Regina v. Douglas

[Indexed as: R. v. Douglas]

35 O.R. (3d) 197
[1997] O.J. No. 3931

**Ontario Court (Provincial Division),
Renaud Prov. Div. J.,**

September 22, 1997

Criminal law — Provincial offences — Motor vehicles — Highways — Driveway of privately-owned apartment building not a highway — Highway Traffic Act, R.S.O. 1990, c. H.8, ss. 1(1), 216.

On June 18, 1996, two police officers had reasonable grounds to believe that the accused was operating a motor vehicle in violation of the Highway Traffic Act ("HTA"). The officers, who were following the accused in their own vehicle, were just about to signal him to stop, when he turned his vehicle from the highway into the paved driveway and parking lot of the multi-dwelling privately-owned apartment where he lived. The driveway was for the benefit of the residents of the apartment. The officers signalled the accused to stop his vehicle, but he initially failed to do so. The accused was charged with failing to obey a lawful signal by a police officer contrary to s. 216 of the HTA.

Held, the accused should be acquitted.

Under the HTA, "highway" was defined as follows: "'highway' includes a common and public highway, street, avenue, parkway, driveway, square, place, bridge, viaduct, or trestle, any part of which is intended for or used by the general public for the passage of vehicles and includes the area between the lateral property lines thereof." In this definition, the touchstone to interpretation was the words "common and public", which qualified all the other words. Unless a surface is "common and public" it may not be a highway notwithstanding "any part of which is intended for or used by the general public". The paved surface of the driveway of a privately-owned property was not a highway, and thus the police officers had no authority to signal the defendant's vehicle to stop. This conclusion was supported by the authority of R. v. Mansour, which was still authoritative notwithstanding amendments made to the HTA after it was decided. It was supported by the absence of a revised definition in the HTA that might correspond to the broader definition of "highway" in other provincial statutes, and the conclusion was supported because a wide definition of "highway" would have the undesirable result of making unlawful everyday activities thought to be lawful. In cases where similar paved surfaces had been held to be highways, the statutory language was broader or the cases did not involve the liberty of the subject so as to engage the concepts of strict interpretation of penal provisions.

Cases referred to

Boggs v. R., [1981] 1 S.C.R. 49, 120 D.L.R. (3d) 718, 34 N.R. 49, 58 C.C.C. (2d) 7, 19 C.R. (3d) 245, 8 M.V.R. 247; Buckle v. Stevens (1996), 141 Nfld. & P.E.I.R. 343, 137 D.L.R. (4th) 594, 443 A.P.R. 343, 21 M.V.R. (3d) 238 (Nfld. T.D.); Consumers' Gas Co. v. Toronto, [1941] O.R. 175, [1940] 4 D.L.R. 670 (C.A.); Galligos v. Louis (1986), 33 D.L.R. (4th) 638, 46 M.V.R. 288 (B.C.C.A.), affg 15 D.L.R. (4th) 458, 33 M.V.R. 102 (B.C.S.C.); Gill v. Elwood, [1970] 2 O.R. 59, 9 D.L.R. (3d) 681 (C.A.); Nova, An Alberta Corp. v. Amoco Canada Petroleum Co., [1981] 2 S.C.R. 437, 128 D.L.R. (3d) 1, 38 N.R. 381, [1981] 6 W.W.R. 391 sub nom. Atta Gas Truck Lines Co. Ltd. v. Amoco Petroleum Co.; Penney v. Britt, [1996] O.J. No. 2821 (Gen. Div.); R. v. Charlie, [1983] 5 W.W.R. 566, [1984] 1 C.N.L.R. 123 (B.C. Co. Ct.) [affd (1985), 19 D.L.R. (4th) 539, [1985] 4 W.W.R. 472, 19 C.C.C. (3d) 406, 32 M.V.R. 40 sub nom. R. v. Canute (B.C.C.A.)]; R. v. Joe, B.C.C.A., No.

222/69, October 22, 1969; R. v. Love (1994), 144 N.B.R. (2d) 224, 368 A.P.R. 224, 3 M.V.R. (3d) 266 (C.A.); R. v. Mansour, [1979] 2 S.C.R. 916, 101 D.L.R. (3d) 545, 27 N.R. 476, 47 C.C.C. (2d) 129, 2 M.V.R. 1; R. v. Singh, [1994] O.J. No. 2452 (Prov. Div.); R. v. Wilson (1990), 24 M.V.R. (2d) 284 (Man. Prov. Ct.); R. v. Wong, [1997] B.C.J. No. 1496 (S.C.); Sked (Litigation Guardian of) v. Henry, [1991] O.J. No. 339 (Gen. Div.); Wolfe Island (Township) v. Ontario (Ministry of Environment) (1995), 23 O.R. (3d) 737, 125 D.L.R. (4th) 266 (C.A.)

Statutes referred to

Criminal Code, R.S.C. 1970, c. C-34, s. 238(3)
Highway Traffic Act, R.S.N. 1990, c. H-3
Highway Traffic Act, R.S.O. 1970, c. 202, ss. 1(1), para. 11, 13(1)
Highway Traffic Act, R.S.O. 1980, c. 198, s. 1(1), para. 14 [am. 1983, c. 63, s. 1(1)]
Highway Traffic Act, R.S.O. 1990, c. H.8, ss. 1(1) "highway", 216(1)
Highway Traffic Act, S.M. 1985-86, c. 3
Insurance (Motor Vehicle) Act, R.S.B.C. 1979, c. 204, s. 19
Motor Vehicle Act, R.S.B.C. 1979, c. 288, s. 1 "highway" -- now R.S.B.C. 1979, c. 318
Motor Vehicle Act, R.S.N.B. 1973, c. M-17, s. 193(1)(n)
Provincial Offences Act, R.S.O. 1990, c. P.33

TRIAL on a charge of failure to obey a lawful signal by a police officer contrary to s. 216(1) of the Highway Traffic Act, R.S.O. 1990, c. H.8.

K. Wright, for the Crown.
M. Henry, for defendant.

RENAUD PROV. DIV. J.: —

INTRODUCTION

The defendant was charged that on the 18th day of June, 1996, he failed to obey a lawful signal by a police officer to stop his vehicle, contrary to s. 216(1) of the Highway Traffic Act, R.S.O. 1990, c. H.8 ("H.T.A.").

The trial was begun on May 28, 1997, in Scarborough, and had to be conducted over the course of three days. At the conclusion of the Crown's case, I held that the offence charged could not be made out as the signal to stop was given by a police officer under such circumstances that he could not invoke the authority he enjoyed pursuant to the H.T.A. Briefly stated, I held that the signal had to be given while either the police officer or the defendant were operating a motor vehicle on a highway.

Having found the defendant not guilty, I indicated that written reasons would follow after the conclusion of the other counts involving Mr. Douglas. I now submit these reasons in support of my conclusion.

DISCUSSION

(1) An overview of the facts

I found that the two police officers who were involved in the investigation of the activities of the defendant, P.C. Keith Jackson, a 27-year veteran of the Metropolitan Toronto Police Services and his partner, P.C. Susan Mundy, an officer with six years' experience, gave their evidence in a fair, frank and reliable fashion, without exaggeration or bias, and that I could accept all of their testimony. Indeed, even though no factual controversy arose in respect of the issue of the application of the "highway" issue, I think it important to stress that I was impressed with their conduct, both on the night in question and before the court. In particular, the sense of duty Cst. Mundy demonstrated when she returned to the court the next day, on a day off, to hear the arguments advanced in this complicated issue evinces her resolve to maintain and to enhance her professional training and competence.

As a result, I find that on June 18, 1996, Cst. Jackson and Mundy had reasonable grounds to believe that the vehicle the defendant was operating was in violation of the provisions of the H.T.A. respecting the degree of window tinting that is permitted. They followed the suspect vehicle and were able to note the plate number and conduct the usual verifications by means of a central information repository. As a result of these inquiries, Cst. Jackson decided to "pursue the vehicle, which was at this point just turning left into the front driveway to number 20 Aurora Court": see p. 8, line 30. They had received information that the plates were not authorized for the subject vehicle. Although this information was later shown to be incorrect, it was appropriate for them to rely upon it at the time they did.

The officers got directly behind the vehicle, in front of the front doors to a multi-dwelling apartment building. It was at this time that the emergency roof lights and alternating high beams were engaged by the officers as well as sounding the air horn at least twice in order to signal the defendant to stop his vehicle: refer to p. 9, lines 3-5.

For present purposes, suffice it to say that the defendant did not immediately stop his vehicle and had he conducted himself in this fashion on a highway, he would have breached s. 216(1) of the H.T.A. Of note, all of the actions I have described with respect to the activation of the equipment and the defendant's actions in not stopping his vehicle occurred on the paved surface of the apartment building's driveway and parking lot. Both officers resorted to expressions such as "parking lot", "driveway", "laneway", etc. to describe the paved surface in question. At p. 31, lines 29-30, Cst. Jackson speaks of a "mutual driveway" between two buildings.

No evidence was led to suggest the identity of the owner or owners of the building in question and no suggestion was advanced that the driveway leads out to a road or highway by another exit. Under the circumstances, in light of the testimony as to the number of parking spaces, of apartment units, and the number of persons who came to congregate outside, I find that the building in question is privately owned and that the driveway and parking area, the paved surface if you wish, is solely for the benefit and comfort of the residents of the building and their private and business guests. I do not know if any signs were posted to discourage trespassers or to regulate the conduct of social or business visitors.

I am prepared to find that the police officers had the firm intention of activating the equipment noted in order to make plain their presence, and to signal the defendant's vehicle to stop on the highway, had the vehicle continued to travel on the highway. It is only by reason of the defendant's decision to turn into the driveway in question, which was his destination without question, that the signal was not given on the travelled portion of a road which is a highway. In other words, both vehicles were on a highway just seconds prior to the signal being made, but it was not given until both vehicles were on this "paved surface".

(2) The legal issue: is the paved surface area a highway?

As I have noted, I ruled that the "paved surface" in question is not a highway and thus, that no authority to signal the defendant's vehicle to stop could be founded upon the H.T.A. My decision is based on three broad headings: firstly, Mr. Justice Estey's judgment in R. v. Mansour, [1979] 2 S.C.R. 916, 101 D.L.R. (3d) 545, 27 N.R. 476, 47 C.C.C. (2d) 129, 2 M.V.R. 1, and two cases that have interpreted that decision; secondly, the absence of a revised definition section in the legislation with respect to highway to conform with other far broader provincial statutes and, thirdly, my concern that greater mischief might follow respecting everyday activities thought to be lawful were the H.T.A. to be interpreted so widely as to embrace the conduct in question.

(a) The decision of the Supreme Court of Canada in R. v. Mansour

I begin my review of the cases with R. v. Mansour, supra. The issue in that case may be fairly stated as follows: was the private parking lot on which the accused operated a motor vehicle a "highway" as defined in the Highway Traffic Act of Ontario, R.S.O. 1970, c. 202? The Supreme Court of Canada held that ss. 1(1), para. 11 and 13(1) of the provincial legislation, by means of which "highway" is defined, did not purport to include private property, to wit, a parking lot adjacent to an apartment building and to which the public had access. Refer to pp. 919-20 of the decision.

It will be of assistance to review this important decision at greater length. Mr. Justice Estey wrote the reasons for judgment and he observed at p. 919 that:

> The preliminary question to be determined is whether or not a driver's licence is required under the law of Ontario to operate a motor vehicle in the parking lot in question. The stated case quoted above describes the lot somewhat ambiguously as "a parking lot adjacent to an apartment building and to which the public had access." I approach the question of licence requirement by giving these words the broadest possible interpretation, that is as being a parking lot to which the public, including the dwellers of the apartment building and their guests, had access.

I have also adopted this perspective in approaching the issue.

His Lordship then set out, at p. 919, the relevant legislative provisions which I now reproduce, for ease of reference.

> Section 13(1) of The Highway Traffic Act, being R.S.O. 1970, c. 202 provides:
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> > 13. -- (1) No person shall drive a motor vehicle on a highway unless the motor vehicle is within a class of motor vehicles in respect of which the person holds a driver's licence issued to him by the Minister. [emphasis added]
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> "Highway" is in turn defined in that Act in s. 1(1)11.
>
> > 1(1)11. "highway" includes a common and public highway, street, avenue, parkway, driveway, square, place, bridge, viaduct or trestle, designed and intended for, or used by, the general public for the passage of vehicles;

Estey J. then made reference to the decision of the Ontario Court of Appeal in Gill v. Elwood, [1970] 2 O.R. 59, 9 D.L.R. (3d) 681, in which the court considered whether the parking area of a shopping centre fell within the definition of "highway" as set out above. In finding that the land in question was not comprised within the definition of "highway", the court stated [at p. 60]: "On the contrary, in our view, and realistically the premises must be viewed as a whole and so viewing the premises the paramount use thereof will emerge as a parking lot with ingress and egress to and fro and with passages within it, but all subordinate to the paramount use of parking vehicles." In particular, attention was drawn (at p. 10) to the words of Aylesworth J.A. at p. 60:

> We think of great significance in that designation are the concluding words "designed and intended for, or used by, the general public for the passage of vehicles". We think too that those words taken together with all of the words comprising the clause in their cumulative effect fall short of including therein as a highway the premises with which the case deals.

R. v. Mansour, supra, then discusses the significance of the word "includes" which is found in the definition. Again, I have chosen to reproduce at length this important passage, found at p. 920:

> I have not overlooked the fact that the definition employs the expansive word "includes" rather than the word "means." In applying this definition to the facts in question, I adopt the statement in Maxwell on Interpretation of Statutes, 12th ed., p. 270 which reads as follows:
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> > Sometimes, it is provided that a word shall "mean" what the definition section says it shall mean: in this case, the word is restricted to the scope indicated in the definition section. Sometimes, however, the word "include" is used "in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their

> natural import, but also those things which the interpretation clause declares that they shall include." In other words, the word in respect of which "includes" is used bears both its extended statutory meaning and "its ordinary, popular, and natural sense whenever that would be properly applicable."

The court then observed at p. 920 that Robertson C.J.O. in Consumers' Gas Co. v. Toronto, [1941] O.R. 175 at p. 192, [1940] 4 D.L.R. 670 at p. 672 (C.A.), in construing a statutory provision containing the word "highway", stated:

> In my opinion, unless its meaning is affected by context or association or definition, "highway" means, in its common uses, a public road or way open equally to everyone for travel, and includes the public streets of an urban district equally with connecting roads between urban districts. I am unable to think of any other word that is so commonly used to include all such roads.

Mr. Justice Estey then remarked (at p. 921):

> I conclude that the term "highway" in its ordinary and popular sense and as illustrated by the words employed in s. 1(1)11 of the Act does not embrace the concept of a parking lot and particularly, a parking lot adjacent to an apartment building, and presumably one which was established primarily for the provision of parking to its inhabitants.

His Lordship went on to observe:

> In contrast to the statutory technique adopted in the Province of Ontario, other provinces such as Alberta in The Highway Traffic Act, being 1975 S.A. c. 56, defined highway as . . . "any thoroughfare, street, road . . . or other place, whether publicly or privately owned, any part of which the public is ordinarily entitled or permitted to use for the passage or parking of vehicles . . .".

The court then highlighted the legislation in force in Manitoba which defines highway as "any place or way . . . which or any part of which the public is ordinarily entitled or permitted to use for the passage of vehicles . . . but does not include any area designed or intended, and primarily used, for the parking of vehicles".

Hence, held our highest court (at p. 921), "It seems clear therefore that the term highway, in respect of which a licence to drive is, in Ontario, required, does not include a parking lot adjacent to an apartment building and to which the public had access." More importantly, note that the court went on to state:

> I agree with respect with the Court of Appeal in rejecting the submission by the Crown that in the event such construction be adopted, the case should be returned to the Provincial Court for a determination as to whether the driving here in question occurred on a highway. Taking the rather cryptic description of the premises in the stated case as being accurate and complete, an appellate tribunal can, upon a determination of the proper construction of the applicable statute, apply that construction to the facts as so found.

At pp. 923-26, the court provides the following signal instruction which warrants repetition in full:

> The expression "in Canada" in the Code provision in question raises the basic difficulty in this appeal. If the expression means any part of the territory comprised within Canada without reference to the licence requirements of the province in question, then the respondent is guilty as charged. On the other hand, if the terminology of the Criminal Code provision is read in the light of the applicable provincial highway regulatory statutes, then the accused is entitled to the acquittal directed by the Court of Appeal. Crown counsel advanced a submission that this provision in the Criminal Code should be accorded the same interpretation as s. 234(1) of the Criminal Code which provides as follows:

> 234. (1) Every one who, while his ability to drive a motor vehicle is impaired by alcohol or a drug, drives a motor vehicle or has the care or control of a motor vehicle, whether it is in motion or not, is guilty of an indictable offence or an offence punishable on summary conviction and is liable . . .

> There have been a number of instances where the courts have found that the offence may be committed wherever the motor vehicle is located . . . These authorities, in my view, shed little light upon the problem here for several reasons. Section 234(1) describes the offence without reference to any provincial statute or licence requirement. All that is required is that a person have the care and control of a motor vehicle as defined in the Code while his ability to drive is impaired as likewise defined in the Code. In ascertaining the width and breadth of the offence, it is unnecessary to look beyond the Criminal Code. In contrast, s. 238(3) has no application unless a province has suspended or cancelled the accused's licence or permit to drive.
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> Furthermore, the behaviour condemned in s. 234 by itself without more, threatens harm or danger.
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> . . . . .
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> One of the apparent purposes, if not the principal purpose, behind s. 238(3) is to give national effect to provincial licence suspensions, that is to extend extra-territorially the impact of the provincial suspension action. Such purpose would not necessarily be diminished if the driving beyond the provincial boundaries thereby proscribed were limited to areas in respect of which a licence is required in the province where the driving occurred.

In addition, I wish to underscore the opinion of Mr. Justice Estey that (at p. 926):

> Another purpose of the subsection might be the addition of criminal sanctions to the provincial penalty for violations of the driving suspensions. The province, by its geographically-limited licence (that is for highways only), has thereby determined that the needs of the community do not call for a licence for other areas in the province. Hence the public interest would not suffer if the criminal impact of s. 238 were limited to the provincial offence, that is driving in an area (a highway) where a licence is required.

Ultimately, the court found, at pp. 22-23:

> . . . the expression "while he is disqualified or prohibited from driving" is of paramount importance when determining the meaning of this Code provision. Literally, an accused is not driving a motor vehicle in Canada while disqualified from driving by reason of licence suspension if the driving in question is not within a part of the country in respect of which a licence is required. This literal interpretation is particularly apt when, as here, the allegedly prohibited driving occurs in the licensing province, for it is even clearer in that circumstance that the accused did not "drive(s) a motor vehicle . . . while he is prohibited from driving. . . ."
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> This is, of course, criminal legislation, and its interpretation and application should not be given an expansive interpretation in order to draw within its net actions of an accused not affected by the section when given a literally correct interpretation. It has been cast more broadly by the learned authors of Maxwell on Interpretation of Statutes (12th ed.) at p. 246:
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> > . . . where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve, the benefit of the doubt should be given to the subject and against the legislature which has failed to explain itself.

R. v. Mansour, supra, appears to support the contention that since the police officer's signal to stop was given at a time when neither he nor the defendant were operating motor vehicles on a highway, it cannot be a valid exercise of the authority granted by s. 216 of the Ontario Highway Traffic Act and may thus be ignored without any quasi-penal consequences. Although I have elected to review a number of cases in which R. v. Mansour,

supra, and the definition of highway contained therein are considered, I wish to stress my opinion that the amendments to the H.T.A. since R. v. Mansour, supra, have not succeeded in impairing the binding precedent which is established by Mr. Justice Estey. My further review is undertaken only on the grounds that my primary conclusion is not well founded.

In this respect, note that in Boggs v. R., [1981] 1 S.C.R. 49, 120 D.L.R. (3d) 718, 34 N.R. 49, 58 C.C.C. (2d) 7, 19 C.R. (3d) 245, 8 M.V.R. 247, the Supreme Court of Canada struck down former s. 238(3) of the Criminal Code, R.S.C. 1970, c. C.34, as being ultra vires the Parliament of Canada and thus, an unconstitutional provision. More to the point of our inquiry, at p. 54 S.C.R., p. 11 C.C.C., Mr. Justice Estey remarked:

> The section was again before this Court in R. v. Mansour where the issue was whether an offence under this Code provision could be committed where the driving in question was in a place (there a parking-lot) where no provincial licence was required for the operation of a motor vehicle.

Thus, no assistance is gained with respect to the question in issue.

In a further decision of the Supreme Court of Canada of 1981, Nova, An Alberta Corp. v. Amoco Canada Petroleum Co., [1981] 2 S.C.R. 437 at pp. 460-61, 128 D.L.R. (3d) 1, 38 N.R. 381, [1981] 6 W.W.R. 391, 32 A.R. 613, the court observed:

> It is helpful in dealing with this submission to recall the history of s. 30 of the Act, set out above. By an amending act, 1970 (Alta.), c. 5, s. 30(1) was enacted in substantially its present form except that the words "including the rates and methods of depreciation and amortization, determination of rate base and rate of return thereon . . ." were not included. These words were added in 1974 by an amending act, 1974 (Alta.), c. 7, s. 19. It has, of course, long been decided that the use of the word "including" by the statutory draftsman is an expansive technique which amplifies the meaning of the words preceding it. Vide R. v. Mansour, where this Court stated at p. 920:
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> I have not overlooked the fact that the definition employs the expansive word "includes" rather than the word "means". In applying this definition to the facts in question, I adopt the statement in Maxwell on Interpretation of Statutes, 12th ed., p. 270 which reads as follows:
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> > Sometimes, it is provided that a word shall "mean" what the definition section says it shall mean: in this case, the word is restricted to the scope indicated in the definition section. Sometimes, however, the word "include" is used "in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include." In other words, the word in respect of which "includes" is used bears both its extended statutory meaning and "its ordinary, popular, and natural sense whenever that would be properly applicable."
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> The court also observed (at p. 461):
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> It is obvious first of all that the addition of a definitive phrase commencing with the word "including" expands the ordinary meaning of that which precedes the word "including", but also it must be added that such a technique does not revise or diminish the ordinary meaning of the preceding word. It therefore follows, in my view, that the words "rates, tolls and other charges" in s. 30(1) are not diminished, but rather are illustrated and amplified by the reference following those words to "rates and methods of depreciation and amortization, determination of rate base and rate of return thereon . . ."

(b) Has the H.T.A. been interpreted to permit this "paved surface" to qualify as a highway?

In light of the instruction found in Nova, supra, it will be of signal assistance to ask whether any of the revisions to the H.T.A. since R. v. Mansour, supra, have resulted in broadening the definition of "highway" so as to permit the paved surface in question to qualify as a highway. As noted, I conclude in the negative.

I note that the present definition of highway, under s. 1(1), in force at the time of the relevant activity, reads as follows:

> "highway" includes a common and public highway, street, avenue, parkway, driveway, square, place, bridge, viaduct or trestle, any part of which is intended for or used by the general public for the passage of vehicles and includes the area between the lateral property lines thereof.

Based on the foregoing review of the cases, I conclude that the touchstone to the interpretation of this definition are the three words that qualify all of the others, "common and public". In my view, with great respect to the contrary opinion, unless a surface is "common and public", it may not be a highway notwithstanding that "any part of which is intended for or used by the general public". In other words, the driveway to a person's home is neither common nor public even though it may well be full of motor vehicles being operated by persons who are not known to the owner and who are attending for a number of reasons, such as political canvassing. In the same vein, the common paved surface in question is not a highway based on the above noted definition, which differs from that studied in R. v. Mansour, supra, for it is not "common and public" in that the general public may be prevented from travelling upon it by the owner. No highway may be said to be owned by any individual in this province, in my opinion, and no one could claim to have a right to travel onto the paved surface in question if the owner decided to plow it under and grow corn, if so inclined.

I am of the belief that a review of the cases that follow will bear out my judgment and will make plain that in those instances in which a paved surface not unlike that at bar was held to be a highway, the relevant legislation was far broader or, on occasion, the courts sought to permit civil claimants to obtain a form of redress. Although all of these cases are of interest, the former are to be distinguished by reason of the different legislative context; the latter, on the basis that the liberty of the citizen was not at play, as here, and the concept of strict interpretation of penal provisions was not engaged.

(i) Cases in which "highway" is defined narrowly as I suggest is appropriate in Ontario

In a decision dated July 25, 1996, Penney v. Britt, [1996] O.J. No. 2821 (Gen. Div.), Kingstone J. had to consider the significance of the fact that a motor vehicle accident occurred in the parking lot of a small shopping plaza off Hartzel Road, a public highway, in the City of St. Catharines. Of note, the plaintiff's vehicle was uninsured. At para. 4, the court remarked that "[b]y s. 1(1) of the Compulsory Insurance Act, 'highway' has the same meaning as in the Highway Traffic Act, R.S.O. 1990, c. H.8."

The court held, at para. 6, that "It is obvious, and I further find, that in going to and from the shopping plaza, both vehicles were operated on highways as defined in the Highway Traffic Act." This factual finding tracks my own. In the next paragraph, the court stated:

> The plaintiff contends the action is not barred because at the time of the damage his vehicle was parked, and in any event, was not on a public highway. The defendant argues that the plaintiff comes within s. 265(7) of the Insurance Act and s. 2(1) of the Compulsory Insurance Act on the plain reading of these sections. The question here is whether a parking lot in a small plaza is a highway within the meaning of the Highway Traffic Act and if not, is the action, nonetheless, barred.
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> Kingstone J. held, at para. 8:
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> It is my view that parking lot in a shopping plaza, particularly a small shopping plaza, is not a highway as defined in the Highway Traffic Act: Gill v. Elwood, [1969] 2 O.R. 49, aff'd [1970] 2

> O.R. 59 (C.A.); R. v. Mansour [1979] 2 S.C.R. 916 at 919-21. Since these two cases and by a 1983 amendment, the words "any part of which" were added to the definition of highway as set out above. In Sked v. Henry; Safeco Insurance Company of America (third party), 28 M.V.R. (2d) 234 at 245, in determining the application of the vicarious liability provisions of the Highway Traffic Act, Campbell J. found that a parking lot of a high school was under the extended definition, a highway, on facts that established the area was more a community area than a high school area, used by the general public at various times for various purposes and for passage of motor vehicles within the parking lot between their parking places and a public street. That wide use by the general public does not exist here so as to bring this small shopping plaza within the extended definition of highway.

(Emphasis added)

At all events, the action was barred by reason of the fact that the vehicle ought not to have been on the highway at any time.

Note as well Galligos v. Louis (1984), 33 M.V.R. 102, 15 D.L.R. (4th) 458 (B.C.S.C.), wherein Locke J. found that a road inside an Indian reserve maintained, authorized and supervised by band members and not accessible to the general public was not a "highway" for purposes of the Insurance (Motor Vehicle) Act, R.S.B.C. 1979, c. 204, s. 19. Of interest, no title to the road was claimed by any government and the exact location of the edge of the road is more or less a matter of guesswork.

It was remarked that the phrase "designed or intended for or used by the general public for the passage of vehicles" in the legislation has been judicially interpreted in several cases and that a similar phrase was interpreted by the Supreme Court of Canada in R. v. Mansour, supra. Mr. Justice Locke did add, however, that "R. v. Mansour, supra, bears little resemblance to the case at Bar". The court held that if the reach of the definition embraced such a "road", there would be no point to having a definition and, more to the point, an exclusion under s. 19 with respect to uninsured motorists who are not on a highway. As held at pp. 113-14:

> If the definition of "highway" is expanded to cover all private roads that are used to service residents, then all driveways would be highways, all roads to farmhouses would be highways, all roadways in Indian Reserves would be highways, in fact all roads except those used solely by a recluse or in totally isolated areas would be highways.

With respect, I agree.

R. v. Mansour, supra, was distinguished in R. v. Wilson (1990), 24 M.V.R. (2d) 284 (Man. Prov. Ct.), James Prov. J. concluding that a road within an Indian reserve to which the public was given implied, open and unrestricted use for vehicular travel was a "highway" under the Highway Traffic Act, S.M. 1985-86, c. 3. Thus, the defendant was liable to be prosecuted under the "drive suspended" provisions of the provincial legislation.

The court noted that (at p. 287):

> "highway" means any place or way, including any structure forming part thereof, which or any part of which the public is ordinarily entitled or permitted to use for the passage of vehicles, with or without fee or charge therefor, and includes all the space between the boundary lines thereof; but does not include any area designed or intended, and primarily used, for the parking of vehicles and the necessary passageways thereon.

(Emphasis added)

Further, the court observed, at p. 288: "The facts in Mansour, supra, differ from the present case, in addition to which that decision relied upon specific provisions of the Ontario Highway Traffic Act, R.S.O. 1970, c. 202 and which differ from the Manitoba Act."

At bottom, the case was decided by the finding that (p. 288):

> When the definition of "Highway" in the Manitoba Act is considered, it is clear that it is a definition of general application applying to all persons in the province, including Indians.

Orsborn J. has also contributed a valuable judgment that is apposite, Buckle v. Stevens (1996), 21 M.V.R. (3d) 238, 137 D.L.R. (4th) 594, 141 Nfld. & P.E.I.R. 343 (Nfld. T.D.). Once again, a motor vehicle accident occurred in a shopping plaza parking lot, the plaintiff in this case submitting that the driving lanes were "highways" and that the accident area was an "intersection" as defined in the Highway Traffic Act, R.S.N. 1990, c. H-3, thus bringing into play the statutory rules of the road, in particular, the obligation to give way to a vehicle on the right.

As noted at p. 240: "The K-Mart shopping lot is private property and is owned and managed by the property owner." Further, s. 2(aa) provides that "highway" means a place or way, including a structure forming part of the place or way, designed and intended for, or used by, the public for the passage of traffic and includes all the space between the boundary lines of the place or way. His Lordship remarked at p. 242 that:

> Authorities which have concluded that a private parking lot area was not a "highway" include R. v. Mansour (1979), 27 N.R. 476 (S.C.C.) -- (Ontario legislation); Gill v. Elwood (1970), 9 D.L.R. (3d) 681 (Ont. C.A.); Brinton v. Sieniewicz (1969), 7 D.L.R. (3d) 545 (N.S.S.C.); White v. Carter (1973), 36 D.L.R. (3d) 315 (N.S.C.A.).

The court next remarked:

> To the contrary are R. v. Love (1994), 3 M.V.R. (3d) 266 (N.B.C.A.); Gamache v. Basaraba (1993), 43 M.V.R. (2d) 255 (Alta. Q.B.); Sked v. Henry (1991), 28 M.V.R. (2d) 234 (Ont. Gen. Div.); Kidd v. George (1973), 38 D.L.R. (3d) 278 (Alta. T.D.); and Morrell v. McKenney (1976), 73 D.L.R. (3d) 258 (P.E.I.S.C.).

I concur with the observation found at p. 242: "These decisions all turn on the interpretation of the particular legislation in question. The provisions vary widely." The court then reviewed the cases en enfilade and interjected a note of caution in determining that the legislation was not broad enough to embrace the parking lot in question. At pp. 246-47, Orsborn J. wrote:

> However, the definition cannot be read out of context. It stipulates what is or is not to be considered a highway for the purposes of the Highway Traffic Act and only for those purposes. Further, and most importantly, once an area is determined to be a highway within the meaning of the Act, it is a highway for all purposes of the Act, and not only (eg.) for the rules of the road provisions.

(Emphasis added)

His Lordship then noted a number of provisions found within the Act that might cause great hardship if they could be invoked in respect of the vehicular traffic found to use a parking lot in a plaza. Ultimately, the court found that (p. 248):

> The Act is replete with a sense of public authority and control. I do not read the Act as intending to give to the minister and other public officials the ability to exercise the wide powers of the Act so as to encroach upon private property rights. The Act as a whole is intended to regulate traffic on property over which the province or municipality has control; it is not intended to extend to private property.

With great respect to the contrary opinion, I agree. The municipality, of course, enjoys the right and the duty to pass by way of by-laws such regimentation of the use of the "paved portion" of the lot outside multiple dwellings

as are consonant with public safety and these may well sanction the conduct described in the case at bar.

(ii) Cases in which "highway" is defined broadly which I suggest is not appropriate in Ontario in a quasi-penal prosecution

I have also considered the assistance to be found in Sked (Litigation Guardian of) v. Henry, [1991] O.J. No. 339 (Gen. Div.), a March 12, 1991, decision of Archie Campbell J. noted in Penney v. Britt, supra. Briefly, at the age of 16 the plaintiff was seriously brain damaged and permanently disabled in a car accident while sitting on the hood of a parked car in a high school parking lot when Larry Henry, an unlicensed 15-year-old driver, rapidly accelerated and threw him off. The plaintiff settled his action against the school board and he now sues the unlicensed 15-year-old driver and the father of the driver who owned the car. A great number of issues were addressed in the course of a lengthy judgment, notably No. 3: "Was any part of the school parking lot used by the general public for the passage of vehicles, making it a 'highway' within the meaning of s. 1(1)14 of the Highway Traffic Act, R.S.O. 1980 c. 198 as amended by 1983 c. 63 s. 1(1))?"

I note that p. 17 of the reasons records that Larry Henry pleaded guilty under the Highway Traffic Act to careless driving and leaving the scene of an accident; he was charged originally with dangerous driving under the Criminal Code. In any event, at pp. 24-25, Campbell J. observed that "It is suggested that the accident did not take place on a highway and that the vicarious liability and other provisions of the Highway Traffic Act do not apply." The court quoted from s. 1(1), para. 14 of the Highway Traffic Act, R.S.O. 1980, c. 198 as amended by 1983, c. 63, s. 1(1) which provides:

> "highway" includes a common and public highway, street, avenue, parkway, driveway, square, place, bridge, viaduct or trestle, any part of which is intended for or used by the general public for the passage of vehicles and includes the area between the lateral property lines thereof.

The court went on to observe that "The words 'any part of which' were added by amendment in 1983 to expand the definition to include places which are only partly used by the general public."

Of signal importance, Mr. Justice Campbell commented at p. 26 that:

> This particular public collegiate parking lot is not the same as the private apartment parking lot considered by the Supreme Court of Canada in R. v. Mansour, supra, or the shopping plaza parking lot considered by the Court of Appeal in the pre-amendment case of Gill v. Elwood, supra.

Further, "The fact that Larry pleaded guilty to a charge under the Highway Traffic Act does not decide the matter any more than the fact that the investigating officer in his report described the 'road location' as 'private drive' and 'other: . . . parking lot'. The photographs and diagrams show a very large parking lot with major roadways for the passage of cars to and from [streets]." This conclusion was based on a number of observations advanced by a private investigator that made plain that the general public was in the habit of frequenting in great numbers and for a variety of reasons the paved surface in question. Of note, at p. 26, the court remarked:

> It is a fair inference from his observations and from the photographs of people and some cars, exhibit 21, that the parking lot and its environs are used not only by people associated with the school but by the general public. Although Mr. Barker did not do a title search of the athletic amenity areas such as the tennis courts, and could not say who owned the area, he thought it more a community area than a high school area. His impression is born out by the evidence of public use.

The court added, at p. 27:

> I find that at least part of the parking lot is used by the general public for the passage of vehicles within the parking lot and between their parking spots and Martingrove Blvd. The parking lot is,

> therefore, a place, part of which is used by the public for the passage of vehicles. This makes it a highway within the extended definition enacted after Gill v. Elwood in 1983. The parking lot and its internal roadways are therefore a highway within the meaning of the Highway Traffic Act.

I am not prepared to find any evidence in the record before me to permit me to draw the same inferences and conclusion.

I have also had the advantage of reviewing Mr. Justice Romilly's judgment in R. v. Wong, [1997] B.C.J. No. 1496 (S.C.). As noted at para. 1, "The sole issue to be decided on this appeal is whether the learned trial judge erred in holding that a ferry operated by the B.C. Ferries is not a 'highway' pursuant to the Motor Vehicle Act, R.S.B.C. 1979, c. 288 (now R.S.B.C. 1996, c. 318)." In summary, the driver of a vehicle conducted himself while at the wheel of his vehicle on the ferry in a fashion that would amount to "careless driving". Section 1 of the Motor Vehicle Act states:

> "highway" includes every highway within the meaning of the Highway Act, and every road, street, lane or right of way designed or intended for or used by the general public for the passage of vehicles, and every private place or passageway to which the public, for the purpose of the parking or servicing of vehicles, has access or is invited.

At para. 11, the court concluded that "this definition incorporates a ferry as a 'highway' in two ways: (a) a ferry is incorporated in the general term 'highway'; and (b) a ferry is incorporated in the phrase set out in the definition 'every private place or passageway to which the public, for the purpose of the parking or servicing of vehicles, has access or is invited'." With great respect, would that mean that every person would be required to have a seatbelt fastened while seated in the vehicle?

In reaching this conclusion, Romilly J. observed at paras. 15-16 that:

> A definition that uses the word "means" is exhaustive: Re Yellow Cab Ltd. and Board of Industrial Relations (1980), 114 D.L.R. (3d) 427 (S.C.C.). . . . The term "includes" indicates that the term "highway" is not restricted to the description following the word "includes" in s. 1 of the Motor Vehicle Act but should be given its ordinary meaning. The word "including" means "shall have the following meaning in addition to its ordinary and popular meaning".

His Lordship then makes reference to the dictionary meaning of the word "highway". Further, I note that at para. 18, it is held that "[t]he term 'highway' has been construed by the courts to include a ferry. Dinner and Others v. Humberstone (1896), 26 S.C.R. 252 (S.C.C.) at p. 267" and Wolfe Island (Township) v. Ontario (Ministry of Environment) (1995), 23 O.R. (3d) 737 at p. 751, 125 D.L.R. (4th) 266 (C.A.).

The New Brunswick Court of Appeal has also had occasion to consider this issue in R. v. Love (1994), 3 M.V.R. (3d) 266, 144 N.B.R. (2d) 224. Hoyt C.J.N.B., Rice and Ayles JJ.A. considered the question of the merits of a finding of guilt in respect of an offence of stopping in a fire lane in a private parking lot contrary to the Motor Vehicle Act, R.S.N.B. 1973, c. M-17. Under s. 193(1)(n) of the Motor Vehicle Act, no person shall stop, stand or park a vehicle "at any place where official signs prohibit stopping". Following a 1980 amendment, the definition of "highway" was expanded to include parking lots. Indeed, as recorded at p. 268: "The explanatory notes . . . stated that: 'The definition "highway" is broadened to include parking lots, drive-in theatres, school yards, picnic sites, beaches and winter roads across ice'" (emphasis in original).

As noted by Ayles J.A., at p. 268:

> In 1980, the Legislature saw fit to extend the meaning of "highway" to include parking lots, such as the one in question here at the Lancaster Mall in Saint John, N.B., and drive-in theatres. It is also true that they are available for the invitees of the owners and the occupiers, and for the owners occupiers themselves. It is equally true that the general public have access to private shopping centre parking areas and may park their vehicles on these properties. In my opinion,

> the wording of the Act is broad enough to include any member of the general public that intends to pass through or park his vehicle in that particular parking lot, even if there may be a right of the owners to remove people who use the property for other than business connected with that property.

In the next paragraph, R. v. Mansour, supra, was considered and the court found that the case could be distinguished by reason of the differences in the definitions of the word "highway". Hence, it was held that the wording of the Act included any member of the general public who intends to pass through or park his vehicle in a particular parking lot, even if the owners have a right to remove people who use the property for other than business connected with that property.

(c) The potential mischief were "highway" to be broadly interpreted

Although I am of the belief that my analysis so far is not erroneous, I will go on to cite certain cases to illustrate my fear that a broad interpretation of "highway" will result in greater mischief than a narrow one, bearing in mind the potential difficulties this case illustrates. At bottom, as will be seen presently, the extension of the term "highway" to include such paved surfaces will result in far too many "neutral" acts by the users of such surfaces falling within the ambit of the Provincial Offences Act, R.S.O. 1990, c. P.33.

For example, in R. v. Joe, unreported, October 22, 1969, No. 222/69 (B.C.C.A.), the accused was charged with driving a car on an Indian reservation without current licence plates. The trial judge found that the road in question was private, and not a highway within the meaning of the Motor Vehicle Act which included the identical definition as exists in the present Motor Vehicle Act (discussed above in Galligos v. Louis, supra, and R. v. Wong, supra) excepting one word not material to this case. On appeal, the acquittal was upheld. Davey C.J.B.C. stated that the road (pp. 2-3):

> . . . is used by members of the general public by authority of the Indian Band in charge of Reservation No. 2 for the purpose among other things, of servicing residences on these lands, for delivering supplies to residents of these lands, for the attendance by non-Indians at social events on the land in company with their Indian friends, and sports events likewise.

Chief Justice Davey continued at pp. 3-4:

> I have not the slightest doubt that the learned trial Judge, in that respect, was quite right. It might be too much to say that people who do come on to this Reserve come on at the invitation, express or implied, by the Indians or the Band; but, in any event, they come on to the land for purposes which are incidental to the ownership of the property by the Indians, and this cannot be said, although they are members of the general public, to be a use of the road by the general public. If the argument of Crown counsel is sound (and he concedes this is the case) it must mean that every serviceman, every merchant, every person who has business with a farmer who uses the farmer's road through his property from the highway to his residence, must likewise be using the road as the general public and so that road fails within the definition of "highway" as contained in the Motor Vehicle Act. Such an extension of the argument I think shows its absurdity.

I note that R. v. Joe, supra, was followed in R. v. Charlie, [1983] 5 W.W.R. 566, [1984] 1 C.N.L.R. 123 (B.C. Co. Ct.). The road in that case was partly paved and partly gravel, and although the occasional public employee or bewildered tourist used the paved sections of the road, only native people lived in the area, and the only business along the road was a cattle farm owned by a native person. There were no barriers to public access, although at times a no trespassing sign was posted at either end of the roadway. Millward Co. Ct. J. stated at p. 575:

> . . . it would be absurd to conclude that Quamichan Reserve Road is a highway merely because out-of-province tourists occasionally become confused and attempt to travel on that road. The

> band does not encourage tourists, and there are no camping or recreational facilities on the road. In the result, since the Quamichan Reserve Road is not a highway, Canute was under no obligation to comply with provincial traffic laws, and his appeal should be allowed.
>
> With respect, I agree with His Honour's comments at p. 575:
>
> Generally speaking, a public road is one to which members of the public have access, not one constructed by and for a special group such as the residents of the reserve: see R. v. Bigeagle, [1978] 6 W.W.R. 65 at 68, 43 C.C.C. (2d) 528 (Sask. C.A.).

In my opinion, the same result in law follows if one substitutes the words "not one constructed by and for a special group such as the residents of the apartment building" for the words "not one constructed by and for a special group such as the residents of the reserve".

With great respect, in attempting to interpret the word "highway" within the context of a quasi-criminal prosecution, I am mindful that if the lot in question were held to be a "highway", it would not be lawful for unlicensed drivers to attend there with their parents, for example, in order to gain a rudimentary knowledge of the operation of a motor vehicle. I cannot say whether the wide interpretation advanced by the court in Sked v. Henry, supra, was influenced by the particular nature of a multi-purpose paved lot, but I do not have any hesitation in concluding that in the case at bar, the lot in question was only described as a "driveway" to a parking lot. For example, if there was a "fair" for the residents of the apartment complex in question, could not the owner of the residences order that the parking lot be blocked off to accommodate floats or stands, an action which no private person or entity may take with respect to a public highway, without authorization from a public agency.

In the final analysis, it may well be that had the Crown been able to provide far more information about the paved surface in question, it might have been possible to conclude that it was a highway. For example, in R. v. Singh, [1994] O.J. No. 2452 (Prov. Div.), my colleague Judge Lane Prov. J. concluded that the apron area of Pearson Airport was a public place and that the driver of a tug or tractor used to pull luggage carts on the apron was violating the disqualification order imposed as a result of a conviction for impaired operation. Her conclusion was influenced to a great extent by the wealth of information she obtained respecting the varied uses and types of users respecting the apron, including information that the apron is subject to strict traffic and safety regulations and, apart from passengers and crew who enter aircraft via the gates and loading ramps, is accessible only to persons who hold a valid Airside Vehicle Operators Permit: refer to para. 6. Of course, no such restrictions exist with respect to the paved surface being considered at bar.

CONCLUSION

In this case, I find that I am bound to apply the interpretation in R. v. Mansour, supra, notwithstanding the amendments to the H.T.A. since then. I find as well that the interpretation I have adopted is in keeping with many reported decisions and that the other cases may be distinguished on two grounds: either the court sought to extend the reach of an insurance clause or the court was not concerned with the strict interpretation rule which applies in criminal and quasi-criminal cases. And, in the final analysis, to extend the reach of the H.T.A. to such paved surfaces may well result in preventing individuals from conducting legitimate activities on their property.

Returning briefly to the facts of the case, it may be that the police officers would not have made such a signal until they left the highway, so as not to interfere with the flow of traffic; if so, they run the risk that it will not be heeded, not unlike the police officer who yells to a person to stop who refuses to. My interpretation should not unduly interfere with their vital work as they are at liberty to advance such signals at any time they, or the subject vehicle, is on a highway.

I wish to commend both counsel for their valuable assistance.

Judgment accordingly.