressly, or by clear implication, excludes the operation of the due diligence defence will necessarily compel the conclusion that the offence is one of absolute liability: see *Kanda*, at para. 40.

[45] Consequently, while I agree with Crown counsel that the appeal judge should not have treated the potential availability of a due diligence defence as a freestanding method of categorizing the offence in question, I think the appeal judge was right to examine the potential availability of a due diligence defence as part of a consideration of the language used to create the offence. Viewed in this way, that examination is part and parcel of the *Sault Ste. Marie* analysis.

[46] I do, however, disagree with the appeal judge's finding that stunt driving as defined in s. 3(7) of the Regulation could not possibly admit of a due diligence defence. The appeal judge reached this conclusion because he believed that an accused could avail him- or herself of a due diligence defence only if the accused believed he or she was not

travelling over the speed limit at all. With respect to the careful reasons of the appeal judge, I agree with the Crown (both at trial and in this court) that the due diligence defence is not limited to persons who believed they were not speeding.

[47] A due diligence defence to a strict liability charge amounts to a claim that the defendant took all reasonable care to avoid committing the offence with which he or she is charged. Where the accused contends that he or she operated under a reasonable misapprehension of the relevant facts, the due diligence defence takes the form of a reasonable mistake of fact claim. As explained in *Sault Ste. Marie*, at p. 1326:

> [T]he doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances.

[48] The due diligence defence relates to the doing of the prohibited act with which the defendant is charged and not to the defendant's conduct in a larger sense. The defendant must show he took reasonable steps to avoid committing the offence charged, not that he or she was acting lawfully in a broader sense: see John Swaigen, *Regulatory Offences in Canada: Liability & Defences* (Toronto: Carswell, 1992), at pp. 98-100. The point is well made in *Kurtzman*, at para. 37: "The due diligence defence must relate to the commission of the prohibited act, *not* some broader notion of acting reasonably" (emphasis in original). Just as a due diligence defence is not made out by acting generally in a reasonable way, it is not necessarily lost by virtue of actions surrounding

the prohibited act, legal or illegal, unless those actions establish that the defendant, in committing the prohibited act, failed to take all reasonable care.

[49] I do not think that it can be said that driving over the speed limit, regardless of how much over the speed limit, will necessarily preclude a finding that an individual took all reasonable steps to avoid driving at 50 km per hour or more over the reasonable limit. For example, a driver, acting reasonably, may be proceeding somewhat over the speed limit in the passing lane of a multi-lane highway. That driver may find that he has no reasonable choice but to accelerate in order to avoid being hit by a vehicle that is approaching from behind. If that driver were to go more than 50 km per hour over the speed limit for the two or three seconds needed to get around traffic so that he could pull out of the passing lane and out of the way of the oncoming vehicle, I think a trier of fact could conclude that the driver was exercising all reasonable care to avoid driving at 50 km per hour or more over the speed limit. Similarly, a driver who testified that he or she relied on a speedometer, which indicated a rate of speed well below 50 km per hour over the speed limit, might succeed on a due diligence defence if there was evidence that the speedometer, unknown to the driver, was malfunctioning.

[50] In outlining the above scenarios, I do not suggest that the due diligence defence is limited to those or similar scenarios. I also do not imply that the due diligence defence will be readily available to this charge. As MacPherson J.A. observed in *Kanda*, at para. 31, the use of strict liability is "a serious commitment to the enforcement of the law". I

would add that even where a due diligence defence is available to a charge of stunt driving contrary to s. 3(7) of the Regulation, a conviction for speeding will often be imposed. Section 55 of the *Provincial Offences Act*, R.S.O. 1990, c. P33, would permit, in most situations, a conviction on the lesser but included offence of speeding contrary to s. 128 of the *Highway Traffic Act*: see *R. v. Benson*, 2009 ONCJ 566, at paras. 29-34.

[51] In summary, I would interpret the offence of stunt driving by speeding as defined in s. 3(7) of the Regulation as creating a strict liability offence. It is true that the prohibited conduct is identical to the conduct prohibited by the offence of speeding created by s. 128. I see nothing illogical in treating one as a strict liability offence and the other as an absolute liability offence. The stunt driving provision provides for the potential of incarceration, the speeding provision does not. This distinction is constitutionally significant. The Legislature cannot, absent reliance on s. 1 of the *Charter*, imprison without fault. Strict liability sets the lowest standard of fault available. The Legislature has chosen, through s. 172, to up the penal stakes for speeding at 50 km per hour or more over the speed limit by including the risk of incarceration. In doing so, the Legislature must be taken, in the absence of clear language excluding the defence, to have accepted the availability of the due diligence defence. Neither the language of s. 172 nor that of s. 3(7) of the Regulation has that effect.

[52] I close these reasons with an observation. This appeal has necessarily focussed on the availability of a due diligence defence and the possibility of incarceration. Neither is

likely to play any role in the vast majority of prosecutions under s. 172 of the *Highway Traffic Act*. The real difference between being charged with speeding and being charged with stunt driving by going 50 km per hour or more over the speed limit lies in the other sanctions that flow from being charged with or convicted of the latter. These include a $2,000 minimum fine, an immediate administrative licence suspension and an immediate seizure of the driver's vehicle. No one has argued on this appeal that the Legislature could not simply have imposed those added sanctions by amending the penalty provisions referable to speeding under s. 128 of the *Highway Traffic Act*.

V. CONCLUSION

[53] The appeal judge erred in holding that stunting driving as defined in s. 3(7) was an absolute liability offence. His acquittal based on that finding must be set aside. Although the trial judge proceeded on the basis that the offence was one of strict liability, given the uncertainty at the time of the trial as to the availability of a due diligence defence and the contours of that defence if available, fairness dictates that the respondent should have a new trial at which she will have the opportunity to advance a due diligence defence if so advised. I would allow the appeal, set aside the acquittal and order a new trial.

RELEASED: "DD" "MAR 18 2010"

"Doherty J.A."
I agree K. Feldman J.A."
I agree R.A. Blair J.A."

APPENDIX "A"

O. Reg. 455/07

Definition, "race" and "contest"

2. (1) For the purposes of section 172 of the Act, "race" and "contest" include any activity where one or more persons engage in any of the following driving behaviours:

1. Driving two or more motor vehicles at a rate of speed that is a marked departure from the lawful rate of speed and in a manner that indicates the drivers of the motor vehicles are engaged in a competition.

2. Driving a motor vehicle in a manner that indicates an intention to chase another motor vehicle.

3. Driving a motor vehicle without due care and attention, without reasonable consideration for other persons using the highway or in a manner that may endanger any person by,

> i. driving a motor vehicle at a rate of speed that is a marked departure from the lawful rate of speed,
>
> ii. outdistancing or attempting to outdistance one or more other motor vehicles while driving at a rate of speed that is a marked departure from the lawful rate of speed, or
>
> iii. repeatedly changing lanes in close proximity to other vehicles so as to advance through the ordinary flow of traffic while driving at a rate of speed that is a marked departure from the lawful rate of speed. O. Reg. 455/07, s. 2 (1).

(2) In this section,

"marked departure from the lawful rate of speed" means a rate of speed that may limit the ability of a driver of a motor vehicle to prudently adjust to changing circumstances on the highway. O. Reg. 455/07, s. 2 (2).

Definition, "stunt"

3. For the purposes of section 172 of the Act, "stunt" includes any activity where one or more persons engage in any of the following driving behaviours:

1. Driving a motor vehicle in a manner that indicates an intention to lift some or all of its tires from the surface of the highway, including driving a motorcycle with only one wheel in contact with the ground, but not including the use of lift axles on commercial motor vehicles.

2. Driving a motor vehicle in a manner that indicates an intention to cause some or all of its tires to lose traction with the surface of the highway while turning.

3. Driving a motor vehicle in a manner that indicates an intention to spin it or cause it to circle, without maintaining control over it.

4. Driving two or more motor vehicles side by side or in proximity to each other, where one of the motor vehicles occupies a lane of traffic or other portion of the highway intended for use by oncoming traffic for a period of time that is longer than is reasonably required to pass another motor vehicle.

5. Driving a motor vehicle with a person in the trunk of the motor vehicle.

6. Driving a motor vehicle while the driver is not sitting in the driver's seat.

7. Driving a motor vehicle at a rate of speed that is 50 kilometres per hour or more over the speed limit.

8. Driving a motor vehicle without due care and attention, without reasonable consideration for other persons using the highway or in a manner that may endanger any person by,

> i. driving a motor vehicle in a manner that indicates an intention to prevent another vehicle from passing,
>
> ii. stopping or slowing down a motor vehicle in a manner that indicates the driver's sole intention in stopping or slowing down is to interfere with the movement of another vehicle by cutting off its passage on the highway or to cause

another vehicle to stop or slow down in circumstances where the other vehicle would not ordinarily do so,

iii. driving a motor vehicle in a manner that indicates an intention to drive, without justification, as close as possible to another vehicle, pedestrian or fixed object on or near the highway, or

iv. making a left turn where,

(A) the driver is stopped at an intersection controlled by a traffic control signal system in response to a circular red indication;

(B) at least one vehicle facing the opposite direction is similarly stopped in response to a circular red indication; and

(C) the driver executes the left turn immediately before or after the system shows only a circular green indication in both directions and in a manner that indicates an intention to complete or attempt to complete the left turn before the vehicle facing the opposite direction is able to proceed straight through the intersection in response to the circular green indication facing that vehicle. O. Reg. 455/07, s. 3.

Exceptions

4. (1) Despite section 2, "race" and "contest" do not include,

(a) a rally, navigational rally or similar event that is conducted,
(i) under the supervision of the Canadian Association of Rally Sport,
(ii) under the supervision of a club or association approved in writing by the Ministry, or
(iii) with the written approval of the road authority or road authorities having jurisdiction over the highway or highways used;

(b) motor vehicle owners engaged in a tour, scenic drive, treasure hunt or other similar motoring event in which the participants drive responsibly and in a manner that indicates an overall intention to comply with the provisions of the Act; or

(c) an event held on a closed course with the written approval of the road authority having jurisdiction over the highway, including any event lawfully using any of

the trademarks “CART”, “Formula One”, “Indy”, “IndyCar”, “IRL” or “NASCAR”. O. Reg. 455/07, s. 4 (1).

(2) Despite sections 2 and 3, “race”, “contest” and “stunt” do not include any activity required for the lawful operation of motor vehicles described in subsections 62 (15.1) or 128 (13) of the Act, or the lawful operation of an emergency vehicle as defined in subsection 144 (1) of the Act. O. Reg. 455/07, s. 4 (2).