Case Name:

R. v. Ali

IN THE MATTER OF the Highway Traffic Act, R.S.O 1990, c. H.8
and Ontario Regulation 340/94

Between
Her Majesty the Queen, and
Neima Mohammad Ali, defendant

[2003] O.J. No. 2045

Ontario Court of Justice
Toronto, Ontario
Quon J.P.

Heard: March 24, 2003.
Judgment: May 23, 2003.
(97 paras.)

Charges: S. 130 Highway Traffic Act - "careless driving" — S. 5(1) O.Reg. 340/94 - "class G1 license holder driving unaccompanied by qualified driver"

Cases Considered or Referred to:

R. v. Ashton (1985), 36 M.V.R. 100 (Ont. Dist. Ct.) per Keenan D.C.J.
R. v. Beauchamp, [1953] 4 D.L.R. 340, 16 C.R. 270, 106 C.C.C. 6, O.R. 422 (O.C.A.) per Pickup C.J.O., J.K. Mackay and F.G. Mackay JJ.A.
R. v. Globocki (1991), 26 M.V.R. (2d) 179; [1991] O.J. No. 214 (QL) (Ont. Ct (Prov. Div.)) per MacDonnell J. at Scarborough.
R. v. Hamon (2000), 4 M.V.R. (4th) 39, 193 Sask. R. 116, 2000 CarswellSask 360 (Sask. Prov. Ct.).
R. v. Hundal (1993), 79 C.C.C. (3d) 97 (S.C.C.).
R. v. K.B., [1995] O.J. No. 913 (QL) (Ont. Ct. (Prov. Div.)) per Linhares de Sousa J. at Ottawa.
R. v. Lower, [1982] B.C.J. No. 737 (QL) (B.C. Co. Ct.) per MacKinnon J.
R. v. McCullough (1999), 45 M.V.R. (3d) 126, 251 A.R. 110, 1999 CarswellAlta. 731 (Alta. Prov. Ct.).
R. v. McDorman (1983), 23 M.V.R. 165 (B.C. Prov. Ct.).
R. v. Namink (1979), 27 Chitty's L.J. 289 (Ont. Co. Ct.).
R. v. Trigiani, [1999] O.J. No. 4924 (QL) (O.C.J.) per Libman J. at Toronto.
R. v. Sault Ste. Marie (1978), 40 C.C.C. (2d) 353 (S.C.C.).
R. v. Skorput (1992), 72 C.C.C. (3d) 294 (Ont. Ct. (Prov. Div.)) per MacDonnell J.

R. v. Steeden, [1995] B.C.J. No. 1413 (QL) (B.C.C.A.) per Southin, Wood and Hutcheon JJ.A.
R. v. Waite (1989), 1 S.C.R. 1436, 13 M.V.R. (2d) 236, 69 C.R. (3d) 323, 48 C.C.C. (3d) 1 (S.C.C.).
R. v. Wall (1968), 11 Cr.L.Q. 223.
R. v. Weedon (1987), 7 M.V.R. (2d) 21 (B.C. Co. Ct.).
R. v. Wilson, [1971] 1 O.R. 349, 1 C.C.C. (2d) 466 (O.C.A.) per Gale, C.J.O., MacKay and Jessup, JJ.A.
Skowronnek v. R. (1980), 9 M.V.R. 36 (Sask. Dist. Ct.).

Statutes, Regulations and Rules cited:

Highway Traffic Act, R.S.O. 1990, c. H.8, s. 130.
Drivers' Licences Regulation - Ont. Regulation 340/94, ss. 5(1), 5(2), 29.

Authorities Referred to:

Swaigen, J., Regulatory Offences in Canada - Liability & Defences (Scarborough, Canada: Carswell - Thomson Professional Publishing, 1992), pp. 80-81.

Exhibits entered:

Exhibit #1 - Ministry of Transportation document.

Counsel:

T. Leacock, prosecutor.
K. Moore, agent, for the defendant.

QUON J.P:—

1. INTRODUCTION

¶ 1 People who drive motor vehicles on Ontario roads have a duty to drive with care and attention or to give reasonable consideration to others using the roads. Ones who do not fulfill this duty or fail to give reasonable consideration to others are liable to be prosecuted for the traffic offence of careless driving. To determine if someone has committed that offence, the person's driving must fall markedly below the standard of care that a reasonably prudent driver would have exhibited in the same circumstances.

¶ 2 In addition, new drivers in Ontario, who only hold a class "G1" license (learner's permit), cannot drive a vehicle on a road unless they are accompanied by a qualified driver. A qualified driver is someone who has attained an Ontario Class "G" license and has four years of driving experience.

¶ 3 In the present case, the defendant was in the driver's seat of a vehicle that jumped a curb and crashed into a group of people. She now faces three charges because of the accident. One is for careless driving contrary to s. 130 of the Highway Traffic Act, R.S.O. 1990, c. H.8. The other two charges were laid under s. 5(1) of the Drivers' Licences Regulation, O.Reg. 320/94. They are for being a class "G1" license holder (novice driver) driving a vehicle while unaccompanied by a qualified driver and while carrying an excessive

number of passengers. However, the prosecution conceded that they had failed to prove that she had been carrying too many passengers. Consequently, the excessive passengers charge was dismissed.

¶ 4 For the more serious driving charge, the prosecution contends the defendant's careless driving caused the accident. On the day of that tragic accident, it had been the defendant's first day ever driving a motor vehicle on a public road. As such, her lack of driving experience is a circumstance to consider in determining whether the defendant committed the offence of careless driving. For the remaining licensing charge, the defendant submits that she had mistakenly believed that the front passenger had the proper license because he had been driving for as long as she knew him.

¶ 5 The trial was held on March 24, 2003. The judgment of the court was reserved and adjourned to be given on May 23, 2003. These are the written reasons.

2. FACTUAL BACKGROUND

¶ 6 The accident happened on Monday, August 5, 2002 at the intersection of Parliament and Shuter. Parliament Street is a north-south road, while Shuter Street runs in an east-west direction. It was a civic holiday for people in Toronto. It was 7:45 p.m. in the evening. Mothers and small children had been walking to Regent Park. They crossed Shuter Street from the southside. They were walking north on the eastside of Parliament Street. Meantime, the defendant had been driving a motor vehicle in a westerly direction on Shuter Street toward Parliament Street. She had stopped her motor vehicle over the eastside crosswalk for two reasons: for a red light and to let the pedestrians pass. These two mothers and five or six tots walked directly in front of the defendant's stopped vehicle. After they had crossed Shuter Street and were safely on the sidewalk on the northeast corner, just to the north of the defendant's vehicle, they continued walking north.

¶ 7 Once the pedestrians were on the sidewalk, the defendant began driving her vehicle forward. She was going to make a right-hand turn to go north on Parliament Street. In the ensuing period following the vehicle completing the turn and proceeding on Parliament Street, it suddenly jumped the east curb and struck several of them. An infant girl became pinned under the car.

¶ 8 The driver of the vehicle was a very inexperienced driver. She only had a novice driver's permit or class "G1" license" to drive. Moreover, she had only previously practiced driving a vehicle in a parking lot. The defendant is also short in stature and required an elevation to sit on, in order to see properly.

¶ 9 The defendant's boyfriend had leased the vehicle she was driving. He was in the front passenger seat beside her. He only had a class "G2" license. She had not asked her boyfriend about his driver's license and believed that he had the proper license because he had been driving for as long as she knew him. They had known each other for only five months before the accident.

¶ 10 The prosecution presented six witnesses. Two were pedestrians involved in the accident, three were near the accident and one was the investigating police officer. For the defence, the defendant and the defendant's boyfriend testified. The witnesses' testimony is summarized below.

WITNESSES FOR THE PROSECUTION

Testimony of the Mina Amani

¶ 11 Amani testified that she had been on the south side of Shuter Street, on the eastside of Parliament Street. She had been taking her children to play at Regent Park. Immediately ahead of her, on the same side, were two women with five or six children walking north on Parliament. The group ahead was crossing Shuter Street on a green light, from the southside to the northside.

¶ 12 When Amani reached Shuter Street, the light facing her was showing red. She observed a west-facing car stopped at the north curb lane of Shuter Street. The car was moving slowly to make a right-hand turn. The car then appeared to be parking or stopping after completing the right turn. Suddenly the car jumped toward the children. They were standing north of Shuter Street. The car had gone over the top of the curb. The car almost hit the gate. She noticed a child under the wheels of the vehicle. She also observed a female, age 22 or 23, as the driver of the vehicle. Amani also saw two male passengers in the vehicle. One in the front and one in the back of the vehicle. In cross-examination, she stated that she observed the vehicle going at a proper speed to make the right turn.

Testimony of Zachary Delmore

¶ 13 Delmore was in a vehicle stopped southbound on Parliament Street waiting for a red light at the intersection of Parliament and Shuter. His vehicle was in the lane closest to the centre of the road. While there, he saw a northbound vehicle jump a curb and hit the fence. He said this vehicle had been traveling between 20 to 40 kilometres per hour. It was traveling at the same speed when it jumped the curb. He observed the vehicle push a group of people into the retaining wall. He then got out of his car and told his girlfriend who was with him to make a 911 call. He ran over to the car that just jumped the curb and noticed the car against the wall with a person pinned underneath. He also noticed that the little girl hit by the car was bleeding. In a matter of moments, the police arrived.

¶ 14 In cross-examination, he said the car had hit three pedestrians against the brick wall. The retaining wall was about five feet from the edge of the curb. He did not hear the screeching of tires or hear anything else.

Testimony of Lindsay Dehaseth

¶ 15 Dehaseth said that she was a passenger in Zachary Delmore's vehicle southbound on Parliament Street at a red light. She heard Zachary scream and saw a car go up on the sidewalk and hit a group of between five to seven people. She did not see the driver of that car. In cross-examination, she stated that she did not see the car go off the street, but it had been traveling between 20 to 35 kilometres per hour. At the time of the accident, she did not hear the screeching of tires.

Testimony of Nattasha Shears

¶ 16 Nattasha Shears had been crossing Shuter Street from the southside to the northside. She noticed a car stopped on the northside of Shuter Street facing west. This is where she first saw the vehicle. She stated that she was on the "southeast" corner when a car came up from behind and hit them. She was hit. As was her daughter. Her friend's daughter and cousin were also struck by the vehicle. Nattasha also said that her two-year old daughter had been pinned against the fence underneath the car. Her daughter's face was all bloody.

¶ 17 After the accident, Nattasha noticed that the person that had been driving the car was just standing there. The driver was the defendant. Nattasha told the defendant to get in the car and drive it out. However,

a male backed the car out instead. The defendant then grabbed Nattasha's daughter while being held in Nattasha's arms. Then, the defendant told Nattasha that she was sorry. Nattasha only saw the people in the front seat of that vehicle. She also said that the male sitting in the front seat had been the male who had driven the vehicle back out.

¶ 18 Nattasha then described her daughter's injuries. They included a bleeding nose and lip, a concussion, a slice on her stomach with flesh hanging out, and burn marks. Her daughter required stitches. She now has a scar on her bum and needs a plastic surgeon for the scar.

¶ 19 She also stated that it was 7:45 p.m. It was light out. It was not raining. Under cross-examination, she said that she did not hear the screeching of tires. She did not hear the vehicle coming but just heard people screaming. When she was hit, she fell frontward from where she was.

Testimony of Jasmine Shears

¶ 20 Jasmine Shears said that she was walking north to the store on the eastside of Parliament Street. Her cousin Nattasha was with her. Jasmine crossed Shuter Street from the southside to the northside. She saw a car stopped across the lines of the crosswalk on the north side of Shuter Street facing westbound when she was crossing Shuter Street. She had to walk around the stopped car.

¶ 21 Jasmine had walked about ten steps when she was struck by the same car that she had only noticed moments earlier on Shuter Street. The car had jumped the curb on Parliament Street. After she was knocked down she got up and noticed the children. One little girl had been hit and Nattasha's daughter was pinned up against the fence by the car. Jasmine tried to push the car off Nattasha's daughter. She also noticed that a male had gone into the driver's seat of the car and reversed the car. Nattasha's daughter was injured on the stomach and her intestines were showing. Regarding her own injuries, Jasmine stated she had been struck on her back and had scraped her foot.

¶ 22 In addition, Jasmine saw the defendant as the person driving the vehicle. It had been light and nice outside. In cross-examination, she stated that she did not hear the screeching of tires.

Testimony of Celeste Butt, police officer

¶ 23 Officer Butt received a radio call at 8:11 p.m. about an accident involving four or five pedestrians being struck. She arrived at Parliament and Shuter at 8:16 p.m. Officers from 51 Division had already cordoned off the area. She observed several ambulances and the fire department there. She also observed that the intersection was signalized. The traffic lights for that intersection were in proper working order.

¶ 24 Butt observed that the vehicle in the accident was a four-door silver Mazda bearing license plate #ALVZ562. The vehicle had been moved back from the point of impact.

¶ 25 The defendant had identified herself to Officer Butt with a valid Ontario driver's license containing the defendant's photograph. Butt said the defendant's driver's license was a class "G1".

¶ 26 Butt also noticed a large black tire mark located 10.5 meters north of the north curb of Shuter Street on the eastside of Parliament Street. She also observed a pedestrian sidewalk that measured 2.9 meters in width. And there was a concrete wall that was 15 inches tall with an eight-foot chain link fence. The point where the vehicle had hit the wall was located 13.8 meters north of the north curb of Shuter Street. This point

was 3.3 meters north of where the vehicle had mounted the curb. The width of Parliament Street is 14.3 meters while Shuter Street measures 13.8 meters.

¶ 27 She also made the following observations. The road conditions were dry. It was hot and clear. It was visible out. The road was in good repair with no debris. The speed limits on both Parliament and Shuter were both posted at 40 kilometers per hour.

¶ 28 Officer Butt said she spoke and cautioned the defendant but did not interview her. She only spoke with the two male passengers. She then charged the defendant with the three offences.

¶ 29 In cross-examination, Butt said that the vehicle had been moved back to the rear of the path it had traveled. When asked if she saw any skidmarks, Butt replied that she did not see any other tiremarks. The concrete retainer wall was standing 15 inches above the sidewalk and three feet from the curb. There was also cement dust on the front bumper of the vehicle. The front right tire was also flattened.

WITNESSES FOR THE DEFENCE

Testimony of defendant, Neima Mohammad Ali

¶ 30 Neima admitted that she was driving the Mazda motor vehicle. The vehicle had been rented by her boyfriend. She also admitted that she had a "G1" class license. She also stated that she, her boyfriend, and a male friend of her boyfriend were in the vehicle. Her boyfriend sat in the front passenger seat beside her. She did not know the actual status of her boyfriend's driver's license until she heard him tell the police officer that he only had a class "G2" license.

¶ 31 She also described her recollection of the events. She had been stopped for a red light and waiting for pedestrians to cross. She then completely turned her steering wheel to the right. The steering wheel jumped and started spinning the other way. She then put her foot on the brake pedal but her shoe slipped and hit the gas pedal.

¶ 32 Neima said the children were close to her and that made her very nervous. She also said that she had been going very slowly. She saw the children and parents. She then jumped the curb and ended up on the sidewalk. Moreover, Neima said that after she made her turn she had been intending to stop and park the vehicle. This had been the address of their destination.

¶ 33 Under prosecution cross-examination, Neima stated that the only driving experience that she had before this accident had been driving a vehicle in a parking lot in New York with a person with a class "G" license. She testified that she believed that her boyfriend had a class "G" license. She thought this because she had known her boyfriend for five months and that he was always driving. However, she did not know how many years in total that he had been driving before they met. She said that she had never asked him about how long he had been driving.

¶ 34 In addition, Neima was able to testify about what limiting conditions her class "G1" license had. She said she was aware that she had to drive with someone with a "G" level driver's license and who had up to four years experience. She also knew that she was not allowed to drive after a certain time in the day.

¶ 35 Furthermore, Neima said that she was doing almost a stopping speed when she did her turn. She had been stopped at a red light. She also said that she had been going very slowly when she mounted the curb. In

addition, she had been going very, very slowly after making the right-hand turn. She said she was not going more than 20 to 30 kilometers per hour but she did not know how fast the vehicle had been going.

¶ 36 Neima also said that she was of small stature and used an elevation to sit on. She also said that her foot had hit the accelerator after the vehicle had hit the curb. Only one tire had been on the curb she contends when her foot accidentally hit the gas. It was then that the vehicle had completely jumped the curb. She then repeated that she had turned the steering wheel to the right all the way to the end, but that the wheel had slipped out of her hand. She said she could not stop the steering wheel because it was spinning very quickly. When the wheel slipped, she said her foot was already on the brake pedal but when she tried to step on the brake her shoe slipped and hit the gas pedal instead. The steering wheel had turned the other way, spinning backwards.

Testimony of Kalifa Abdulkadir

¶ 37 Abdulkadir testified that he had picked up the defendant at the airport. She had just returned from the United States. Their intention had been to go to a store on Shuter Street. He had been sitting in the front seat of the Mazda. When they arrived at the store, the children had already passed. He said that the defendant was intending to park the car. The vehicle had been travelling very, very slowly, at 10 kilometres per hour.

¶ 38 In addition, Abdulkadir testified that he had never discussed the status of his license with the defendant. He admitted that the status of his driver's license was a class "G2". He said that the defendant was not aware that he was a class "G2" license holder. He stated that he had now known the defendant for at least a year. Under cross-examination, he said that he did not know that the defendant was a class "G1" license holder. When he had given her the car to drive, he had thought she was a class "G2" licensed driver. He said that the defendant had wanted to drive and so he allowed her to drive. He had never inquired if she had a license nor did she ever tell him she had one.

¶ 39 Moreover, Abdulkadir said that he saw the steering wheel slip out of the defendant's hands. He then saw the car go over the curb after the steering wheel had slipped. However, he did not know if the vehicle had mounted the curb before or after she had hit the gas pedal.

¶ 40 He also admitted that he talked to the defendant about the incident.

ARGUMENT

¶ 41 The defendant contends she had been driving properly and slowly just before the accident. She also said that she had been turning the corner when the steering wheel suddenly recoiled out of her hands. This circumstance caused her to lose control of the vehicle, which then led to the vehicle jumping the curb. She then accidentally hit the accelerator pedal instead of the brake pedal, which caused the vehicle to proceed into the pedestrians. This therefore was not careless driving submits the defence, but a situation where she simply lost control of her vehicle because of the action of the steering wheel.

¶ 42 The prosecution disagrees and asserts that the vehicle had already been going at an excessive speed when it jumped the curb. That is, the vehicle had to have been going at a speed faster than the 10 kilometres per hour that the defendant's boyfriend had claimed it had been going, in order for it to have jumped the curb. Furthermore, the prosecution suggests that if the defendant's version were correct that the vehicle had been travelling very slowly before it hit the curb, then the vehicle would have just bounced off the curb

instead of mounting it. It was also suggested that the defendant did not let go of the steering wheel when it mounted the curb.

¶ 43 In addition, the prosecution insinuates that the defendant and her boyfriend were concocting the story that the vehicle was going slowly and that the defendant's foot had slipped off the brakes and hit the gas pedal instead. Moreover, the prosecution points to the fact that the defendant was an inexperienced driver and had been operating the vehicle without an experienced driver beside her. Therefore, the prosecution argues that the defendant knowing what she knew about her inexperience and not being with an experienced driver and still getting into the car and driving it, would be driving a vehicle without reasonable consideration for others on the highway.

¶ 44 For the remaining charge, the prosecution contends that a qualified driver was not sitting in the front seat of the vehicle beside the defendant as required by law. The person beside the defendant only had a class "G2" license. Only someone with a class "G" license is entitled to be in the front seat beside a novice driver. To this licensing charge, the defendant argues that she had believed that the front seat passenger had been qualified since he had a driver's license. However, the prosecution submits that the defendant had to be more than passive. She had to verify the status of the front seat passenger's driving license by at least asking him about the status of that license. Thus, the prosecution submits, the fact that the defendant had failed to ask about the required license negates the defence of due diligence or mistake of fact. The defendant is relying on a mistake of fact as her defence. The defendant said she believed the front seat passenger was a class "G" license holder because he drove constantly and had been driving for the five months she knew him before the accident.

3. ISSUES

¶ 45 The issues to be decided in this matter may be summarized as follows:

(a) Is the defendant's lack of driving experience on a public road or highway a determinative factor in whether the defendant had been driving a motor vehicle carelessly?
(b) Depending on the circumstances, can the driver's inexperience in driving a motor vehicle or lack of driving instruction be used alone as proof of driving a motor vehicle without reasonable consideration for others using the highway?
(c) Since a class "G1" licensed driver cannot drive a motor vehicle without being accompanied by a qualified driver, does that novice driver have to make a reasonable investigation into whether someone is a qualified driver, before driving that vehicle in the company of that other person?
(d) Did the defendant have to at least ask the front seat passenger if he was a properly qualified driver in order to make out the defence of due diligence or mistake of fact for the charge of driving a vehicle while unaccompanied by a qualified driver?
(e) Is care and control of a motor vehicle an element of careless driving?
(f) Does the defendant breaching a condition of her class "G1" license have any connection to the offence of careless driving?

4. ANALYSIS OF FACTS AND LAW

(a) The Offence Of Careless Driving

¶ 46 In the present case, a tragic accident has occurred. A young girl has been injured. She ultimately needs plastic surgery after becoming scarred by the vehicle that ran over her. However, the existence of a vehicle accident involving pedestrians does not necessarily infer careless driving on the part of the driver: R. v. Skorput (1992), 72 C.C.C. (3d) 294 (Ont. Ct. (Prov. Div.)) per MacDonnell J.

¶ 47 The defendant has been charged for careless driving under s. 130 of the Highway Traffic Act, R.S.O. 1990, c. H.8. That section states [emphasis is mine below]:

> s. 130. Every person is guilty of the offence of driving carelessly who drives a vehicle or street car on a highway without due care and attention or without reasonable consideration for other persons using the highway 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 or permit may be suspended for a period of not more than two years.

¶ 48 Six circumstances in this case are noteworthy and need to be examined in determining if the offence of careless driving has been made out. First, the distance the vehicle traveled before it jumped the curb had been only 10.3 metres. Second, it had been the first day the defendant had ever driven a vehicle on a public road. Third, a qualified driver did not accompany the defendant. Fourth, the defendant is short in stature and needed an elevation to sit on. Fifth, the defendant contends the steering wheel spun out of her control. Sixth, the defendant accidentally stepped on the gas pedal instead of the brake pedal.

¶ 49 In R. v. Trigiani, [1999] O.J. No. 4924 (QL) (O.C.J.), Libman J. at para. 208, held that one of the two essential ingredients in s. 130 has to be proved in order to convict someone for careless driving:

> The issue ... is whether the Crown has proven beyond a reasonable doubt that the defendant either drove his or her motor vehicle on a highway without due care and attention, or that he or she operated it without reasonable consideration for other persons using the highway. One of these two essential ingredients must be proven in order to support a conviction for careless driving. Otherwise the defendant is entitled to an acquittal.

¶ 50 Therefore, driving carelessly may be committed in two ways. One is if someone drives a motor vehicle on a highway without due care and attention. The other way is if he or she operates a vehicle without reasonable consideration for other persons using the highway. Furthermore, the offence of careless driving must specifically arise out of driving on a highway, which by definition does not include a sidewalk: R. v. Wall (1968), 11 Cr.L.Q. 223. Although the circumstance of the defendant's vehicle striking the pedestrians had occurred off the road and near the sidewalk area, the defendant's action of steering her vehicle around a corner just before the vehicle jumped the curb occurred on a public road. As such, the relevant driving activity that could comprise the offence of careless driving had occurred on a highway before the vehicle had jumped the curb.

¶ 51 MacDonnell J. in R. v. Skorput at p. 300, also referred to the test for careless driving that was formulated by the Ontario Court of Appeal in R. v. Beauchamp, [1953] 4 D.L.R. 340, 16 C.R. 270, 106 C.C.C. 6, O.R. 422:

> Careless driving is a regulatory offence as that term is understood in light of Sault Ste. Marie and Wholesale Travel, [1991] 3 S.C.R. 154. As was stated above, in the prosecution

> of a regulatory offence the Crown ordinarily establishes a prima facie case upon proving that the defendant committed the actus reus of the offence. At that point, the burden of showing that reasonable care was taken shifts to the defendant. However, careless driving is somewhat of an anomaly in that the failure to take reasonable care is part of the actus reus of the offence. In R. v. Beauchamp (1953), 106 C.C.C. 6 at p. 13, [1953] 4 D.L.R. 340, 16 C.R. 270, the Ontario Court of Appeal stated that the test of careless driving is:
>
> > ... not whether, if the accused had used greater care or skill, the accident would not have happened. It is whether it is proved beyond reasonable doubt that the accused, in the light of existing circumstances of which he was aware or of which a driver exercising ordinary care should have been aware, failed to use the care and attention or to give to other persons using the highway the consideration that a driver of ordinary care would have used or given in the circumstances.
>
> To establish a prima facie case of careless driving, sufficient to convict a defendant who elects to present no evidence, the prosecution must establish beyond a reasonable doubt a departure from a standard of care. The onus of establishing an absence of negligence only arises once the Crown establishes a prima facie case.

¶ 52 The test for careless driving therefore, is whether the defendant drove with marked departure from the standard of care that a reasonably prudent driver would have exhibited in the same circumstances that confronted the defendant.

Standard of care

¶ 53 Libman J. at para. 202, in R. v. Trigiani, concluded that the standard of driving a driver is measured against, to determine whether he or she has driven carelessly, varies upon the factual circumstances he or she has encountered. Moreover, the factual standard that his Honour referred to, can shift depending on the existing circumstances or that which may reasonably be expected. This includes factors such as traffic, weather conditions, visibility and any other reasonable condition that an ordinary prudent driver would take into consideration:

> The standard against which the defendant's driving is to be measured in a careless driving prosecution is that set out in s. 130 of the Highway Traffic Act. That is to say, it is necessary to consider whether and to what extent the defendant departed from the standard appropriate to the factual circumstances encountered by him or her. The factual standard, thus, is a constantly shifting one, depending upon the factors which exist or may reasonably be expected, such as traffic and, weather conditions, visibility, and any other conditions that an ordinary prudent driver would take into consideration: R. v. Beauchamp, [1953] O.R. 422 (C.A.) at 432.

¶ 54 In the present case, there are no pertinent traffic, road, weather or time of day conditions that could have affected the defendant's ability to drive with due care and attention. Instead, the defendant submits that an unexpected mechanical situation involving the vehicle's steering system and not her driving ability had caused the vehicle to jump the curb.

The steering wheel: care and control of the vehicle

¶ 55 The defendant testified that after making a slow right turn, the steering wheel snapped back and spun out of control. She also contends that it was this happenstance that caused the vehicle to jump the curb. Additionally, she stated she had turned the steering wheel all the way to the right and that when it slipped out of her hands, it spun in the opposite direction, too quickly for her to stop it.

¶ 56 In R. v. Steeden, [1995] B.C.J. No. 1413 (QL) (B.C.C.A.), Wood J.A. considered the meaning of the word "drive" and held at para. 13 that:

> It is my view, that when it is intended to describe conduct in relation to a motor vehicle, the ordinary meaning which attaches to the verb "drive" in the English language is one that combines the elements of movement and control; movement of the vehicle and control of that movement by the person said to be driving.

¶ 57 Hence, if the defendant had lost control of the vehicle's movements, because of the spinning steering wheel then the defendant would no longer be driving the vehicle in the legal sense. It is at that point the defence has argued that the vehicle then jumped the curb and collided with the pedestrians. Moreover, since the defendant is no longer driving the vehicle or in control of the vehicle's movements, then how could she be guilty of driving in a careless manner?

¶ 58 However, before concluding that the defendant had lost control of the vehicle, it must be first determined whether the spinning steering wheel scenario is plausible. From the defendant's perspective, a steering wheel when turned all the way to the right would have to act like a coil being wound up tightly so that when the steering wheel is released it would spring back in the opposite direction with tremendous force. In that vein, if the defendant's testimony about the recoiling steering wheel were brought to its logical conclusion, it is likely that the defendant's vehicle would have ended up facing in a different direction then from what it actually did. To illustrate, consider that the defendant's vehicle had been in the midst of a right turn, from westbound Shuter Street to northbound Parliament Street. With the steering wheel all the way to the right, the front wheels of the vehicle would have been also turned right and to the passenger side of the vehicle. Once the vehicle began its turn onto Parliament Street, the vehicle would have been proceeding north. At any point after the vehicle was pointing north, and if the steering wheel would have started spinning in the opposite direction as the defendant contends, the front wheels would have started turning left or back to the driver side of the vehicle. Therefore, the vehicle would have logically started going back in a westerly or northerly direction. However, the evidence indicates the vehicle jumped the curb to its right. Ergo, if the steering wheel would have spun in the opposite direction once it slipped out of the defendant's hand, the most logical direction the vehicle would have traveled would have been to the left and in a westerly direction and not to the right in an easterly direction, which the vehicle had indeed done. As well, there is no evidence that the steering wheel mechanism had been broken.

¶ 59 Consequently, the defendant's claim that the steering wheel had spun out of control is not plausible or credible when the final resting spot of the vehicle is considered. Therefore, the defendant had still been driving the vehicle and in control of the vehicle's movements when it jumped the curb.

(i) Due Care And Attention

> Momentary error in judgement or careless driving over the 10.5 metres of travelling distance

¶ 60 The Court of Appeal of Ontario in R. v. Beauchamp, [1953] 4 D.L.R. 340, 16 C.R. 270, 106 C.C.C.

6, [1953] O.R. 422, per Pickup C.J.O., J.K. Mackay and F.G. Mackay JJ.A., held at pp. 431-432 of O.R. 422 that a driver must display a reasonable amount of skill in the handling of a vehicle which is a potential source of danger to other users of the road:

> To support a charge under s. 29(1) of The Highway Traffic Act, the evidence must be such as to prove beyond reasonable doubt that the accused drove in the manner prohibited by the subsection, namely, without due care and attention or without reasonable consideration for others. The standard of care and skill to be applied has been long established and is not that of perfection. It is, I think, correctly stated in Mazengarb, op cit., at pp. 176-7, as follows:
>
> > "The law does not require of any driver that he should exhibit 'perfect nerve and presence of mind, enabling him to do the best thing possible.' It does not expect men to be more than ordinary men. Drivers of vehicles cannot be required to regulate their driving as if in constant fear that other drivers who are under observation, and apparently acting reasonably and properly, may possibly act at a critical moment in disregard of the safety of themselves and other users of the road." "But the law does insist upon a reasonable amount of skill in the handling of a vehicle which is a potential source of danger to other users of the road. ... The question always is 'What would an ordinary prudent person in the position of the plaintiff have done in relation to the event complained of?'" (Pollock on Torts uses the term "average man".)
>
> ... It must also be borne in mind that the test, where an accident has occurred, is not whether, if the accused had used greater care or skill, the accident would not have happened. It is whether it is proved beyond reasonable doubt that this accused, in the light of existing circumstances of which he was aware or of which a driver exercising ordinary care should have been aware, failed to use the care and attention or to give to other persons using the highway the consideration that a driver of ordinary care would have used or given in the circumstances

¶ 61 From Officer Butt's testimony, the defendant's vehicle jumped the eastside curb of Parliament Street, 10.5 metres north of the north curb of Shuter Street. That distance is only about two carlengths. Thus, the defendant's careless driving, if any, would have had to occur in that short distance in a relatively short time. The defendant had been stopped at a red light to let the pedestrians cross Shuter Street. She then drove her vehicle and made a right turn. Then over a distance of two carlengths the vehicle had jumped the curb. Furthermore, the defendant said she had the intention to park the vehicle on the eastside of Parliament Street. Even the witness Mina Amani indicated that the defendant appeared to be parking or stopping her vehicle before it jumped the curb.

¶ 62 A plausible explanation of what made the vehicle jump the curb is related to what the defendant had said about accidentally hitting the wrong foot pedal. Although the defendant claims she accidentally slipped off the brake pedal and hit the gas pedal after one tire had went over the curb, two more likely scenarios could have occurred. One is when the defendant was intending to park or stop the vehicle. As she was intending to stop or slow the vehicle with the brake pedal, she instead, accidentally hit the gas pedal and that unexpected acceleration of the vehicle caused it to jump the curb and collide with the pedestrians. The other plausible explanation is that when she was intending to park the vehicle, she missed stepping on the brake pedal completely and the momentum of the vehicle caused it to jump the curb. The likelihood of these two

scenarios is supported by the testimony of Zachary Delmore who was stopped at the red light on Parliament and facing southbound. He said he saw the defendant's vehicle traveling between 20 to 40 kilometres per hour, and when it jumped the curb, it had been traveling at the same speed.

¶ 63 Assuming that one of these scenarios did occur, the possibility of hitting the gas pedal instead of the brake pedal or missing the correct pedal while the vehicle traveled only 10.5 metres, would be classified as a momentary error in judgment. The court in R v. Namink, [1979] O.J. No. 317, (1979), 27 Chitty's L.J. 289 (Ont. Co. Ct.), held that such a momentary lapse or simple error in judgment is insufficient to justify a conviction for careless driving. Therefore, in this case I find that the vehicle jumped the curb because of a simple error in judgment. It was likely caused by the defendant hitting the gas pedal instead of the brake pedal. In addition, while the defendant's driving must be measured against a standard, that standard is not one of perfection: R. v. Beauchamp.

¶ 64 However, a simple or momentary error in judgment committed while driving a vehicle coupled with some other negligent act can be careless driving. In the accidentally stepping on the accelerator case of R. v. McCullough (1999), 45 M.V.R. (3d) 126, 251 A.R. 110, 1999 CarswellAlta. 731 (Alta. Prov. Ct.), the accused was convicted of careless driving. He had fallen asleep while in his vehicle. He had been queued for a drive-through facility servicing motor vehicles. When he awoke upon being summoned to drive forward into the service bay, he drove his vehicle forward. When he attempted to brake, he depressed the accelerator instead and struck an individual and several motor vehicles. The court held that the conduct of falling asleep while in a queue for service bays made out the offence.

¶ 65 Furthermore, driving at low speeds does not excuse a careless driving conviction. In R. v. Lower, [1982] B.C.J. No. 737 (QL) (B.C. Co. Ct.), MacKinnon J. confirmed the decision of the trial judge that momentary inattention at speeds of 20 to 30 m.p.h. may be sufficient to constitute careless driving.

¶ 66 Although the defendant's imperfect driving during the distance of 10.5 metres ended in an accident, it was the result of a mere error in judgment of a momentary nature, and not sufficient to support a finding of driving without due care and attention. However, the remaining circumstances concerning the defendant's inexperience, her physical stature and driving for the first time on a public highway may still constitute driving without reasonable consideration for others using the highway.

(ii) Reasonable Consideration For Others Using The Highway

> The defendant's first day driving on a public road, her lack of experience and knowledge of driving a motor vehicle, her short stature and use of an elevation to sit on, and driving without a qualified driver beside her.

¶ 67 The court In R. v. McDorman (1983), 23 M.V.R. 165 (B.C. Prov. Ct.), concluded that the careless driving charge was not based on bad driving conduct, but rather on the cumulative effect of several factors that provided a foundation for a conviction. Thus, one of several factors considered alone may not be careless driving, but when the cumulative effect of all the factors are considered, the offence could be established.

¶ 68 Similarly, the age of the driver or their inexperience, when considered alone may not support a finding of careless driving when the manner of driving causes no danger to others. This is illustrated in R. v. Hamon (2000), 4 M.V.R. (4th) 39, 193 Sask. R. 116, 2000 CarswellSask 360 (Sask. Prov. Ct.). In that case, a vehicle had been weaving in its lane below the speed limit. The vehicle was being driven by a seven-year

old. The court held that the manner of driving was not so different from that of a prudent driver. There was no source of danger to others. The fact that the vehicle had been operated by a child was not relevant. Therefore, the court concluded that the seven-year old child had not been driving without due care and attention. However, in the case at bar, pedestrians were endangered by the defendant's vehicle jumping the curb, while in Harmon the only questionable driving involved weaving in a lane below the speed limit. Thus, the defendant's inexperience when considered with other factors may lead to a finding of careless driving.

¶ 69 Nevertheless, the standard of care is an objective standard not related to the degree of proficiency or experience of any particular accused, and evidence that the accused has a good record as a careful driver is irrelevant: R. v. Beauchamp. In some prosecutions, a consideration of the standard of skill creeps in, in light of an accident in the background. However, it is wrong to assume that there is one standard for ordinary drivers and another for inexperienced drivers: Skowronnek v. R. (1980), 9 M.V.R. 36 (Sask. Dist. Ct.).

¶ 70 In R. v. Ashton (1985), 36 M.V.R. 100 (Ont. Dist. Ct.), the accused had a temporary license which did not permit him to drive in the evening. The court held that there was no logical connection between this breach and the offence of careless driving. For the defendant in the present case, she had been driving without a qualified driver beside her. The breach of that condition of her class "G1" license when considered alone does not amount to careless driving. In any event, the accident may not have been avoided even if the defendant had been with a qualified driver. The defendant's vehicle had not been equipped with dual brakes or dual steering wheels.

¶ 71 However, when these factors of the defendant's inexperience in driving motor vehicles, her first time driving on a public road, her short stature, and driving without a qualified driver, are considered together for their cumulative effect, has the charge of careless driving been made out? The prosecution argues that although the defendant knew she had limited driving experience and had driven without an experienced and qualified driver, she still knowingly got into the vehicle and drove it. This deliberate act submits the prosecution would constitute driving a vehicle without reasonable consideration for others on the highway. In other words, she ought to have known of the potential danger that her inexperience and her lack of knowledge of driving on a public road when combined with her short stature and need to sit on an elevation, would be to the public in general.

¶ 72 Following that line of argument, Linhares de Sousa J., in the dangerous driving case of R. v. K.B., [1995] O.J. No. 913 (QL) (Ont. Ct. (Prov. Div.)), did find that the young person charged had operated the vehicle in a manner that was dangerous to the public. The young person who was just 14 years old had stolen a vehicle, drove it at an excessive speed around a blind and obstructed corner that was filled with cars and pedestrians. She had swerved quickly in the direction of some pedestrians in order to avoid a parked car, barely missing one person but hitting another. She then hit the gas pedal, lost control of the vehicle, ran the car onto a lawn and hit a tree before stopping. The court held that the young person's driving was a marked departure from the standard of a reasonably prudent driver. This incident had been her first entry into the world of driving. When she took control of the vehicle, she was not a licensed driver nor had she received any instruction on driving. The court held that it was a deliberate act of driving falling below the standard of a reasonably prudent driver in the circumstances.

¶ 73 Linhares de Sousa J. in R. v. K.B. at paragraphs 31 to 33 made the following findings which touch on circumstances that are present in the case at bar [emphasis is mine below]:

> This incident was Ms. B.'s first entry into the world of driving. When she took control of the vehicle, she was not a licensed driver nor had she received any instruction on

> driving. She also indicated in her cross-examination that when she began driving the vehicle, she did not think of the consequences of getting into a car without knowing how to drive.
> ... It is logical therefore to ask the question whether Ms. B.'s lack of licence and hence absence of presumed mental, and physical capability of driving and basic knowledge of the standard of care required of licensed drivers makes a difference, either in the applicable test or in raising a reasonable doubt by way of an explanation. Given the well enunciated principles as well as the spirit of the Hundal decision supra, I conclude that it does not and can not. The whole incident of 24 May 1994 was not a result of a simple momentary inadvertence or thoughtlessness of which all drivers are capable, even the most experienced. Nor was it a simple error in judgment of an inexperienced driver. Rather it was a deliberate act of driving falling below the standard of a reasonably prudent driver in the circumstances.
> By this I do not mean to say that all uninstructed, unlicensed and inexperienced drivers would necessarily drive in a manner dangerous to the public. I am sure some of them would be able to drive very appropriately. However, Ms. B. was evidently not one of these. She experienced difficulty with the vehicle on her U-turn. Yet in the face of this she continued driving. A reasonably prudent driver, without instruction, without licence and without experience would not have taken control of the vehicle and driven it in the manner that she did, at the time that she did and at the location that she did, without consideration for the potential consequences. I cannot find that Ms. B.'s lack of licence and lack of experience as a driver assists her on the facts of this case. Neither is it necessarily a neutral factor on the facts. To take control of a potentially lethal machine in a well used public place when it was well used without any proper instruction or without having met any of the licensing requirements that would confirm that she was familiar with the standard of care required of her is in itself dangerous to the public. The driving that comes out of such an endeavour need not be in and of itself dangerous, which of course, was not the case here. More importantly embarking on such driving was, in all the circumstances, dangerous to the public to do so. It certainly does not place her, in the words of Mr. Justice Cory in Hundal, supra in "a position of responsibility to other members of the public who use the roads."

¶ 74 In R. v. Weedon (1987), 7 M.V.R. (2d) 21 (B.C. Co. Ct.), it was held that the failure of the accused to consider the risk which he was creating constituted the requisite inadvertence for a careless driving conviction. That is, he did not have reasonable care for other actual and potential users of the highway.

¶ 75 Although, the prosecution does not have to prove any mental element to obtain a conviction for careless driving, a failure of the defendant to consider the risk involved in driving a motor vehicle constitutes the requisite inadvertent negligence that may support a conviction. Also, this is only in relation to whether the defendant drove without reasonable consideration for others. Thus, did the defendant consider the potential risk and consequences, knowing that she had never driven on a public road before, that she was short in stature and needed to sit on an elevation, that she had virtually no experience driving a motor vehicle and that she had not received any instruction from a driving instructor or driving school, before she got into the vehicle and drove it on a public road? The defendant had testified that because she was a new driver, it never occurred to her that she would be in an accident.

¶ 76 In addition, did the defendant, in proceeding to drive the vehicle on a public road, knowing that she

lacked any experience and appropriate instruction, a deliberate act that may fall below the standard of a reasonably prudent driver in the circumstances? Again, though there is mention of a deliberate act, intention is not a requirement to be proved for a conviction. However, if the elements to prove dangerous driving are present, it only follows that the same elements could be used to prove careless driving since the former requires proof of advertent negligence while the latter requires inadvertent negligence. Regardless, the cumulative effect of all these factors in relation to these questions must still be considered under the standard of a reasonably prudent driver.

inadvertent negligence

¶ 77 The Supreme Court of Canada in R. v. Waite, [1989] 1 S.C.R. 1436, 13 M.V.R. (2d) 236, 69 C.R. (3d) 323, 48 C.C.C. (3d) 1, reiterated that the nature of careless driving as a regulatory offence is inadvertent negligence, while to prove the criminal driving charge of dangerous driving requires advertent negligence. However, mere inadvertent negligence will not necessarily support a conviction for careless driving: R. v. Wilson, [1971] 1 O.R. 349, 1 C.C.C. (2d) 466. To be careless driving, the marked departure of the impugned driving from the standard of a prudent and reasonable driver must be deserving of punishment. That is, if the driving in question constitutes a sufficient departure from the conduct that could be expected of a reasonable person in the same circumstances, then, in the absence of some explanation, the act itself may determine culpability.

¶ 78 Cory J. in R. v. Hundal (1993), 79 C.C.C. (3d) 97 (S.C.C.), at para. 203 held that:

> It is not overly difficult to determine when a driver has fallen markedly below the acceptable standard of care". ... most persons understand and readily recognize the concept of negligence. ... negligent driving can be thought of as a continuum that progresses, or regresses, from momentary lack of attention giving rise to civil responsibility through careless driving under a provincial Highway Traffic Act to dangerous driving under the Criminal Code.
> deserving of punishment

¶ 79 Libman J. at para. 204 of Trigiani held that:

> While the defendant's driving is to be measured against such a standard, it does not require, as MacDonnell J. observed, one of perfection: R. v. Globocki (1991), 26 M.V.R. (2d) 179 (Ont. Prov. Div.) at 185. That is to say, the issue is not whether or not the driving conduct of the defendant at the relevant time was flawless. It must be of such a nature as to be "considered a breach of duty to the public and deserving of punishment": R. v. Beauchamp.

¶ 80 Mere inadvertent negligence will not necessarily support a conviction for careless driving: R. v. Wilson, [1971] 1 O.R. 349, 1 C.C.C. (2d) 466. More than a bare act of negligence must be proven. It must be shown by the prosecution that the defendant's driving was a sufficient departure from the standard of a prudent and reasonable driver to make the driving deserving of punishment.

¶ 81 In the present case, the defendant only possesses a class "G1" license. In other words, she only has a learner's permit to drive a vehicle. She is not a fully licensed or experienced driver. Thus, according to public policy and reasons of public safety, a class "G1" license holder is prohibited from driving a motor vehicle on a highway except under certain legislated conditions. These include the requirement of having a qualified driver in the front seat with the novice driver, not driving on designated highways, not driving at

certain times, or not driving after consuming any alcohol.

¶ 82 Furthermore, the defendant testified that the only previous occasion that she had driven a vehicle was while she was practicing in a parking lot in New York. This shows that the defendant was a very inexperienced driver at the time of the accident. Also, when the accident occurred it was her first time ever driving on a public road.

¶ 83 Therefore, one of the risks or consequences that an ordinary prudent driver would consider is the extent of their own driving experience on a public highway. In this case, the defendant did not possess any experience driving on a public road or highway nor was their evidence that she had obtained instruction and driving experience from a driving school or instructor. This does not mean that every novice driver without experience driving on a public highway would necessarily be committing the act of careless driving. Specifically, someone taking driving lessons in a vehicle with dual brakes with a licensed instructor would not be ordinarily committing the offence of careless driving.

¶ 84 In the instant case, the defendant had also been driving under the auspices of her boyfriend who only held a class "G2" license. Section 29 of Ontario Regulation 340/94 still classifies someone holding a class "G2" license as a novice driver. The boyfriend did not possess a class "G" license nor did he have four or more years of driving experience. Neither was he a qualified driving instructor. Therefore, he was not qualified under the law to be sitting in the front passenger seat teaching the defendant on how to drive.

¶ 85 To exacerbate her inexperience was the fact that she is short in stature. She testified that she had to sit on an elevation. Although there is no evidence to this fact, someone who is short in stature and needs an elevation to sit on, may also have difficulty reaching the foot pedals. Requiring an elevation also means she would have difficulties seeing over the dashboard and steering wheel without that elevation.

¶ 86 When considering these circumstances collectively, they do amount to inadvertent negligence. Therefore, the final question is whether a reasonably prudent driver, without having ever driven on a public road, who only practiced a few times in a parking lot, who never received instruction from a driving instructor, who was short of stature and required a elevation to sit on, who drove without a qualified person in the front seat, would have taken control of the vehicle and drove it in the manner she did, at the time that she did and at the location she did, without consideration for the potential consequences?

¶ 87 First, the defendant had a class "G-1" license, an indication she was on her way to becoming properly licenced as a driver. In addition, there was no evidence that Parliament and Shuter had been a busy street with many pedestrians and cars at the time of the accident. She also had driven within the speed limit around a corner. She had stopped for a red light and had allowed pedestrians to proceed. This shows taking precaution while driving a motor vehicle. She also used an elevation to sit on as opposed to not using one. This is an indication of foresight and consideration of potential visibility problems. Her driving maneuver was a right hand turn with an intention to stop and park the vehicle. This was not by itself a dangerous or difficult driving maneuver. She was driving with someone with a driver's license. She had not been driving at high speeds or for a long distance. The accident was caused by a momentary error in judgment. The law requires reasonable skill and not perfection in operating a motor vehicle. Under those circumstances, it can be concluded that the defendant did consider the consequences of her action and did act reasonably, and not deliberately without consideration of others, such that her driving would have fallen below the standard of care of a reasonably prudent driver under the same circumstances.

¶ 88 Therefore, when all the factors and circumstances are considered together, the prosecution's

argument that the defendant drove without reasonable consideration for others using the highway has not been made out. Furthermore, the presence of mere inadvertent negligence on the part of the defendant is not deserving of punishment.

(b) The Offence Of Class "G1" Licensed Driver Driving While Unaccompanied By Qualified Driver

¶ 89 The evidence clearly shows that the defendant, a novice driver, with a class "G1" license was driving on a highway with an unqualified driver in the front seat beside her. The front seat passenger is required to hold a designated class of license, namely a class "G" license and be licensed at least for four years. This requirement is found in s. 5(1) and 5(2) of Ontario Regulation 340/94: [emphasis is mine below]:

> s. 5(1). The holder of a Class G1 driver's licence may drive a Class G1 motor vehicle on a highway if a holder of a Class A, B, C, D, E, F or G driver's licence or its equivalent authorizing the holder to drive the motor vehicle, who qualifies as an accompanying driver, occupies the seat beside the driver for the purpose of giving him or her instruction in driving the motor vehicle and the following additional conditions are met:
>
> 1. The novice driver's blood alcohol concentration must be zero at all times while he or she is operating the motor vehicle.
> 2. The accompanying driver's blood alcohol concentration must be less than 50 milligrams of alcohol in 100 millilitres of blood while the novice driver is operating the motor vehicle.
> 3. No person other than the novice driver and the accompanying driver shall occupy a front seat in the motor vehicle.
> 4. The number of passengers in the seats other than the front seats of the motor vehicle must not exceed the number of operable seat belt assemblies in those other seats.
> 5. The motor vehicle may not be driven on a highway designated by subsection (4).
> 6. The motor vehicle may not be driven by the novice driver between midnight and 5 a.m.
>
> (2) A person is qualified to act as an accompanying driver if he or she,
>
> (a) is a fully licensed driver in a Class G motor vehicle;
> (b) has been licensed in Ontario or another jurisdiction for at least four years except if the person is licensed as a driving instructor in Ontario; and
> (c) meets the applicable requirements of the Act and the regulations, including any requirement to wear corrective or contact lenses but not including any requirement for any special or modified controls applicable to the accompanying driver's licence.

¶ 90 In her defence, the defendant argues mistake of fact. She claims that she did not know that her boyfriend, Kalifa Abdulkadir, the passenger in the front seat beside her was not a class "G" license holder. Instead, she believed that he was properly licensed because since the time she met him he had always

drove. She had known Abdulkadir for only about five months before the accident. She had held the belief that he was properly licensed even though she had never asked him about the status of his driver's license.

¶ 91 In addition, she testified that she knew she could not drive unless someone with a class "G" license with four years experience was beside her. Yet, she only knew Abdulkadir for five months before the accident. To be a qualified driver, besides having the proper class of license, he was also required to be licensed for at least a period of four years. This then begs the question. Although the defendant testified that Abdulkadir had always drove since she knew him, she only knew him for five months at that time, then on that basis how could she know if he had been licensed for four years unless she would have asked him about the status of his license and for how long he had been licensed?

¶ 92 To make things worse, Abdulkadir testified that he thought the defendant had a class "G2" license and had not asked her if she had the proper license to drive, before he allowed her to drive his leased vehicle.

¶ 93 The Supreme Court of Canada in R. v. Sault Ste. Marie (1978), 40 C.C.C. (2d) 353 held at pages 373-374 that if an accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, if the accused took all reasonable steps to avoid the particular event:

> Offences in which there is no necessity for the prosecution to prove the existence of mens rea; the 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. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability.

¶ 94 John Swaigen in his reference work: "Regulatory Offences in Canada - Liability & Defences" (Scarborough, Canada: Carswell - Thomson Professional Publishing, 1992), reviewed various defences to strict liability offences, including the defence of reasonable care. At pages 80-81, Swaigen considered the defence of mistake of fact and concluded that for the defence to operate a defendant must not only show that the mistake of fact is an honest held belief, but is also one based on reasonable grounds. In addition, Swaigen concluded that in establishing whether there had been due diligence on the part of a defendant, one must consider the active as well as the passive aspect of the defence:

> In strict liability offences, however, a defendant must show that the mistake of fact is not only an honest one, but is also based on reasonable grounds. To rely on a defence of reasonable mistake of fact, the accused cannot simply assert that he or she was unaware of the facts. If the violation is a foreseeable result of his or her activities, the accused must usually show that he/she actually put his/her mind to the problem, attempted to ascertain the true nature of the situation, and made all reasonable inquiries to that end.
> In this respect, since there is an active, as well as a passive, aspect to the defence, mistake of fact involves establishing due diligence. To show that a mistake of fact was reasonable, the accused must establish that he or she took all reasonable steps and made all reasonable inquiries to find out the correct information. As several courts have said, mistake of fact and due diligence are closely related, if not the same, since both come down to the question whether the accused exercise all reasonable care.
>
> A perfunctory inquiry is not sufficient. ...

¶ 95 There certainly would be a reasonable mistaken belief if someone actually tells a novice driver that they have been licensed for over four years or that they have the appropriate class of license. This however, is not the situation in the case at bar. The defendant was not told by the boyfriend that he was properly licensed or qualified. In fact, she was not active in inquiring about his driver's license and his years of driving experience.

¶ 96 In conclusion, the defendant was passive or willfully blind. She should have done more in verifying the status of the front passenger's driving license. She should have at least asked whether he had a class "G" license and whether he had at least four years driving experience. Her belief that he was properly licensed because he had always driven as long as she knew him could not have satisfied her mind in any event. They had known each other for only five months. Thus, her belief that he was properly licensed or qualified to sit in the front seat beside her is not a reasonable conclusion on her part. She even testified that she did not know how long he had been driving before they had met. Furthermore, she had not made all reasonable inquires to ascertain the true nature of her boyfriend's driver's license. Therefore, the defendant had not been duly diligent in finding out about the front passenger's driver's license.

5. DISPOSITION

¶ 97 Although there has been a serious accident involving a motor vehicle driven by the defendant, the prosecution has failed to prove beyond a reasonable doubt that the defendant committed the offence of careless driving. However, the prosecution did prove beyond a reasonable doubt that the defendant, Neima Mohammad Ali, committed the offence of being a class "G1" license holder driving a motor vehicle without being accompanied by a qualified driver contrary to s. 5(1) of Ontario Regulation 340/94.

QUON J.P.

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