Indexed as:

R. v. Colabufalo

IN THE MATTER OF the Highway Traffic Act, R.S.O. 1990, c. H.8

Between
Her Majesty the Queen, and
Grace Colabufalo, defendant

[2001] O.J. No. 2471

Ontario Court of Justice
Provincial Offences Court - Mississauga, Ontario
Quon J.P.

Heard: March 5-6, 2001.
Judgment: June 25, 2001.
(109 paras.)

Charge: Fail to yield to pedestrian - s. 144(7) Highway Traffic Act

Cases Considered or Referred To:

Erven v. the Queen, [1979] 1 S.C.R 926, 44 C.C.C. (2d) 76, 92 D.L.R. (3d) 507 (S.C.C.).
R. v. Faria (December 14, 1987) unreported per Langdon J. at Brampton.
R. v. Hodgson [1998] 2 S.C.R. 449, S.C.J. No. 66 (S.C.C.).
R. v. Roti (June 25, 1992) unreported per Zimmerman at Newmarket.
R. v. Slopek [1974] O.J. No. 826 (O.C.A.) per Gale C.J.O., Brooke and Martin JJ.A.
R. v. St. Lawrence, [1949] O.R. 215, 93 C.C.C. 376 (H.C.J.)).
R. v. Starr [2000] S.C.J. No. 40, 147 C.C.C. (3d) 449 (S.C.C.).
R. v. Sweeney [2000] O.J. No. 3534, 50 O.R. (3d) 321 (Ont. C.A.) per Abella, Rosenberg and MacPherson JJ.A.
R. v. Sweezey [1974] O.J. No. 690, 20 C.C.C. (2d) 400, 27 C.R.N.S. 163.
R. v. Tat [1997] O.J. No. 3579, 117 C.C.C. (3d) 481 (O.C.A.) per Labrosse, Doherty and Weiler JJ.A.
R. v. White [1999] S.C.J. No. 28, 2 S.C.R. 417 (S.C.C.).

Statutes, Regulations and Rules Cited:

Highway Traffic Act, R.S.O. 1990, c. H.8, ss. 1(1), 144(1), 144(7), 199(1), 199(3), 200(1).

Exhibits Entered

Exhibit "1" - letter from distributor of motorized scooters indicating maximum speed of scooter is 5 m.p.h.

Counsel:

C. Mariuz, prosecutor. B. Cashmore, for the defendant.

QUON J.P.: —

1. INTRODUCTION

¶ 1 Poor Mrs. Panchenko, while on her motorized scooter, was hit by an automobile as she was in a pedestrian crosswalk. She uses this scooter to move about because she is unable to perambulate. The police charged the defendant as the driver of that vehicle with failing to yield to Mrs. Panchenko who was a pedestrian in the crosswalk. At the time Mrs. Panchenko was struck, the driver of that automobile appeared to have been using a cellular telephone. One more time this accident shows the careless and cavalier attitude people have while driving and using cellular telephones.

¶ 2 The defendant's agent contends the prosecution has not proven the defendant was the driver of the vehicle that had struck Mrs. Panchenko. Mrs. Panchenko while testifying for the prosecution fell short of identifying the person who was driving the automobile that struck her. If she had known the driver's name, she failed to mention it. The agent also contends the only evidence identifying the defendant as the driver came from the investigating officer's testimony. However, it is argued that the court must exclude this identification evidence since a voir dire was not held to determine the voluntariness of any inculpatory statement given by the defendant to the officer. The defence seeks to exclude the portion of the officer's testimony in which he concluded the defendant was the driver of the subject vehicle, as this conclusion was a direct result of a conversation between the officer and the defendant. The defence submits there is no exception to the requirement of holding a voir dire. The prosecution is required to prove the defendant's inculpatory statements were made voluntarily to a person in authority to be admissible. As a consequence of the prosecution failing to prove the voluntariness of any statements made by the defendant to the officer, and the court's obligation to exclude the officer's testimony regarding the identity of the driver, the defence submits that there remains no admissible evidence that the defendant was the driver of the vehicle involved in the accident.

¶ 3 The defendant's agent relies on R. v. Slopek [1974] O.J. No. 826 (O.C.A.); R. v. Faria (December 14, 1987) unreported, per Langdon J. at Brampton; and R. v. Roti (June 25, 1992) unreported, per Zimmerman at Newmarket, to support his argument on the prerequisite of holding a voir dire to determine the voluntariness of a statement before admissibility.

¶ 4 The primary issue to decide in this case is whether there is any admissible evidence that the defendant has been identified as the driver of the automobile that hit the unfortunate Mrs. Panchenko. Consequently, if the only evidence of the identity or name of the driver comes from the investigating officer's testimony, is that evidence a product of a conversation between the defendant and the officer, or was it from information that Mrs. Panchenko had relayed to the officer? If the information on the identity of the driver came directly from the defendant, then those statements would have to be voluntarily given. If the name of the driver was obtained from Mrs. Panchenko, then there is no issue on voluntariness and a voir dire is not required. However, if the identity of the driver did come from Mrs. Panchenko, the issue then becomes the admissibility of hearsay evidence, particularly if the prosecution is seeking to have this evidence admitted for the truth of its contents.

¶ 5 The trial was held on March 5 and 6, 2001. The matter was then adjourned for judgment to be rendered on June 25, 2001.

2. FACTS

¶ 6 The defendant has been charged under section 144(7) of the Highway Traffic Act, R.S.O. 1990, c. H.8, for failing to yield to a pedestrian on July 31, 2000 at 4:30 p.m. at Bristol Road West and Creditview Road in the City of Mississauga.

¶ 7 Mrs. Panchenko uses a motorized scooter as a mobility device. She has difficulty walking under her own power because of her physical disability: spinal bifida. On July 31, 2000, she was on her scooter at the intersection of Creditview Road and Bristol Road West. She was on the north side of Bristol Road West going eastbound toward the crosswalk. As she reached the start of the crosswalk, she observed the signal light for her

was still green. The pedestrian signal showed a green man. At this moment, she noticed a stopped automobile in the curb lane. The driver of that vehicle appeared to have a cellular telephone to her ear.

¶ 8 Mrs. Panchenko then proceeded to cross the street. Her rear wheels on her scooter were off the curb, on the roadway, and within the crosswalk markings painted on the road. She was within the crosswalk when the stopped automobile continued with a right turn for Bristol Road West. This automobile then hit her and knocked her off her scooter. Mrs. Panchenko observed this automobile travelling southbound on Creditview Road travelling at about 10 miles per hour just before colliding with her in the crosswalk.

¶ 9 The front right bumper of the automobile hit Mrs. Panchenko on her upper left leg between her knee and her hip. Her upper leg took most of the impact.

¶ 10 After the accident, Mrs. Panchenko and the driver of the automobile that hit her had a brief conversation. During this conversation the driver had written down her licence plate number and her insurance information and then gave this written information to Mrs. Panchenko.

¶ 11 She was taken to a hospital for x-rays. She was in a lot of pain and she sustained internal bruising.

¶ 12 Officer Valade, the investigating officer, testified that he attended Credit Valley Hospital on July 31, 2001 sometime after 5:52 p.m. to investigate a motor vehicle collision, which involved a personal injury. At the hospital Mrs. Panchenko told Officer Valade the accident occurred earlier that day at about 4:30 p.m. She also told Officer Valade that the driver of the vehicle that hit her was operating a cellular telephone and looking to her left, in what appeared to be an attempt to make a safe right turn on a red light. The vehicle's right-front passenger-side bumper struck the victim. The driver of the vehicle assisted Mrs. Panchenko in getting back on her scooter and then escorted Mrs. Panchenko home.

¶ 13 Officer Valade testified that Mrs. Panchenko had given him information about the defendant before he visited the defendant at her residence in Mississauga. Officer Valade stated: "I subsequently attended the defendant's residence. I received her information from the victim and spoke to the defendant, who identified herself with a valid Ontario driver's licence, number C62113003575124, as Ms. Grace Colabufalo".

¶ 14 During the conversation with the defendant at her residence, Officer Valade testified that the defendant indicated to him the vehicle she had been operating. He then inspected the vehicle she had pointed out to him. He noted the vehicle was a 1995 four-door Volvo, black in colour. He then testified, that he noticed some dust had been somewhat wiped off the front passenger-side bumper, which appeared to be the result of the collision with the victim. Officer Valade stated that the vehicle was somewhat dirty; it was not clean.

¶ 15 Officer Valade also investigated the intersection where the accident occurred and testified there were clearly marked pedestrian crosswalk lines for the entire intersection.

¶ 16 Under cross-examination, Valade testified that after speaking with Mrs. Panchenko he had not yet made a decision to charge the defendant. His usual practice was hearing from both sides before deciding whether charges should be laid. It was not until Officer Valade attended at the defendant's residence that he had decided to charge the defendant.

¶ 17 The defendant was absent from the courtroom during the trial. No voir dire was held concerning the voluntariness of any statements made by the defendant to Officer Valade.

ARGUMENTS

Defence argument

¶ 18 If the prosecution wishes to use inculpatory information the defendant gave to the officer during a conversation, the defendant's agent submits, that information must be entered through a voir dire. It was argued that information concerning the driver's identity received by the officer and then relayed to the court was from statements that the defendant gave to the officer. The officer asked questions and the defendant gave

answers. The officer during his testimony alluded to the fact that the defendant was the driver. Therefore, one of those statements given to the officer would have to do with the defendant being the driver of the vehicle.

¶ 19 Identification is an essential element of every charge. Identification is a statement that says: "I was the driver" or "I was there", or "I was involved". That is a statement and whether the officer quotes the defendant verbatim or whether the officer testifies that the defendant advised the officer of that -- that evidence of identification comes through the officer. Thus, the only evidence of the identity of the driver in this case comes from the officer. Mrs. Panchenko, on the other hand, indicated that she and the driver of the vehicle that hit her only had a conversation in which the driver gave Mrs. Panchenko a plate number for the vehicle. The only utterance of the defendant's name has come from the officer and that information as to who was driving the vehicle was not entered through a voir dire.

¶ 20 Further, there is no evidence from Mrs. Panchenko, the victim, that the defendant actually identified herself to Mrs. Panchenko. Mrs. Panchenko only indicated that she received the licence plate number from the driver. As a result, the officer was able to locate the residential address of the owner of the vehicle through the licence plate number, attended at the registered address, had discussion with the defendant and determined through some dust displacement that this was the vehicle involved in hitting Mrs. Panchenko.

¶ 21 Therefore, the defence submits identification is an essential element of any charge and it is suggested that there is no admissible evidence to rely upon to prove the identification of the driver. R. v. Slopek, [1974] O.J. No. 826 (O.C.A) was offered up in support of the defence's argument.

¶ 22 The defence acknowledges that inculpatory statements in which someone admits or confesses to being the driver of a vehicle can be used as evidence, but only after the statement had been entered through a voir dire. Since a voir dire was not held in this case, according to R. v. Faria (December 14, 1987), unreported, per Langdon J. at Brampton, the defendant's statement that he was the driver is not admissible evidence. Also R. v. Roti (June 25, 1992), unreported, per Zimmerman at Newmarket and R. v. Slopek say that a voir dire must be held if the prosecution wishes to use any information the defendant may have given to a police officer.

¶ 23 In this case, the defence submits, the prosecution relies on essentially what was a statement from the defendant to the officer, to prove that the driver of the vehicle that hit Mrs. Panchenko was the defendant. That is a form of confession and although holding a voir dire is inconvenient, the statement must still be entered through a voir dire.

¶ 24 There is no exception to that principle, it is argued. That principle applies to anything relevant including identification.

¶ 25 The prosecution argued that the defence was silent and failed to object during the officer's testimony regarding the identification of the defendant as the driver. The defence contends that he does not know of anything that requires the defence to ensure that a voir dire is held when dealing with statements. It is not the job of the defence to complete the prosecution's case.

¶ 26 The prosecution submitted that justice was not served with the absence of the defendant, especially when the defence brought up the identity of the driver. In response to that submission, the defence replied that the defendant does not have to be present during the trial according to the Provincial Offences Act. Whether the defendant is in court or not, the statement that the defendant was the driver still would have to be entered through a voir dire.

Prosecution's argument

¶ 27 The prosecution submits section 144(1) of the Highway Traffic Act defines "pedestrian" to include a person in a wheelchair. Section 1(1) of the Highway Traffic Act defines "wheelchair" for the purpose of the Act to mean a chair mounted on wheels driven by muscular or any other kind of power and used for the carriage of a person who has a physical defect or disability. The prosecution contends the Mrs. Panchenko's motorized

scooter is such a chair mounted on wheels and is used for the carriage of a person with a physical defect or disability.

¶ 28 On the issue of identification, the prosecution asserts that since the defendant's agent did not raise an objection or asked for a voir dire, the court may consider the agent's silence as acquiescence to the admissibility of the officer's evidence in chief and an admission of voluntariness. Further, the prosecution submits the officer's evidence on the identity of the defendant as the driver was just confirmation of what the victim, Mrs. Panchenko, had learned from speaking with the defendant and is not direct evidence that is subject to the requirements of a voir dire. Simply, there is no inculpatory statement made by the defendant to the officer requiring a voir dire. Mrs. Panchenko, who received the information about the identity of the driver from the driver herself, is not a person in authority and therefore the defendant had given this information about her identity freely. The officer only confirmed in his conversation with the defendant what Mrs. Panchenko had told him.

¶ 29 Regarding holding a voir dire, the prosecution concedes that any statement made by a defendant to an officer before being admissible would be subject to a voir dire to determine voluntariness. It was also conceded that a voir dire was not held with respect to the officer's recitation of information provided to him by the defendant. However, the prosecution explains that since the defendant's agent did not object during the officer's testimony, his acquiescence constitutes an admission of voluntariness of any statements made by the defendant to an officer. It is contended that there is a duty on the defendant's agent to put forth an objection if he believes there is a legal bar to a particular statement or piece of evidence being entered. The agent was silent for the testimony of the officer during chief; no objection was raised and no comment made during trial. It only arises now in submissions.

¶ 30 Additionally, the prosecution questions whether any information relayed by the officer to the court was brought forward in a context that required a voir dire. The prosecution submits that the defendant had a conversation with the victim after the accident and the victim advised the court that she obtained the identification of the defendant on the date of the accident and provided that information to the officer so the officer could visit the residence of the defendant. The prosecution concedes that the victim was unable to provide that documentation or that information to the court directly, but certainly, the officer's attendance at the defendant's residence would not have been possible without that information. Also, there is no issue of voluntariness of any statement the defendant gave to the victim, as the relationship between the defendant and the victim is not a situation where the victim is a person in authority.

¶ 31 The prosecution also had concerns over the audacity of the defense to argue the issue of identification or voluntariness of any information given to the police officer, especially when the defendant herself does not personally appear for trial. Although the prosecution concedes that the defendant is entitled to be represented by an agent, the defendant is benefiting by not being before the court and her absence is jeopardizing the interest of justice by not being present. The defence made issue with the voluntariness of any statement made by the defendant to the officer, yet fails to be present to establish such contention.

3. ISSUES

¶ 32 Is there an onus on the defence to request a voir dire concerning the voluntariness of the defendant's out-of-court statements that were given to the investigating police officer?

¶ 33 Was a voir dire required to determine the voluntariness of any out-of-court statements made by the defendant to a police officer?

¶ 34 Is there any evidence objectively viewed that the information given by the defendant to the police officer was given voluntarily?

¶ 35 If Mrs. Panchenko knew the name of the driver of the vehicle that struck her and gave that name to the officer, is the name admissible as hearsay evidence through the testimony of the officer?

¶ 36 Is there any admissible evidence to prove beyond a reasonable doubt that the defendant was the driver of the vehicle that struck Mrs. Panchenko?

4. ANALYSIS OF FACTS AND LAW

¶ 37 First, on the issue of whether Mrs. Panchenko was a pedestrian when a vehicle struck her. I agree with the prosecution that she falls within the definition of a pedestrian. Mrs. Panchenko was operating a motorized scooter while crossing the street within a pedestrian crosswalk. Mrs. Panchenko uses this scooter to move about as she has difficulty walking. Section 144(1) of the Highway Traffic Act, R.S.O. 1990, c. H.8, defines "pedestrian" to include a person in a wheelchair. Section 1(1) of the same Act defines "wheelchair" for the purpose of the Act to mean a chair mounted on wheels driven by muscular or any other kind of power and used for the carriage of a person who has a physical defect or disability. Mrs. Panchenko has spinal bifida, a disability. Therefore, since Mrs. Panchenko's motorized scooter is such a chair mounted on wheels and is used for the carriage of a person with a physical defect or disability, she is a pedestrian for the purposes of this charge. The defense did not oppose this point.

1. (1) In this Act,

...
"wheelchair" means a chair mounted on wheels driven by muscular or any other kind of power and used for the carriage of a person who has a physical defect or disability. ("fauteuil roulant")

144(1) In this section,

...
"pedestrian" includes a person in a wheelchair; ("piéton")

Yielding to pedestrians

144(7) When under this section a driver is permitted to proceed, the driver shall yield the right of way to pedestrians lawfully within a crosswalk.

¶ 38 Next, the major question to decide is whether the prosecution has proven beyond a reasonable doubt that the defendant was the driver of the vehicle that struck Mrs. Panchenko while she was on her motorized scooter and a pedestrian within a crosswalk.

¶ 39 The evidence proffered by the prosecution is that the defendant was the driver of the vehicle that struck Mrs. Panchenko. Since Mrs. Panchenko did not name or identify the driver in her testimony, the prosecution wishes to indirectly enter evidence pertaining to the identity of the driver via the officer's testimony. Officer Valade was not present during the accident, nor did he observe the accident, and obviously cannot give a first hand account of the accident. The one person who is directly able to identify the driver of the vehicle that struck Mrs. Panchenko is Mrs. Panchenko herself. Unfortunately for the prosecution, she only testified about the speed of the vehicle, the direction the vehicle was travelling, the position of the streets at the intersection, the colour of the lights, the presence of a pedestrian signal, the gender of the driver and what the driver was doing. Mrs. Panchenko omitted to physically describe the driver or to give the driver's name in her testimony. She did however testify that the driver of the vehicle that struck her gave her a document with the number of the licence plate and insurance information written on it. She unfortunately did not bring that document with her to court.

¶ 40 Essentially, the prosecution is seeking to enter indirectly the defendant's name or identity through the officer who investigated the accident. The name of the defendant is being proffered as the driver, either through a statement or a confession given by the defendant to the officer, or through the victim's knowledge of the identity of the driver and relayed to the officer. With the latter perspective, there are two possible scenarios. In one scenario, which the prosecution adopts, the identity of the driver is obtained by the victim, who learned it directly from the defendant, and then given to the officer. In this scenario, the victim had the defendant's name,

which she then forwarded to the officer, and that the officer only attended at the defendant's residence to verify the victim's story. The defence, however, espouses and favours a second scenario. That situation being the victim only had a license plate number and some insurance information, which was given to the officer, who then checked his computer and learned the address of the owner of the vehicle involved in the accident. The officer subsequently attended at that address and discovered the identity of the driver through a conversation with the defendant in which it appears the defendant may have admitted being involved in the accident.

¶ 41 If the defendant admitted or confessed to being the driver of the vehicle while conversing with the officer and the prosecution wishes to enter that inculpatory evidence which was made out of court, the defence submits that a voir dire should have been conducted by the prosecution to determine if the defendant freely and voluntarily made those culpable statements to the officer. The prosecution submits there was no need to hold a voir dire as the defendant's identity came from Mrs. Panchenko, who relayed it to the officer. Alternatively, it is argued that the defence's silence during the officer's testimony should be construed as an acceptance that any inculpable information was voluntarily given. Therefore, was a voir dire required in this case?

THE REQUIREMENT OF A VOIR DIRE

¶ 42 It is trite to say that the prosecution's task would be simple if a defendant confesses that she committed the offence or that she was the driver of a vehicle involved in an accident. Nonetheless, in order for the prosecution to utilize an inculpatory statement given by the defendant out of court to a person in authority, either as part of the prosecution's case or in cross-examination of the defendant, it must be proved beyond a reason doubt the defendant made this statement voluntarily. Considering that courts do place great weight on confessions, a safeguard was developed that ensured that convictions resulting from confessions were not unfairly obtained and unjust. This safeguard is called the "confessions rule".

(a) the confessions rule

¶ 43 Briefly, the confessions rule applies to any out of court statement of the defendant given to a person in authority conducting an investigation of a suspected offence. Cory J. for the majority in R. v. Hodgson (1998), 127 C.C.C. (3d) 449 (S.C.C.) at page 459 referred to the confessions rule:

> It "can now be taken to be clearly established in Canada that no statement made out of court by an accused to a person in authority can be admitted into evidence against him unless the prosecution shows, to the satisfaction of the trial judge, that the statement was made freely and voluntarily". See Erven v. The Queen, [1979] 1 S.C.R 926 at p. 931, 44 C.C.C. (2d) 76, 92 D.L.R. (3d) 507, per Dickson J., as he then was. This, of course, is the confessions rule.

¶ 44 A person in authority is anyone whom the defendant reasonable believes is acting on behalf of the state and could therefore influence the course of the investigation or prosecution. It typically applies to those formally engaged in the arrest, detention, examination or prosecution of the defendant.

¶ 45 Cory J. in Hodgson gave a summary of the confessions rule and its relation to the person in authority requirement at pages 460 to 461. His Lordship wrote:

> Evidence of a confession has always been accorded great weight by triers of fact. This is a natural manifestation of human experience. It is because of the tremendous significance attributed to confessions and the innate realization that they could be obtained by improper means that the circumstances surrounding a confession have for centuries been carefully scrutinized to determine whether it should be admitted. A confession is not excluded, however, simply because of the risk that a conviction may result, but because of the greater risk that the conviction will be unfairly obtained and unjust. The unfairness of admitting a confession has historically been addressed by a consideration of two factors. First, the voluntariness of the statement; and second, the status of the receiver of the statement, that is to say, whether the receiver was a person in authority.

> As to the first factor, a statement is said to be voluntary when it is made without "fear of prejudice or hope of advantage": see Ibrahim v. The King, [1914] A.C. 599 (P.C.) at p. 609, adopted in Canada in Prosko v. The King (1922), 63 S.C.R. 226, 37 C.C.C. 199, 66 D.L.R. 340. In Boudreau v. The King, [1949] S.C.R. 262 at p. 269, 94 C.C.C. 1, [1949] 3 D.L.R. 81, Rand J. explained that "the rule is directed against the danger of improperly instigated or induced or coerced admissions". Voluntariness also requires that the statement must be the product of an operating mind: see Ward v. The Queen, [1979] 2 S.C.R. 30 at p. 40, 44 C.C.C. (2d) 498, 94 D.L.R. (3d) 18, per Spence J. and Horvath v. The Queen, [1979] 2 S.C.R. 376 at p. 425, 44 C.C.C. (2d) 385, 93 D.L.R. (3d) 1, per Beetz J. Voluntariness is determined by a careful investigation of the circumstances surrounding the statement of the accused, and involves a consideration of both objective and subjective factors.
>
> Second, the person in authority requirement generally refers to anyone formally engaged in "the arrest, detention, examination or prosecution of the accused" .... This definition may be enlarged to encompass persons who are deemed to be persons in authority as a result of the circumstances surrounding the making of the statement. For the moment, however, let us consider the purpose of each of these factors as they pertain to the admissibility of statements of the accused.
>
> Historically the insistence that a confession must be voluntary related to concerns about the reliability of the evidence. Indeed, the basis for the admission of a statement of the accused as an exception to the rule against hearsay is that what people freely say which is contrary to their interest is probably true. However, where a statement is prompted by a threat or inducement held out by a person in authority, it can no longer be presumed to be true.

¶ 46 Cory J. also commented at page 464 on the significance of determining the voluntariness of inculpatory statements made by a defendant:

> The emphasis on voluntariness has two main effects: it both avoids the unfairness of a conviction based on a confession that might be unreliable, and has a deterrent effect on the use of coercive tactics.

¶ 47 A voir dire, or a trial within a trial, is held to determine if the defendant's confession or out of court statement to a person in authority was freely and voluntarily given. If the court determines after a voir dire that the defendant's confession or statement was voluntarily given to a person in authority, then the confession or statement is admissible, subject to reliability. In the case at bar, the prosecution did not seek leave to hold a voir dire for determining the voluntariness and admissibility of any statement made by the defendant to Officer Valade.

(b) burden of proof

¶ 48 The burden of proof on a voir dire to establish the voluntariness of a statement made by a defendant to a person in authority is always upon the prosecution. On the other hand, the defence is required to establish that the person hearing the confession or inculpatory statement is a person in authority. In Hodgson, Cory J. for the majority of the Supreme Court of Canada, wrote about the respective burdens of the prosecution and defence on a voir dire. At page 470, Cory J. writes:

> Finally, something must be said about the respective burdens which must be borne by the accused and the Crown on a voir dire to determine whether a statement of the accused to a person in authority should be admitted. The Crown, of course, bears the burden of proving beyond a reasonable doubt that the statement was made voluntarily. However, in relation to the person in authority requirement, the evidence required to establish whether or not a person should be deemed a person in authority will often lie primarily with the accused. The accused therefore must bear some burden in relation to this aspect of the confessions rule. The burden should be an evidential and not a persuasive one.

(c) defence initiative in seeking a voir dire and trial judge's obligation to hold a voir dire

¶ 49 If the defence is silent in requesting a voir dire or in objecting to the admissibility of a statement made by a defendant, the trial judge has a duty to take the initiative and require a voir dire if there is evidence that objectively indicates the need for one. This duty should arise rarely, given the defence obligation to raise the issue of admissibility. Where the statement was to a conventional person in authority such as a police officer or prison guard, the trial judge clearly has the duty, even if the defence does not request one, to hold a voir dire or ask the defence if it waives a voir dire on the voluntariness issue. Absent waiver, a voir dire must be held. This of course is contingent on whether there is any inculpatory information or statement made out of court by the defendant to a person in authority. There would be no need to hold a voir dire if the prosecution is not seeking to introduce any inculpatory evidence directly resulting from the defendant's conversation with a person in authority.

¶ 50 In the Hodgson case, defence counsel did not request a voir dire to test the voluntariness of certain out-of-court statements allegedly made by the accused and, consequently, the statements were admitted into evidence. On appeal, Hodgson contended that the trial judge erred in failing to direct a voir dire of his own motion to determine whether the statements were given to a person in authority and if so, whether they were made voluntarily.

¶ 51 Cory J., writing for the majority in Hodgson, found it necessary to consider several issues before determining whether the trial judge erred. First, does the onus always rest with the defense to request a voir dire to test the voluntariness of an accused's out-of-court statements? If not, when and under what circumstances should a trial judge hold a voir dire of his or her own motion? Further, is the trial judge's obligation to hold a voir dire triggered only where the receiver of the statement is a "conventional" person in authority, or should the obligation be construed more broadly?

¶ 52 At pages 472 to 474 Cory J. held [emphasis is mine below]:

> The trial judge has a duty "to conduct the trial judicially quite apart from the lapses of counsel'": see R. v. Sweezey (1974), 20 C.C.C. (2d) 400 (Ont. C.A.) at p. 417. This includes the duty to hold a voir dire whenever the prosecution seeks to adduce a statement of the accused made to a person in authority: see pp. 417-18. However, where the defence has not requested a voir dire and a statement of the accused is admitted into evidence, the trial judge will only have committed reversible error if clear evidence existed in the record which objectively should have alerted him or her to the need for a voir dire notwithstanding counsel's silence. Thus, the test for holding a voir dire is assessed by an appellate court's objective review of the evidence in the record to determine whether something should have triggered the trial judge's obligation to conduct an inquiry. This test is different from the test applicable on the voir dire, which requires the trial judge to undertake an examination of the reasonable belief of the accused and the circumstances surrounding the making of the statement to determine both whether the receiver is a person in authority and whether the statement was made voluntarily.
>
> ...
>
> Specifically, the reasoning in Erven, with which I agree, has two implications for the present case. First, the requirement that a voir dire be held cannot be founded upon the presence of evidence which is conclusive of the very issue to be examined on the voir dire. Second, a voir dire is required in respect of any statement made by an accused person to a "person in authority". See Erven, supra, at p. 931. Thus, given the highly prejudicial nature of confession evidence, the trial judge has an obligation to hold a voir dire of his or her own motion, notwithstanding the absence of any request by counsel, wherever the Crown seeks to adduce a statement made by an accused to a person in authority. Clearly, counsel for the accused may waive the voir dire. Once the waiver is given, it is unnecessary to hold the voir dire.
>
> However, the trial judge's obligation is triggered only where the evidence makes the need for a voir dire clear. Evidence which clearly demonstrates that the receiver of the statement made by

> the accused was closely connected to the authorities should alert the trial judge to hold a voir dire. This evidence progresses along a spectrum. That is, where the receiver of the statement is a "conventional" person in authority, such as a police officer or prison guard, the trial judge clearly has an obligation to proceed to a voir dire. In such a case, the connection to the authorities is readily apparent. Similarly, where the evidence clearly discloses a close connection between the receiver of the statement and the authorities which indicates that the receiver was, in the circumstances, acting as a person in authority, this may be sufficient to trigger the trial judge's obligation to hold a voir dire.
>
> Specifically, the trial judge must be satisfied that if the accused had been aware of the connection between the receiver of the statement and the authorities, the accused could reasonably believe the receiver was acting as an agent of the police or prosecuting authorities or as part of the prosecution team and was therefore capable of influencing the prosecution against him or her. If the evidence establishes this sort of connection, the trial judge should inquire whether the defence is prepared to discharge its evidential burden on the person in authority issue or whether it waives a voir dire on this issue. Thus, evidence of close association with the authorities might provide an entry to the voir dire procedure but the inquiry on the voir dire will still focus on an analysis to determine whether the receiver of the statement, assessed from the point of view of the accused, is a person in authority and ultimately whether the statement was made voluntarily. However, the further away the receiver of the statement is from the "conventional" case, the less likely it will be that the evidence will alert the trial judge to the need to hold a voir dire, and the greater the obligation of the accused to raise the issue.

¶ 53 L'Heureux-Dubé J. in Hodgson, however disagreed with Cory J. on what circumstances would trigger the trial judge's obligation to hold a voir dire. Her Ladyship held that this obligation should be precisely defined in order to promote certainty and help facilitate the judge's difficult task of judicially conducting a trial. At pages 494 to 496, Her Ladyship concluded [emphasis is mine below]:

> As a general rule, the defence has the onus of requesting a voir dire raising the issue that the accused's statement was made to a "person in authority" and thus putting the statement's admissibility into question. In the voir dire itself, as elaborated by my colleague in para. 37, the accused has an evidential burden of ensuring there is enough evidence on the record to make the issue of whether the statement was made to a "person in authority" a live one such that voluntariness must be established.
>
> The imposition of this basic burden on the accused is reasonable because it encourages parties to raise the issue of admissibility of evidence at trial, and saves counsel from seeking a voir dire or waiver concerning every statement made by the accused to anyone, in order to avoid the possibility of a successful appeal on that basis. More importantly, the determination of who is a "person in authority" derives from a close analysis of the facts, to which the subjective belief of the accused is relevant. As such, the imposition of this onus on the defence follows from the nature of the inquiry.
>
> In addition, this onus is consistent with the basic role of defence counsel in our adversarial system, whose competence in making tactical decisions and responsibly representing their client's best interests we have recognized (R. v. Lomage (1991), 2 O.R. (3d) 621 (C.A.)). In this regard, a failure to object to the admission of evidence may be based on a conscious decision of what best serves the interests of the defence. The basic duty to request a voir dire is consistent with this reality, and reflects the importance of some judicial deference to the competence of defence counsel and the avoidance of any undue interference with their trial strategy.
>
> Notwithstanding this responsibility borne by the accused, a trial judge still has the basic duty of ensuring the fair conduct of a criminal trial apart from lapses of counsel. Thus, in exceptional cases, she or he may have the duty to conduct a voir dire into the voluntariness of a confession even if there is no request from counsel. As Martin J.A. held in R. v. Sweezey (1974), 20 C.C.C. (2d) 400 (Ont. C.A.), a voir dire should be held either where it is requested,

> or absent such a request, where there are circumstances that cast doubt on the statement's voluntariness. In Erven v. The Queen, [1979] 1 S.C.R. 926, 44 C.C.C. (2d) 76, 92 D.L.R. (3d) 507, a plurality of this Court clarified that the very making of a statement to a person in authority is sufficient to cast doubt on the statement's voluntariness. In other words, there is no need for evidence of actual involuntariness. In this regard, the trial judge's duty to conduct a voir dire, absent the accused's waiver of this right, can arise on the facts before him or her.
>
> The critical issues upon which my colleague and I disagree is what circumstances trigger the trial judge's obligation to hold a voir dire -- where does the evidence reveal the realistic possibility that a statement has been made to a person in authority. This issue centres on the "person in authority" test, as it is the factor which triggers the application of the confessions rule. Logically, therefore, the circumstances under which the duty to hold a voir dire will arise should consistently mirror its definition.
>
> As a basic proposition, the duty to hold a voir dire is triggered where the evidence shows the reasonable possibility that the accused's statement was made to a person in authority. Mirroring the test for "person in authority" which I have adopted above, if the evidence reveals the reasonable possibility that first, the admission was made to someone formally engaged in the arrest, detention, examination or prosecution of the accused, and second, the accused might objectively have known of this authority, then a voir dire must be conducted. At this stage, there is an air of reality to the claim that the confession was made to a person in authority, voluntariness becomes a live issue and the trial judge has a duty to hold a voir dire.

¶ 54 Her Ladyship also summarized this obligation to conduct a voir dire at pages 498 to 499 [emphasis is mine below]:

> I agree with Finlayson J.A. that as a general rule the accused has the duty to request a voir dire in the case of non-obvious persons in authority. Where requested, the trial judge has an obligation to grant the accused the opportunity to establish that the statement was made to a person in authority.
>
> In the rarest of circumstances, however, even without any request by counsel, there may be enough evidence on the record prior to the statement's admission which should have alerted the trial judge to the need for a voir dire. As outlined above, there must be the realistic potential that the person was formally acting for the state and the accused could have known of this relationship. Otherwise, it would serve no legitimate purpose to interrupt the trial to conduct a voir dire.
>
> In summary, the trial judge has a duty to hold a voir dire where there is a reasonable possibility that the statement was made to a person in authority. This will automatically arise in cases of obvious persons in authority, subject to informed waiver by the accused. In the case of non-obvious persons in authority, however, the evidence must reveal both the reasonable possibility that the person was an agent of the state and the accused could have known of this status. As a general rule, the accused bears the onus of requesting this trial within a trial. However, in exceptional circumstances, the evidence itself will require the trial judge to conduct a voir dire proprio motu.

¶ 55 After reviewing the Supreme Court's ruling in Hodgson, the defence's contention that it is not obligated to request a voir dire is not entirely correct. Cory J. stated the defence has an obligation to raise the issue of holding a voir dire in a situation where there is an issue concerning the status of the receiver of some statement, especially if it is not clear whether the person receiving the information is a person in authority. L'Heureux-Dubé J. stated the general rule is that the defence has the duty to request a voir dire in the case of a non-obvious person in authority. Both Cory J. for the majority and L'Heureux-Dubé J. found that there is an onus for the trial judge to hold a voir dire even if the defence does not request one when it concerns a statement given to a person in authority. However, L'Heureux-Dubé held the trial judge's duty to step in and hold a voir dire occurs only in exceptional or the rarest of circumstances. In the case at bar, there are two individuals who may have received a statement from the defendant. Officer Valade is clearly a person in authority. However, Mrs. Panchenko is not. If there had been an out-of-court statement made by the defendant to Officer Valade, in which the officer

wish to proffer now to the court, the court then would have been obligated to hold a voir dire, even if counsel failed to make such a request.

¶ 56 Regardless, the prosecution submits that the defence in not objecting on the issue of admissibility or failing to request a voir dire is a tacit agreement or acquiescence to the voluntariness of the statements made by the defendant to the officer. The Court of Appeal of Ontario in R. v. Sweezey (1974), 20 C.C.C. (2d) 400 addresses that argument. Martin J.A. writing for the Court of Appeal at page 417 held:

> In my view the failure of counsel to object cannot have the effect of making an inadmissible statement admissible. I adopt what was said by Sidney Smith, J.A. in Regina v. Ostroglow, 113 C.C.C. 279 at p. 283:
>
> > " ... it is the duty of a Judge to conduct the trial judicially quite apart from lapses of counsel."
>
> Consequently, the defence's silence on the admissibility of a statement is not implicit consent that it had been made voluntarily to the officer.

¶ 57 Still, is there a situation in which the trial judge does not have to hold a voir dire if the circumstances surrounding the making of a statement obviously indicate that statement had been made voluntarily? L'Heureux-Dubé J. in Hodgson at page 495 addressed Martin J.A.'s holding in R. v. Sweezey in which Martin J.A. refers to a voir dire not being required where the circumstances may show that the statements were voluntarily given:

> As Martin J.A. held in R. v. Sweezey (1974), 20 C.C.C. (2d) 400 (Ont. C.A.), a voir dire should be held either where it is requested, or absent such a request, where there are circumstances that cast doubt on the statement's voluntariness.

¶ 58 Martin J.A. writing for the Court of Appeal in R. v. Sweezey at page 413 held [emphasis is mine below]:

> To hold that it is a condition of the admissibility of any statement made to a police officer during an investigation of a crime and tendered in evidence against an accused that the statement must be shown to have been made voluntarily is not to say that the burden of proof can only be discharged by the holding of a voir dire. The voluntary nature of a statement made by a person to a police officer during an investigation may sufficiently appear from the evidence adduced as to the circumstances in which the statement was made depending upon the particular facts.

¶ 59 In addition, Martin J.A. concluded at page 417 of Sweezey:

> It is not necessary in every case to hold a voir dire to decide whether a statement made by an accused to a person in authority was voluntary and the voluntary nature of the statement may be shown by the circumstances surrounding the making of the statement without the necessity for a voir dire.

¶ 60 However, it is not clear whether Martin J.A.'s conclusion is still applicable today, in light of the Supreme Court's finding in Hodgson. Although, L'Heureux-Dubé J. in Hodgson at page 495 did write:

> In Erven v. The Queen, [1979] 1 S.C.R. 926, 44 C.C.C. (2d) 76, 92 D.L.R. (3d) 507, a plurality of this Court clarified that the very making of a statement to a person in authority is sufficient to cast doubt on the statement's voluntariness. In other words, there is no need for evidence of actual involuntariness. In this regard, the trial judge's duty to conduct a voir dire, absent the accused's waiver of this right, can arise on the facts before him or her.

L'Heureux-Dubé J. holds the trial judge's duty to conduct a voir dire can arise on the facts before him or her. This appears not to exclude the situation where the facts obviously and clearly indicate that a defendant's

statement to a person in authority had been made voluntarily.

(d) admitting involuntary statements: the "St. Lawrence" rule

¶ 61 The Court of Appeal of Ontario in R. v. Sweeney (2000), 148 C.C.C. (3d) 247 (O.C.A.) held that in the most exceptional circumstances, the court has the common law discretion to admit portions of an involuntary statement if the truth of which are confirmed by other evidence. This common law rule is referred to as the rule in R. v. St. Lawrence, [1949] O.R. 215 (H.C.J.), which provides that, where the discovery of some fact confirms the truth of an involuntary confession, the part of the confession that is confirmed by the discovery of the fact is admissible.

¶ 62 Generally, the reference to an "involuntary statement" means a statement given to a person in authority that resulted from the statement maker being coerced or induced by threats or promises, and therefore involuntarily made. It is questionable whether the term "involuntary statement" is broad enough to include situations where there is an out-of-court inculpatory statement given to a person in authority and no voir dire was held for its admissibility regarding voluntariness. The statement in that query would not have been proven to be made voluntarily by the prosecution, as a voir dire had not been held to determine its admissibility. The question then is, since the statement had not been proven in a voir dire to be voluntarily made, since no voir dire was held, would this also make any out-of-court statement made by a defendant to a police officer wear the involuntary label. That is, should the statement in this scenario be deemed to be an "involuntary statement" for the purposes of falling within the rule in R. v. St. Lawrence. That question, however, will have to be left for another day, when the facts arise.

(e) Is a voir dire required in this case?

¶ 63 The defence contends that a voir dire was required to be held. It is necessary to hold a voir dire to determine the voluntariness of a statement made by the defendant to a person in authority, unless the defence waives the voir dire. The agent for the defendant in this matter did not explicitly waive holding any voir dire into the voluntariness of any statement the defendant may have given to Officer Valade.

¶ 64 The defence may waive holding a voir dire by conceding either the defendant made a voluntary statement or that the statement was not to a person in authority. The waiver must be informed and unequivocal. The trial judge is not bound by the waiver and may hold a voir dire anyway.

¶ 65 However, in the case at bar, was there a statement made by the defendant to a person in authority that required a voir dire to prove voluntariness? The prosecution submits that there was no statement in the context that required the holding of a voir dire. I agree with the prosecution on that point. There was no verbatim inculpatory statement from the defendant that Officer Valade recounted in his testimony. Furthermore, there was no evidence from Officer Valade that could be construed to be derivative of any statement that the defendant may have said to the officer, indicating that she was the driver of the vehicle that hit Mrs. Panchenko. As such, there was no need to hold a voir dire since the prosecution did not try to enter in evidence an inculpatory statement or confession from the defendant to prove the prosecution's case.

¶ 66 There were only two parts of Officer Valade's evidence that even required consideration in this question of the need for a voir dire. First, the officer testified that after he met with Mrs. Panchenko, he subsequently attended the defendant's residence. He stated, "I received her information from the victim and spoke to the defendant, who identified herself with a valid Ontario drivers licence, number C62113003575124, as Ms. Grace Colabufalo ...". All that this evidence indicates is that the officer spoke with someone named Grace Colabufalo. Depending on the circumstances, there is a duty to identify oneself to a police officer when so requested. A person identifying oneself with a driver's license or giving verbal identification is not, taken in isolation, an inculpatory statement. It may be different if the officer had spoken to the driver of the vehicle at the scene of the accident, and not at the driver's residence. Therefore, a voir dire was not required to test the voluntariness of the statement given by the defendant identifying herself to the officer. Again, this is not an out-of-court confession or inculpatory statement given to a person in authority.

¶ 67 The second part of the officer's testimony to be considered in whether a voir dire was required concerns when he stated, "I had occasion to inspect the vehicle that the defendant indicated that she was operating ...." This evidence is ambiguous. Does it mean the defendant showed the officer the vehicle she was driving on the day of the accident or could it possibly mean the defendant showed the particular vehicle that she normally drives though it is not necessarily the same vehicle that was involved in the accident? This indication of the vehicle she was operating is not inculpatory. It does not indicate that the defendant was the driver of the vehicle that hit Mrs. Panchenko. Again, this part of the officer's evidence does not require the application of a voir dire.

¶ 68 Finally, the officer's testimony regarding the dust displacement of the defendant's vehicle, at best, only proves the defendant's vehicle was involved in the accident but does not prove who the driver was that hit Mrs. Panchenko.

¶ 69 In sum, a voir dire was not required to be held as there were no inculpatory statements made by the defendant to Officer Valade that were entered as evidence through his testimony. In addition, there is no evidence that clearly and objectively indicates that the defendant may have given any information, inculpatory or otherwise, to Officer Valade, such that the court may make a finding of voluntariness without holding a voir dire, as espoused in R. v. Sweezey. Moreover, the officer's testimony does not indicate that he made his conclusion to charge the defendant as a result of his conversation with the defendant or that the defendant gave him any inculpatory evidence during their conversation at the defendant's residence.

THE OFFICER RECEIVED THE DEFENDANT'S NAME FROM MRS. PANCHENKO

¶ 70 The prosecution's case is now dependent on whether the testimony of Officer Valade in identifying the defendant as the driver was the result of receiving the defendant's name from Mrs. Panchenko. If it can be clearly established that Mrs. Panchenko gave the name of the driver to the officer, then there is no issue on voluntariness and a voir dire is not required, as Mrs. Panchenko is not a person in authority. Even if it were clear that Mrs. Panchenko had given the name of the driver to Officer Valade, the prosecution would still have the problem of the admissibility of hearsay evidence, particularly, if the prosecution wishes to rely on that out-of-court utterance received by the officer from Mrs. Panchenko for the truth of its contents.

¶ 71 The prosecution may have the name of the driver admitted as hearsay evidence through the testimony of Officer Valade in two ways. First, the hearsay evidence may be entered as a categorical exception to the hearsay rule, or secondly it may be admissible under the general exception or principled approach of reliability and necessity. Under the first scenario, the prosecution could enter the hearsay evidence under the "prior identification" exception. This is a situation in which Mrs. Panchenko would testify that she had known the name of the driver and gave this name to Officer Valade, and now could no longer remember what that name is. The prosecution then would enter the name of the driver through the testimony of Officer Valade. However, this hearsay evidence under the categorical exception category must still pass the reliability and necessity test. In the second scenario, the prosecution would seek to have the name of the driver entered as hearsay evidence under the principled approach of reliability and necessity. That is the hearsay evidence must pass through the tests of reliability and necessity to be admissible.

¶ 72 Before addressing the hearsay issue, the issue of whether the prosecution's argument that the name of the driver was given by Mrs. Panchenko to Office Valade must be canvassed. It is not explicit in the evidence that this occurred, but does the evidence support such an inference? To reach that conclusion, there must also be evidence that the driver had given her name to Mrs. Panchenko. Furthermore, can it be reasonably inferred that the driver of the vehicle involved in the accident gave Mrs. Panchenko her name? The court should be careful in making such inferences if the evidence does not justify it.

¶ 73 The Highway Traffic Act requires that a driver involved in an accident must give certain information to the other party if the other party request such. That obligation is found in section 200 of the Highway Traffic Act, R.S.O. 1990, c. H.8 and reads [emphasis is mine below]:

> 200(1) Duty of person in charge of vehicle in case of accident -- Where an accident occurs on a highway, every person in charge of a vehicle or street car that is directly or indirectly

involved in the accident shall,

(a) remain at or immediately return to the scene of the accident;
(b) render all possible assistance; and
(c) upon request, give in writing to anyone sustaining loss or injury or to any police officer or to any witness his or her name, address, driver's licence number and jurisdiction of issuance, motor vehicle liability insurance policy insurer and policy number, name and address of the registered owner of the vehicle, and the vehicle permit number.

¶ 74 Section 200(1)(c) requires the driver of the vehicle that struck Mrs. Panchenko to give in writing, if Mrs. Panchenko requests, his or her name and address, insurance particulars and other information. The court heard from Mrs. Panchenko that she received the driver's licence plate number and insurance information in writing. It is not unreasonable for someone who is concerned with the welfare of Mrs. Panchenko after the accident, which is manifested by the driver escorting Mrs. Panchenko back to her residence, to have given her name and her address to Mrs. Panchenko along with her licence plate number and her insurance particulars. . Although, Mrs. Panchenko was not specific about what was contained in that insurance information, Officer Valade did testify that Mrs. Panchenko gave him information about the defendant. To repeat, the prosecution submits that this information contained the defendant's name.

¶ 75 If the driver of the vehicle involved in the accident had refused or failed in giving her name to Mrs. Panchenko after it was requested of her, the driver could have been charged for failing to give her name under section 200(1)(c). There is no evidence however that the driver was charged with this offence. Again, can the court draw an inference that the driver gave her name to Mrs. Panchenko, because the driver was not charged with an offence under section 200(1)(c)?

¶ 76 In that light, would it be reasonable to infer from Officer Valade's testimony that he did receive the name of the driver of the vehicle involved in the accident from Mrs. Panchenko? Officer Valade testified that Mrs. Panchenko had given information about the defendant to him before he visited the defendant at her residence. Notably, Officer Valade did not testify that Mrs. Panchenko gave him only information about the vehicle. Instead, he stated that she had given him information about the defendant. The prosecution contends that Officer Valade could not have attended at the defendant's residence without having known who the driver was and where she lived. It was further averred that the only way Officer Valade could have known who the driver was, had to have resulted from Mrs. Panchenko giving the driver's name and address to him.

¶ 77 In cross-examination, the officer was asked if it was while he was at the hospital speaking with the victim that he had made a decision to lay the charge, or had he decided to wait to speak with the defendant first. The officer replied that he wanted to speak to the defendant because he makes it a habit of getting both sides of the story first before he makes up his mind about laying a charge. It appears from this series of questions that the officer knew who the defendant was. In fact, he did not specifically reply that he had not made up his mind to lay charges as he did not know who the driver of the vehicle was. Instead, he stated he wanted to hear both sides of the story. The officer first mentioned the defendant' s name in his testimony after the defendant gave her driver's licence to him. In addition, the officer did not specifically testify about using a photo line-up with the victim after he attended the defendant's residence. If the victim did not know who had hit her, normally the investigating officer would have asked the victim to identify the driver out some photographs shown to her. Nevertheless, this is all conjecture. Again, the court should only make inferences that are justified by the evidence.

¶ 78 Section 199(3) of the Highway Traffic Act imposes a duty on Officer Valade after receiving a report of an accident to obtain from the person making the report the particulars of the accident and the persons involved. This duty in section 199(3) reads [emphasis is mine below]:

Duty of police officer

> 199(3) A police officer receiving a report of an accident, as required by this section, shall secure from the person making the report, or by other inquiries where necessary, the particulars of the accident, the persons involved, the extent of the personal injuries or property damage, if any, and the other information that may be necessary to complete a written report concerning the accident and shall forward the report to the Registrar within ten days of the accident.

¶ 79 This section requires Officer Valade to obtain the names of the people involved in the accident. Now, can it be reasonably inferred that Officer Valade would have asked Mrs. Panchenko at the hospital if she knew who the person was that was driving the vehicle that had hit her? It is clear that section 199(3) would have imposed a duty on him to ask such a question. Mrs. Panchenko had given him information about the defendant before he had attended at the defendant's residence. Officer Valade testified that he received information from the victim concerning the defendant. Once more, did that information contain the defendant's name?

¶ 80 The Highway Traffic Act also imposes a responsibility on the defendant to report an accident. Section 199(1) reads:

> Duty to report accident
>
> 199(1) Every person in charge of a motor vehicle or street car who is directly or indirectly involved in an accident shall, if the accident results in personal injuries or in damage to property apparently exceeding an amount prescribed by regulation, report the accident forthwith to the nearest provincial or municipal police officer and furnish him or her with the information concerning the accident as may be required by the officer under subsection (3).

¶ 81 If the defendant did not report the accident forthwith to a municipal police officer, she could have been charged under section 199(1) for failing to report an accident. There is no evidence that the defendant received such a charge. Would this duty also require the defendant to speak to Officer Valade who was investigating the accident and give particulars of the accident, as well as her name? This would bring in the issue of statutorily compelled statements and the right to silence under section 7 of the Charter. The Supreme Court has partially ruled on this issue in R. v. White, [1999] S.C.J. No. 28 (S.C.C.). The Supreme Court in that case concluded that an accident report should be excluded in a criminal charge involving a fatality. However, the issue of whether an accident report should be excluded in a trial held under a regulatory regime such as the Highway Traffic Act is still debatable. It is not necessary to consider statutorily compelled statements in this case as the issue was not argued, nor is there any inculpatory evidence that the defendant had given in an accident report being proffered by the prosecution.

¶ 82 In conclusion, there is no evidence that Officer Valade determined the identity of the driver through independent means, nor is there evidence that he obtained the defendant's name from an accident report filed by the defendant. Even if Officer Valade knew who the driver was before he attended at the defendant's residence, it would still be hearsay, as the name of the driver could only have come from Mrs. Panchenko.

THE OFFICER'S TESTIMONY ON THE IDENTITY OF THE DRIVER IS HEARSAY EVIDENCE -- SUBMITTED FOR THE TRUTH OF ITS CONTENTS.

¶ 83 If the identity of the driver was already known by Mrs. Panchenko and she gave that name to the officer, and the officer was only testifying that the name had been given to him by the victim, then the name of the driver may be admissible as evidence, if that hearsay statement falls within an exception to the hearsay rule, or if it meets the criteria of reliability and necessity under the principled approach to the admissibility of hearsay evidence.

¶ 84 Officer Valade testified that Mrs. Panchenko told him certain facts and when he repeated those facts as words from Mrs. Panchenko, he was actually tendering those utterances as evidence for the truth of its contents. The officer was giving evidence about something that had been said by someone else and heard by

him. That is hearsay evidence. If Officer Valade were saying that the driver of the vehicle was Grace Colabufalo, because Mrs. Panchenko told him so, that identification evidence would be hearsay.

¶ 85 The general rule on hearsay is that it is not admissible. However, evidence of a statement made a person who is not called to testify is not always hearsay. If that statement is introduced for the truth of its contents, it is hearsay. If the statement is introduced for the fact that it was said, it is not hearsay and not subject to the exclusionary hearsay rule. The statement must be also relevant to a fact in issue. If the statement is not tendered for the truth of its contents, the party adducing it should establish its relevance. There is one general exception of necessity and reliability to the hearsay rule. The general exception is that hearsay is admissible for proof of its contents if the party adducing it establishes that it meets the reliability and necessity tests. This is also referred to as the principled approach to hearsay evidence.

¶ 86 Recently the Supreme Court of Canada looked at the hearsay rule in R. v. Starr, [2000] S.C.J. No. 40 (S.C.C.). Iacobucci J. writing for the majority concluded that the principled approach to hearsay now applies to both the rule and its exceptions alike. That is, hearsay evidence may be admissible even if it does not fall within a categorical exception to the hearsay rule, provided that evidence meets the criteria of reliability and necessity. Although there was disagreement on whether the criteria of reliability and necessity should also apply to the categorical exceptions to the hearsay rule, the majority held that the principled approach is paramount and therefore governs the exceptions as well. Thus, hearsay evidence that falls within a categorical exception still may be ruled inadmissible, if it fails to meet the criteria of necessity and reliability. Iacobucci J. states at para. 153 to 155 of the judgment that:

> The law of hearsay in Canada and throughout the common law world has long been governed by a strict exclusionary rule relaxed by a complex array of exceptions. Recently, as noted in Smith, supra, at p. 932, this Court has moved in a new direction by adopting a principled approach to hearsay "governed by the principles which underlie the rule and its exceptions alike". According to this approach, hearsay evidence may be admissible, notwithstanding the inapplicability of the categorical exceptions on the facts of the case, provided the criteria of necessity and reliability set out in Khan are met.
>
> ...
>
> Answering this question also raises issues respecting the interaction between the principled approach and the existing exceptions. I conclude that in the event of a conflict between the two, it is the principled approach that must prevail. The governing principles for hearsay admissibility must be reliability and necessity.

¶ 87 The reliability criterion for admissibility is not a determination of whether the statement is true or not. That would be ultimate reliability. For a statement to be admissible, it must meet threshold reliability. Threshold reliability is concerned with whether or not the circumstances surrounding the statement itself provide circumstantial guarantees of trustworthiness. It involves consideration of the reliability of both the maker of the statement and the witness relating the statement to the court. The statement must be made under circumstances that substantially negate the possibility that its maker was untruthful or mistaken. In the case at bar, there is an officer investigating an accident, who is the receiver of the statement, and the victim of the accident, who is the maker of that statement. In those circumstances, Mrs. Panchenko making a statement to the Officer Valade identifying the driver of the vehicle that hit her would be trustworthy and clearly threshold reliable. There is no reason to doubt otherwise.

¶ 88 The necessity criterion for admissibility under the principled approach involves whether the evidence is reasonably necessary to prove a fact in issue. Necessity includes the maker of the statement being unavailable to testify; incompetent to testify; competent to testify but the person may experience potential trauma if forced to testify; competent to testify but the person is unable to provide an accurate and frank recital of the events; or competent to testify, called to testify, and able to provide an accurate and frank recital but, is unwilling to do so. In the absence of exceptional circumstances, necessity is not established where the witness is available. Necessity does not mean necessary to prove the prosecution's case or necessary to the defence. In the

case at bar, there is no evidence that Mrs. Panchenko had known the name of the driver, given the driver's name to Officer Valade and is now unable to provide an accurate and frank recital of the driver's name. Therefore, Officer Valade's hearsay evidence is not admissible under the principled approach as the necessity criterion has not been met. The maker of the statement, Mrs. Panchenko was available and willing to testify, not incompetent, and did testify.

¶ 89 Now if the statement was introduced for the fact that it was said, and not for the truth of its contents, it is not hearsay and not subject to the exclusionary hearsay rule. That is, if the prosecution is submitting the fact that Mrs. Panchenko did tell Officer Valade that she gave the name of the driver to him, not for the truth of the actual name given, but that the name had been given and that Officer Valade had known the name and that is what motivated him to drive to the residence belonging to the driver, then that statement would not be hearsay. If it is accepted that Mrs. Panchenko gave the officer the name of the driver of the vehicle that struck her, this would support the prosecution's contention that Officer Valade already knew the identity of the driver before attending at the defendant's residence. However, in this particular scenario, it still does not establish that the driver of the vehicle was the defendant, especially if the statement is admitted for the reason that it was said and not for the truth of its contents. This particular scenario would only be favourable to the prosecution if the officer had established during his testimony that he had verified the identity of the driver independently.

¶ 90 Alas, only the categorical exception to the hearsay rule remains for the prosecution to have the name of the defendant admitted as the driver of the vehicle. The category in which Officer Valade's hearsay evidence of the driver's name would be admitted under is the "prior identification" exception to the hearsay rule, subject to meeting the reliability and necessity criteria.

¶ 91 The "prior identification" exception to the hearsay rule was an issue in R. v. Starr. At para. 220 of that judgment, Iacobucci J. for the majority states:

> The narrow issue before this Court is whether hearsay evidence of an out-of-court identification by a trial witness is admissible where the witness does not testify at trial that she made the identification.

¶ 92 Iacobucci J. then comments on the "prior identification" exception at para. 221 to 222 of R. v. Starr [emphasis is mine below]:

> The scope of the "prior identification" exception to the hearsay rule was recently thoroughly canvassed in the lucid reasons of Doherty J.A. in Tat, supra. As Doherty J.A. sets out, there are two situations in which out-of-court statements of identification may be admitted for the truth of their contents. First, "prior statements identifying or describing the accused are admissible where the identifying witness identifies the accused at trial" (pp. 497-98). Second, such statements are admissible "where the identifying witness is unable to identify the accused at trial, but can testify that he or she previously gave an accurate description or made an accurate identification" (p. 500). In the latter circumstance, Doherty J.A. explained, "the identifying witness may testify to what he or she said or did on those earlier occasions and those who heard the description given by the witness or witnessed the identification made by the witness may give evidence of what the witness said or did" (ibid.).
>
> In the present case, only the second branch of the "prior identification" exception could possibly be applicable to permit the admission of the police testimony under the exception, because Ball did not identify the appellant in court. However, in my opinion, the requirements of this second branch are not satisfied in the circumstances. Ball did not testify that she could not remember whether the appellant was the person whom she identified. She was not asked to compare the appellant with her recollections about the person she saw on the night of the murders. Accordingly, the underlying circumstances of necessity required to trigger the second branch of the traditional exception did not exist. Even aside from this point, the police evidence went far beyond the scope of the "prior identification" exception. Part of the rationale underlying the second branch of the exception is that the testimony that is being admitted to complement the testimony of the identifying witness does not truly constitute

> hearsay. If the witness can at least testify that at some point she made an accurate identification, then a police officer's testimony that he or she observed the identifying witness in the act of identification is original evidence that the identifying witness did indeed select a particular person, and that that person is the accused. However, for this rationale to apply, the identifying witness must confirm that the person he or she identified in the police officer's presence was the person who committed an act that is relevant in the immediate proceedings.

¶ 93 Officer Valade testified that he received information from Mrs. Panchenko about the defendant. To have that hearsay information admissible for the truth of its contents within the "prior identification" exception, one of the two situations as described by Doherty J.A. in R. v. Tat (1997), 117 C.C.C. (3d) 481 and accepted by Iacobucci J. in R. v. Starr, must exist.

¶ 94 Under the first situation of admissibility as described in R. v. Tat, the hearsay evidence of the identity of the driver is not admissible, as Mrs. Panchenko did not identify the defendant at trial by naming or physically describing the driver, nor did she make an "in dock" identification. She was unable to make an in the dock identification as the defendant was represented by an agent and absent during the trial.

¶ 95 In consideration of the second situation described in R. v. Tat, the out-of-court statement on the identity of the driver is inadmissible. Mrs. Panchenko did not testify that she had known the name of the driver and gave this name to Officer Valade, and now could no longer remember what that name is. Therefore, the prosecution cannot have the name of the driver entered as an exception to the hearsay rule through Officer Valade. If Mrs. Panchenko had testified that she had known the driver's name and gave it to Officer Valade, and could not now recall or repeat that name in court, the prosecution could have sought to enter the name of the driver as a "prior identification" exception to the hearsay rule, subject to meeting the criteria of reliability and necessity.

¶ 96 Furthermore, Mrs. Panchenko only testified that the driver gave her insurance information and the license plate for the vehicle. This evidence does not show beyond a reasonable doubt that the defendant was the driver of the vehicle that hit her. Someone, other that the defendant, could have been driving the vehicle that hit Mrs. Panchenko and then gave her the insurance information regarding the vehicle and the license plate number of the vehicle owned by the defendant. This does not however mean that it was the defendant herself that was at the accident and gave that information to Mrs. Panchenko. That is, someone else could have hit Mrs. Panchenko. The document the driver had given to Mrs. Panchenko containing information about the insurance particulars for the vehicle and a license plate number does not conclusively indicate who was driving the vehicle, it only verifies which vehicle was involved in the accident.

¶ 97 In short, it is not clear whether Mrs. Panchenko knew the name of the driver. If she did and gave that name to Officer Valade, it cannot be admitted for the truth of its contents, as it did not meet the necessity criterion under the principled approach to admitting hearsay evidence, nor did it fit into the categorical exception of "prior identification" to the hearsay rule. Without the driver being directly identified by Mrs. Panchenko, or the name of the driver entered indirectly through Officer Valade as admissible hearsay evidence, the prosecution has failed to prove the defendant was the driver of the automobile involved in the accident.

5. CONCLUSION

¶ 98 A vehicle struck Mrs. Panchenko while she was on her motorized scooter within a pedestrian crosswalk. Section 144(1) of the Highway Traffic Act defines "pedestrian" to include a person in a wheelchair. Section 1(1) of the same Act defines wheelchair to mean a chair mounted on wheels used for the carriage of a person who has a physical defect or disability. Mrs. Panchenko needs this scooter for mobility as she has difficulty walking because of her disability. Therefore, her scooter is a wheelchair, making her a pedestrian for the purposes of the Highway Traffic Act.

¶ 99 A voir dire, or a trial within a trial, was not held in the case at bar to determine if any out-of-court statements made by the defendant to the investigating officer were voluntarily made. The defence argued that any statements from the defendant that were entered through the testimony of the officer without being subjected to a voir dire should be excluded. The defence had not waived the holding of a voir dire nor did it request one to be

held. The prosecution contends that a voir dire was not required as the evidence regarding the identity of the defendant was given to the officer by Mrs. Panchenko, the victim.

¶ 100 After reviewing the Supreme Court's ruling in R. v. Hodgson, the defence's contention that it is not obligated to request a voir dire is not entirely correct. The court in Hodgson held that the defence has an obligation to raise the issue of holding a voir dire in a situation where there is an issue concerning the status of the receiver of some statement, especially if is not clear whether the person receiving information is a person in authority. The court also held, notwithstanding any request by the defence, the trial judge has an obligation to hold a voir dire on his or her own motion whenever the prosecution seeks to adduce a statement made by a defendant to a person in authority. However, the court said that more removed the receiver of the statement is from the conventional person of authority such as a police officer, the less likely it is that evidence will alert the trial judge to the need for a voir dire, and the greater the obligation on the defendant to raise the issue.

¶ 101 In the case at bar, if there had been some sort of out-of-court statement made by the defendant to Officer Valade, which the officer wish to proffer to the court, then the court would have been obligated to hold a voir dire, even if counsel failed to make such a request. However, a voir dire was not required to be held, as there were no inculpatory statements made by the defendant to the investigating officer and entered as evidence. In addition, the officer's testimony did not indicate that he made his conclusion to charge the defendant as a result of any conversation with the defendant or that the defendant gave him any inculpatory evidence during their conversation at the defendant's residence. Moreover, as the defendant did not give any information, inculpatory or otherwise to Officer Valade, which Officer Valade attested to, there was no need for the court to consider if there was any clear and objective evidence which would enable the court to make a finding of voluntariness without holding a voir dire, as espoused in R. v. Sweezey.

¶ 102 Officer Valade testified that he received information from Mrs. Panchenko about the defendant before he attended at the defendant's residence. If the identity of the driver was already known by Mrs. Panchenko and she gave that name to the officer, and the officer was only testifying that the name had been given to him by the victim, then the name of the driver may be admissible as evidence, for the truth of its contents, if that hearsay statement falls within an exception to the hearsay rule, or if it meets the criteria of reliability and necessity under the principled approach to the admissibility of hearsay evidence.

¶ 103 If the prosecution seeks to enter Officer Valade's recital of the name of the driver as an out-of-court statement made by Mrs. Panchenko, as hearsay evidence under the principled approach, the criteria of reliability and necessity must be met. The prosecution has failed to meet the criterion of necessity under the principled approach, as there is no evidence that Mrs. Panchenko had known the name of the driver, given the driver's name to Officer Valade and is now unable to provide an accurate and frank recital of the driver's name. Therefore, Officer Valade's hearsay evidence is not admissible under the principled approach as the necessity criterion has not been met. The maker of the statement, Mrs. Panchenko was available and willing to testify, not incompetent, and did testify.

¶ 104 Now, to have that hearsay evidence admissible for the truth of its contents within the "prior identification" exception, one of the two situations as described by Doherty J.A. in R. v. Tat and accepted by Iacobucci J. in R. v. Starr, must exist. Under the first situation of admissibility as described in R. v. Tat, the officer's hearsay identification of the driver is not admissible, as Mrs. Panchenko did not identify the defendant at trial by naming or physically describing the driver, nor did she make an "in dock" identification. She was unable to make an in the dock identification since the defendant was absent during the trial and represented by an agent.

¶ 105 In consideration of the second situation described in R. v. Tat, the out-of-court statement on the identity of the driver is also inadmissible. Mrs. Panchenko did not testify that she had known the name of the driver, given this name to Officer Valade, and now could no longer remember what that name is. Therefore, the prosecution cannot have the name of the driver entered as a categorical exception to the hearsay rule through Officer Valade. If Mrs. Panchenko had testified that she had known the driver's name and gave it to Officer Valade, and could not now recall or repeat that name in court, the prosecution could have sought to enter the name of the driver as a "prior identification" exception to the hearsay rule, subject to meeting the criteria of reliability and necessity.

¶ 106 Furthermore, Mrs. Panchenko testified that the driver gave her insurance information and the license plate for the vehicle that hit her. This evidence does not show beyond a reasonable doubt that the defendant was the driver of that vehicle. Someone, other that the defendant could have been driving the vehicle that hit Mrs. Panchenko and then gave her the insurance information regarding the vehicle and the license plate number of the vehicle owned by the defendant. This insurance and license plate evidence does not prove it was the defendant herself that was at the accident and gave that information to Mrs. Panchenko. That is, someone else could have been driving the automobile that hit Mrs. Panchenko. The document the driver had given to Mrs. Panchenko containing information about the insurance particulars for the vehicle and a license plate number does not conclusively indicate who was driving the vehicle, it would only verify which vehicle was involved in the accident.

¶ 107 Finally, it is not clear whether Mrs. Panchenko knew the name of the driver. If she did and gave that name to Officer Valade, it cannot now be admitted as hearsay evidence for the truth of its contents, as it did not meet the necessity criterion under the principled approach, nor did it fit into the categorical exception of "prior identification" to the hearsay rule. Without the driver being directly identified by Mrs. Panchenko, or the name of the driver entered indirectly through Officer Valade as admissible hearsay evidence, the prosecution has failed to prove the defendant was the driver of the automobile involved in the accident.

¶ 108 Justice has failed Mrs. Panchenko in this trial. Shame on the driver who hit Mrs. Panchenko, especially since the driver appeared to be using a cellular telephone while driving, just before the accident. Unfortunately, the evidence cannot support holding the defendant legally liable for this offence. This is not to say the defendant is not responsible or at fault for any injury the victim has sustained, it is just that the prosecution in this matter has failed to prove beyond a reasonable doubt that the defendant committed this particular offence under the Highway Traffic Act. Hopefully, Mrs. Panchenko still has a remedy for damages in a civil proceeding against the driver for her pain and suffering. Poor Mrs. Panchenko!

6. DISPOSITION

¶ 109 In the result, it is the finding of this Court that the prosecution has not proven beyond a reasonable doubt that the defendant, Grace Colabufalo, is guilty of failing to yield to pedestrian contrary to section 144(7) of the Highway Traffic Act. Therefore, the case is dismissed.

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