Case Name:

R. v. Krupa

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

Between
Her Majesty the Queen, and
Piotr Krupa, defendant

[2002] O.J. No. 1650

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

Heard: January 23, 2002.
Judgment: May 2, 2002.
(58 paras.)

Motor vehicles — Regulation of vehicles and traffic — Pedestrians — Intersections and crosswalks — Right of way — Yielding to pedestrians — Offences — Intent or mens rea — Offences of strict liability.

Trial of Krupa on charge of failure to yield to pedestrian in a crosswalk. The Crown contended that Krupa drove his vehicle through the crosswalk without slowing or stopping his vehicle to allow a pedestrian to finish crossing. Krupa was observed letting off a passenger in the southbound curb lane of a four-lane street. He then proceeded toward the crosswalk where the pedestrian had begun to cross. The officer observed that as the pedestrian reached the half-way point of the crosswalk, he had to stop, possibly to avoid being struck by Krupa's vehicle as it proceeded through the crosswalk. When Krupa's vehicle had just entered the crosswalk, the pedestrian was still in the northbound lane closest to the centre of the road approaching the southbound lane. As the pedestrian reached the centre yellow line, Krupa's vehicle was in the crosswalk. Krupa was travelling between 15 and 20 kilometres per hour through the crosswalk.

HELD: Krupa found guilty of failing to yield to a pedestrian within a crosswalk. The legislation allowed Krupa to proceed through the crosswalk despite the presence of a pedestrian if that pedestrian was situated on the far half of the crosswalk. However, where the pedestrian and Krupa's vehicle arrived simultaneously in the same half of the crosswalk, Krupa was obligated to yield if the pedestrian would objectively be endangered by his vehicle's proximity. The offence was a strict liability offence but did not necessarily require Krupa to stop. The defence of due diligence was open to Krupa, but no evidence was led on this issue and no reasonable inference could be drawn from the facts as to his diligence. Under the objective endangerment test, Krupa's vehicle could not have passed through the crosswalk completely before the pedestrian had entered the danger zone. Krupa was therefore required to yield by slowing down or stopping, if necessary. Since his vehicle would have likely entered the crosswalk before the pedestrian could have set foot on the nearside curb, it was necessary for Krupa to stop his vehicle before the crosswalk for the safety of the pedestrian.

Statutes, Regulations and Rules Cited:

British Columbia Motor Vehicle Act, s. 179(1).
Highway Traffic Act, ss. 1, 140(1), 140(1)(a), 140(1)(b), 140(4), 144(28).

Saskatchewan Highway Traffic Act, s. 54(1).

Charge: S. 140(1)(b) Highway Traffic Act - Fail to yield to pedestrian in crosswalk

Cases Considered or Referred to:

Alter v. Soloway, [1931] 2 D.L.R. 328 (Ont. Supreme Ct. (App. Div.)) per Latchford, C.J., Riddell, Masten and Fisher, JJ.A.
Lalonde v. Kahkonen (1971), 22 D.L.R. (3d) 279, [1972] 1 O.R. 91 (O.C.A.), per Schroeder, Kelly and Arnup, JJ.A.
R. v. Davis, [1996] N.S.J. No. 60 (N.S.C.A.), per Pugsley, Matthews and Flinn JJ.A.
R. v. Deck, [1997] B.C.J. No. 3034 (B.C. Prov. Ct.) per Makhdoom J.P.
R. v. Knutson, [1989] S.J. No. 130 (Sask. Q.B.), per Gerein J.

Statutes, Regulations and Rules cited:

Highway Traffic Act, R.S.O. 1990, c. H.8, ss. 1, 140(1), 140(1)(a), 140(1)(b), 140(4), 144(28).
Motor Vehicle Act, R.S.B.C. 1979, c. 288, s. 179(1).
Highway Traffic Act (Saskatchewan), S.S., c. H-3.1, S. 54(1).

Counsel:

P. McMahon, for the Crown.
P. Periti, agent for the defendant.

QUON J.P.:—

1. INTRODUCTION

¶ 1 This case is about the protection of pedestrians in crosswalks and the duty of motorists approaching crosswalks. Section 140(1) of the Highway Traffic Act, R.S.O. 1990, c. H.8 (H.T.A.), governs the obligation that motorists have towards pedestrians in pedestrian crossovers or crosswalks. For the present charge, it is contended that the defendant drove his vehicle through a crosswalk without slowing or stopping his vehicle to allow a pedestrian to finish crossing the road. Hence, the defendant has been charged for breaching s. 140(1)(b), as a driver that failed to yield the right of way to a pedestrian in a crosswalk.

¶ 2 It is evident that s. 140(1) creates a conflict between pedestrian safety and the motorist's duty on one side and the motorist's discretion or judgment on the other. This conflict makes for difficult decision-making, since the legislators have given motorists the entitlement to proceed through a crosswalk despite the presence of a pedestrian, if that pedestrian is situated on the far half of the crosswalk. A motorist is only required to yield when a pedestrian is on the near half of the crosswalk, or when a pedestrian is about to enter the near half and the motorist's vehicle would be so close to the crosswalk that the pedestrian becomes endangered. In other words, the motorist must only yield when the pedestrian is in the same half of the crosswalk as the motorist's vehicle, or if the pedestrian is endangered by the proximity of the vehicle.

¶ 3 The difficulty, of course, arises when a pedestrian and a vehicle arrive simultaneously in the same half of the crosswalk, specifically when that vehicle proceeded towards the crosswalk while the pedestrian was in the far half of the crosswalk. At that point of time, s. 140(1)(b) requires that the motorist must yield if the pedestrian would be endangered by the vehicle's proximity. Yielding requires the motorist to either slow the vehicle or stop if necessary. Ergo, the legislators have inadvertently made the decision of yielding to a pedestrian a discretionary one for a motorist.

¶ 4 In order to decide this case, it must be determined whether the pedestrian was objectively put into danger by the proximity of the defendant's vehicle. If the pedestrian had been put into danger, then it has to be determined whether the defendant had complied with his obligation of ceding the right of way to the pedestrian.

¶ 5 The trial was held on January 23, 2002. The matter was then adjourned for judgment to be rendered on May 2, 2002.

2. FACTS

¶ 6 The defendant has been charged under section 140(1)(b) of the Highway Traffic Act, R.S.O. 1990, c. H.8, for failing to yield to a pedestrian approaching in a crosswalk on February 5, 2001 at 1:16 p.m. while he was driving southbound on Roncesvalles Avenue at Marion Street in the City of Toronto.

¶ 7 Police Officer Hughes, who was situated at the northeast corner of this intersection, was there specifically to monitor the crosswalk. Hughes described the crosswalk as painted lines marked on the roadway south of Marion Street. He also said there was X's painted on the road approximately 30 metres north of the intersection. There were also signs on the road and overhead yellow lights indicating pedestrian crossing. In addition, there were flashing amber lights that could be activated by pedestrians. Roncesvalles Avenue is comprised of two lanes for northbound traffic and two lanes for southbound traffic.

¶ 8 Hughes testified he saw a male pedestrian that just had come from the seniors' residence located south of Marion Street at approximately 1:16 p.m. He was walking northbound on Roncesvalles Avenue. This pedestrian approached the crosswalk and activated the overhead amber warning lights. The pedestrian then pointed, paused momentarily and then started to cross from the east side to the west side.

¶ 9 At this moment, Hughes observed the defendant's vehicle 20 metres north of the intersection, in the southbound curb lane on Roncesvalles Avenue. The defendant had been stopped, letting off a passenger.

¶ 10 The male pedestrian on the eastside of Roncesvalles Avenue entered the crosswalk at the time the defendant's vehicle was stopped. Officer Hughes then said that the defendant's vehicle began to move forward toward the crosswalk. He then noticed that as the pedestrian reached the half-way point of the crosswalk, the pedestrian had to stop, possibly to avoid being struck by the defendant's vehicle as it proceeded through the crosswalk. When the defendant's vehicle had just entered the crosswalk, the pedestrian was still in the northbound lane closest to the centre of the road approaching the southbound lane. As the pedestrian reached the centre yellow line, the defendant's vehicle was in the crosswalk. Hughes said in cross-examination that there might have been approximately a lane between the vehicle and the pedestrian.

¶ 11 The defendant was driving alone in a blue 1990 Pontiac when stopped by Hughes. Hughes said the day was mild and cloudy, but the roads were wet. Hughes estimated the speed of the defendant's vehicle as it went through the crosswalk was no more than 15 to 20 kilometres per hour.

¶ 12 Officer Hughes was not sure if the defendant stayed in the curb lane or had moved to the left lane when he drove through the crosswalk, but because there are usually parked cars on the south side of Marion Street, Hughes opined that the defendant would have had to change lanes because of the parked cars.

¶ 13 The defendant, who did not attend the trial or give any parol evidence relating to due diligence, was represented by a traffic paralegal.

3. ISSUES

¶ 14 Did the defendant objectively endanger a pedestrian walking in a crosswalk by driving his vehicle too close to the crosswalk?

¶ 15 If the pedestrian had been endangered by the proximity of the defendant's vehicle, had the defendant fulfilled his burden of yielding the right of way to the pedestrian?

¶ 16 Had it been necessary for the defendant to stop his vehicle before reaching the crosswalk?

4. ANALYSIS OF FACTS AND LAW

¶ 17 The defendant is charged for failing to yield to a pedestrian approaching in a pedestrian crossover under s. 140(1)(b) of the Highway Traffic Act, R.S.O. 1990, c. H.8. That section provides:

> 140(1) Subject to subsection (2), when a pedestrian or a person in a wheelchair crossing a roadway within a pedestrian crossover,
>
> is upon the half of the roadway upon which a vehicle or street car is travelling; or
> is upon half of the roadway and is approaching the other half of the roadway on which a vehicle or street car is approaching so closely to the pedestrian crossover as to endanger him or her,
>
> the driver of the vehicle or street car shall yield the right of way to the pedestrian or a person in a wheelchair by slowing down or stopping if necessary.

¶ 18 A "pedestrian crossover" is defined in s. 1 of the H.T.A.:

> "pedestrian crossover" means any portion of a roadway, designated by by-law of a municipality, at an intersection or elsewhere, distinctly indicated for pedestrian crossing by signs on the highway and lines or other markings on the surface of the roadway as prescribed by the regulations; ("passage pour piétons").

¶ 19 And a "crosswalk" is also defined in s. 1 of the H.T.A.:

> "crosswalk" means,
>
> that part of a highway at an intersection that is included within the connections of the lateral lines of the sidewalks on opposite sides of the highway measured from the curbs or, in the absence of curbs, from the edges of the roadway, or
> any portion of a roadway at an intersection or elsewhere distinctly indicated for pedestrian crossing by signs or by lines or other markings on the surface; ("passage protégé pour piétons").

¶ 20 I find that a pedestrian crossover and crosswalk as defined under the H.T.A. are virtually identical and may be interchanged with each other. Accordingly, in this decision, reference to "crosswalk" will be synonymous with the expression, "pedestrian crossover".

¶ 21 The evidence in this case indicates that the pedestrian was in the crosswalk or pedestrian crossover traversing from the eastside to the westside of Roncesvalles Avenue. Officer Hughes testified that the pedestrian was just reaching the halfway point of the street when the pedestrian had to stop his forward motion or progress to possibly avoid being struck by the defendant's vehicle. The defendant's vehicle at this point was moving southbound, entering or had just entered the crosswalk, close to the defendant's position in the crosswalk. However, there may have been approximately the width of a lane between the pedestrian and the vehicle. Hughes had not recorded in his notes whether the defendant's vehicle was still in the curb lane or whether it had moved into the left southbound lane because of the parked cars in the curb lane south of Marion Street. Section 140(1)(b) stipulates that where a pedestrian is approaching the same half of the crosswalk as an advancing vehicle, and that vehicle is close enough to endanger the pedestrian, the driver must yield the right of way to the pedestrian by slowing down or stopping if necessary.

¶ 22 As such, would allowing motorists an option for discharging their duty of yielding to pedestrians, by slowing down or stopping, make the offences for not yielding under s. 140(1), strict liability or absolute liability offences? In R. v. Deck, [1997] B.C.J. No. 3034 (B.C. Prov. Ct.), it was held that the offence of failing to yield to a pedestrian within a crosswalk is a strict liability offence. The law in British Columbia is very similar to the Ontario provision requiring that motorists yield the right of way to pedestrians within crosswalks. Makhdoom J.P. at paras. 20-21 in R. v. Deck discussed the driver-pedestrian scheme in the British Columbia Motor Vehicle Act, R.S.B.C. 1979, c. 288 and made the following conclusions [emphasis is mine below]:

> The driver-pedestrian scheme as contained by the Act can be summarised as follows: Public safety is the primary interest and intent of the Act. There is a higher degree of responsibility placed on the driver of a vehicle to ensure safety of the pedestrians. However, public safety is not an exclusive burden on the vehicle drivers. The pedestrians must share this burden of keeping the streets safe. The Act stipulates that the pedestrian must yield right of way when (a) lights operating at the intersection and (b) when crossing a highway from an area other than a crosswalk. When no lights operating, a driver must yield right of way to a pedestrian when the later is already in the middle of the crosswalk or is perilously close to the vehicle. Despite ss. 178-180, the driver of a vehicle has a duty to exercise due care to avoid colliding with a pedestrian who on the highway.
>
> Offence of failing to yield right of way to a pedestrian under s. 179 of the Act is a strict liability offence. For such an offence, the Crown has no onus to prove mens rea. That is, doing of the forbidden act prima facie imports the offence. Mr. Justice Dickson in R. v. Sault Ste. Marie, [1978] 2 S.C.R. 1299, 3 C.R. (3d) 30, 21 N.R. 295, 7 C.E.L.R. 53, 40 C.C.C. (2d) 353, 85 D.L.R. (3d) 161, identifies such offences as "public welfare offences" where negligence and not mental element imports the offence. The fact that Mr. Flynn was struck by a van negligently driven by the defendant imports the offence of Mr. Deck's failure to yield to a pedestrian. Sault Ste. Marie (supra) and more recently, R. v. Pontes (1995), 100 C.C.C. (3d) 353 (S.C.C.) clearly establish the availability of the defence of due diligence for strict liability offences where negligence is an element. That is, a defendant would be entitled to this defence if he can show, on a balance of probabilities, that (a) he had reasonable amount of skill in driving a motor vehicle evidenced by his possession of a valid and subsisting drivers licence, and (b) he exercised due care to avoid colliding with a pedestrian who was on the highway.

¶ 23 The British Columbia requirement for drivers to yield to pedestrians within crosswalks is found in s. 179(1) of the Motor Vehicle Act, R.S.B.C. 1979, c. 288. That section provides:

> 179(1) Subject to section 180, the driver of a vehicle must yield the right of way to a pedestrian where traffic control signals are not in place or not in operation when the pedestrian is crossing the highway in a crosswalk and the pedestrian is on the half of the highway on which the vehicle is travelling, or is approaching so closely from the other half of the highway that he or she is in danger.

¶ 24 The difference between the Ontario and the British Columbia provision is that motorists in Ontario are specifically instructed on how to yield to a pedestrian. They must slow down or stop. The s. 140(1) provision allows alternative methods for yielding to a pedestrian, thus creating a discretion between which method to use and a choice whether it is required to be performed. Therefore, since a motorist can escape liability by either slowing or stopping his vehicle when necessary before reaching the crosswalk, the provision of choices for compliance would not make the offences contained in s. 140(1) ones of absolute liability. Thus, the offence under s. 140(1)(b) is a strict liability type offence. As such, a motorist would have the defence of due diligence. If the defendant shows that he was diligent or prudent in performing either action, that an unforeseen circumstance occurred, or that objectively, the alternative actions were not needed, then he would have a valid defence.

¶ 25 As it was noted in R. v. Deck, I also find that motorists in Ontario have a common law duty of care towards pedestrians on highways, besides the duties imposed in s. 140(1). This duty of care has been confirmed by the Court of Appeal of Ontario in Lalonde v. Kahkonen (1971), 22 D.L.R. (3d) 279, [1972] 1 O.R. 91.

¶ 26 In R. v. Davis, [1996] N.S.J. No. 60 (N.S.C.A.), Flinn J.A. writing for the Nova Scotia Court of Appeal at para. 26 held there are situations where a motorist failing to yield to a pedestrian had a defence if he or she could show the act was committed through no fault of the motorist:

> There are, undoubtedly, many situations where it could be said that failure to yield the right-of-way to a pedestrian in a marked crosswalk was as a result of no fault on the part of the driver. For example, it could be that, notwithstanding careful and prudent driving, the respondent was forced into a situation of failing to yield to the pedestrians through no fault of

> her own; such as the negligence of another driver. It could be that the pedestrians ran out into the crosswalk, suddenly, or under circumstances where that event could not reasonably be foreseen. There might have been an unforeseen mechanical failure to her vehicle.

¶ 27 Therefore in the present case, if the pedestrian would be endangered by the closeness of the defendant's vehicle, then the defendant must yield the right of way. If he doesn't yield, he is in breach of s. 140(1)(b) unless he can show that he slowed down to a reasonable rate of speed for the circumstances, or that his inability to yield was caused by mechanical problems, the negligence of the pedestrian or of another motorist, or that it was not necessary to stop. However, the defendant's due diligence is not at issue in this case, as he has not provided any evidence of it and no reasonable inference can be made from the evidence that he was diligent in complying with s. 140(1)(b).

¶ 28 In addition, there is no evidence that the defendant had been forced into not yielding by the negligence of another motorist, or that the pedestrian had run out into the crosswalk unexpectedly. Nor is there evidence that the defendant's vehicle had mechanical problems. The evidence, on the other hand, shows that the overhead pedestrian lights were flashing and that the pedestrian was walking in the crosswalk in a normal manner during daylight hours.

¶ 29 Section 140(4) of the H.T.A. also imposes a duty on pedestrians to be diligent when crossing streets:

> 140(4) No pedestrian or person in a wheelchair shall leave the curb or other place of safety at a pedestrian crossover and walk, run or move the wheelchair into the path of a vehicle or street car that is so close that it is impracticable for the driver of the vehicle or street car to yield the right of way.

¶ 30 However, there is no evidence that the pedestrian did anything contrary to the H.T.A. or breached his duty to be diligent when crossing Roncesvalles Avenue. The pedestrian had activated the pedestrian lights, pointed and entered the crosswalk at the far side before or just as the defendant's vehicle began to move towards the crosswalk.

(a) Position of pedestrian within crosswalk

¶ 31 In analyzing the present evidence, the initial question to consider is the position of the pedestrian within the crosswalk when the defendant's vehicle was approaching the crosswalk. If the pedestrian was already in the same half of the roadway as the defendant's vehicle then the defendant is compelled to yield the right of way. However, if the pedestrian is only just reaching the half way point or is on the other half of the roadway farthest from the defendant's location, then the issue becomes whether the pedestrian would be endangered by the defendant's vehicle being driven so close to the crosswalk. If the pedestrian would be objectively put into danger by the nearness of the defendant's vehicle, then the defendant would also have to yield to the pedestrian. If the defendant fails to yield, when the circumstances are considered objectively, then the prosecution has made out a prime facie case.

(b) Whether slowing down is conditional

¶ 32 Before considering the issue of objective endangerment, a clarification has to be made about the use of the "if necessary" conditional phrase in s. 140(1). Does the "if necessary" phrase modify both actions of slowing down and stopping the vehicle, or does it only modify the word "stopping". If it indeed modifies the phrase "slowing down", then a motorist is not obliged to slow down for a pedestrian in a crosswalk unless it was necessary. In that scenario, a pedestrian may be placed at a greater risk of harm. A motorist that is compelled to slow down unconditionally for a pedestrian would allow sufficient time to stop in case the pedestrian does something unexpectedly or in case of unforeseen events. This provides the motorist with a margin for error. Indeed, there may be situations where the safety factor would be insufficient unless the motorist had been compelled to reduce the speed of the vehicle appropriately for a pedestrian. A good example would be where a pedestrian is blind.

¶ 33 In addition, the alternate options of slowing down and stopping are not equally onerous on motorists or equally safe for pedestrians. Stopping forces the motorist to be more cautious and this option enhances the safety of pedestrians. Hence, vehicles stopping at pedestrian crosswalks provide a safer environment and meet the objective of public safety better than when a vehicle is only obliged to slow down.

¶ 34 Logically, it follows that a vehicle needs to slow down first before it can stop. Despite it being safer for pedestrians under the stopping option, there are practical situations where slowing down would suffice. For example, a motorist that makes a proper right hand turn into the crosswalk is not required to stop while there are only pedestrians on the far side of the crosswalk. In that instance, it would be more expedient and efficient for traffic flow to allow the vehicle to proceed slowly through the crosswalk.

¶ 35 In Lalonde v. Kahkonen (1971), 22 D.L.R. (3d) 279, [1972] 1 O.R. 91 (O.C.A.), Schroeder J.A. for the Ontario Court of Appeal, held that motorists are under a greater obligation at crosswalks to maintain a sharp look-out for pedestrians, since they are given the knowledge that this is where pedestrians cross from curb to curb. This holding is found at pp. 280-281 of 22 D.L.R. (3d) 279:

> Pedestrians in making a crossing at a regular street crossing, while they must exercise care, have higher rights than if they attempted to cross elsewhere. Equally, motorists are under a greater obligation to maintain a sharp look-out at such points, knowing it is the place where pedestrians cross from curb to curb. The pedestrian has an undoubted right to cross a highway not at a regular crossing for foot pedestrians, but in such a case a duty is cast upon him to take special care and to use greater vigilance -- and for a very good reason because drivers are given the knowledge that there are safety zones for the use of pedestrians and which they are ordinarily expected to use.

¶ 36 Moreover, the H.T.A. has referred to a pedestrian's right of way over vehicles in s. 144(28). Although this reference is found in the provisions related to intersections controlled by traffic lights, it does indicate the emphasis on pedestrian safety:

> 144(28) Every pedestrian who lawfully enters a roadway in order to cross may continue the crossing as quickly as reasonably possible despite a change in the indication he or she is facing and, for purposes of the crossing, has the right of way over vehicles.

¶ 37 Therefore, since motorists are required to have greater vigilance for the presence of pedestrians at intersections with crosswalks, they should, if not already slowing down, be cognizant of slowing down when approaching crosswalks. I surmise that the conjuncture "if necessary", if applicable to the option of slowing down, would hinder or diminish a pedestrian's safety at crosswalks, as it would give a motorist too much latitude in deciding to slow down. On the other hand, making stopping conditional does have practicable applications. Stopping, although ultimately safer, is not absolutely necessary, especially when a motorist could meet its duty to yield by first slowing down to a safe speed for the circumstances. As long as motorists are prudent, then pedestrian safety is maintained. Therefore, in interpreting s. 140(1), in light of the public safety objective of the H.T.A., I conclude the phrase "if necessary" should not apply to the words "slowing down" and only apply to the word "stopping".

(c) Whether a subjective or objective view should be used in determining if a motorist should stop for a pedestrian

¶ 38 Now, in deciding whether it is necessary for a motorist to stop for a pedestrian under s. 140(1), should it be decided using the motorist's subjective belief or based objectively on the circumstances?

¶ 39 In R. v. Knutson, [1989] S.J. No. 130 (Sask. Q.B.), Gerein J. considered the situation of a pedestrian immobile in a crosswalk and the rights of pedestrians to preferential treatment over motorists because of pedestrian vulnerability [emphasis is mine below]:

> One of the objectives of The Highway Traffic Act is to regulate the flow of traffic so as to minimize the risk to the safety of persons who use or are present upon public thoroughfares. This objective must be kept in mind when interpreting s. 54(1) of the Act. As between motor vehicles and pedestrians, it is the latter who are more vulnerable and hence in greater need of protection. Their particular vulnerability flows from the fact that they are on foot, as opposed to being contained in a vehicle with its attendant protection, and that vulnerability varies not in the least whether they are stationary or in motion. When a collision occurs between a pedestrian and a motor vehicle the pedestrian never wins.
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> The usual meaning of the verb "to cross" is to pass from one side to another. However, that specific meaning presumes completion of the act of crossing. On the other hand, the act may not always be completed as occurs when there is a return to the starting point. In such instance there would be a partial crossing. Likewise, there may be a stopping part way followed later by a continuation. In that instance there would be a completed crossing, but one accompanied by stops. The one thing that is common to all forms of crossing is the initial movement towards the other side. Thereafter, a variety of things may occur.
>
> The words "is crossing" as used in s. 54(1) simply describe the person who has moved from one side of a highway towards the other side. That is the only movement required. Once a pedestrian has placed himself upon the highway he is engaged in the process or act of crossing. It matters not if he continues all the way across; if he stops and stands immobile; if he turns and returns from whence he came. So long as he is located upon the highway he "is crossing" it. This is the only interpretation which accords with both the common meaning of the words and the objective of the legislation, to say nothing of the reality of real life situations.
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> In the instant case the pedestrians were located in the crosswalk. The fact that they were stationary did not relieve the accused of his obligation to yield the right of way to them. The trial judge erred in law in holding otherwise.

¶ 40 It is noteworthy that s. 54(1) of the Saskatchewan Highway Traffic Act, S.S., c. H-3.1, mentioned in R. v. Knutson requires a vehicle to stop in order to yield to a pedestrian:

> When the driver of a vehicle on a highway within the boundaries of a municipality approaches an intersection or clearly marked pedestrian crosswalk where a peace officer is not on duty and traffic lights are not in operation and a pedestrian is crossing the highway, he shall stop the vehicle and yield the right of way to the pedestrian if the pedestrian is on the half of the highway on which the vehicle is travelling or is approaching so closely from the other half of the highway that he is in danger.

¶ 41 In Alter v. Soloway, [1931] 2 D.L.R. 328 (Ont. Supreme Ct. (App. Div.)), Fisher J.A. for the majority determined that a pedestrian, after looking before entering a crosswalk, has the right to assume that any vehicle coming up to the crossing would exercise care by reducing his or her speed or stop [emphasis is mine below]:

> This is not a case where a pedestrian is found crossing a street at a place other than an intersection, but of a pedestrian exercising care by looking before proceeding to cross; and, having done that, my opinion is that once a pedestrian has got into vehicular traffic and has begun to cross he must be allowed to continue his crossing in safety and to finish it. That is the law as laid down by Lord Sumner in The King v. Brock, [1915] A.C. 1110, at p. 1115. The plaintiff having looked before she started across, and everything then being clear, she had the right to assume that any one who might come up to the crossing she had already entered would exercise care by reducing his speed or stopping. See Myers v. Toronto R. Co. (1913), 10 D.L.R. 754, 30 O.L.R. 263; reversed 18 D.L.R. 335. It is only when a pedestrian observes approaching traffic at the time when he ventures to cross that he is bound to exercise care by keeping that traffic in sight: Jones v. Toronto & York Radial R. Co., 25 O.L.R. 158.

¶ 42 Schroeder J.A. furthermore in Lalonde v. Kahkonen, at pp. 281-282 held that a motorist has a higher degree of care required of him or her at intersections:

> A pedestrian, particularly one who crosses between intersections, has a duty to look out for his own safety and keep a proper look-out for approaching vehicles. Did he do so as a reasonable man would be expected to do? Did he step from a place of safety to a place of danger and fail to use reasonable care as required in the existing circumstances? A motorist, on the other hand, must take proper precautions to guard against risks which might reasonably be anticipated to arise from time to time as he proceeds on his way having regard to all relevant circumstances of time, place and traffic conditions. A higher degree of care is required of him at intersections than at points between intersections.

¶ 43 To fulfill the regulatory objective of s. 140(1)(b) of pedestrian safety, I find the condition "if necessary" must be considered on an objective basis, otherwise pedestrian safety would be left to impatient or careless motorists who undoubtedly believe they can pass through the crosswalk before a pedestrian reaches them. This requirement is not unreasonable, since this is a strict liability offence, and a motorist may still exonerate himself or herself by showing due diligence.

¶ 44 Therefore, in satisfying the public safety intent or interest of the H.T.A., a motorist fulfills the obligation to yield under s. 140(1)(b) by initially slowing down his or her vehicle to an appropriate rate of speed, but cannot enter the crosswalk before the pedestrian has passed through the danger zone and set foot on the near side curb. If the pedestrian is still in this danger zone, then the vehicle must come to a stop before the crosswalk. That would fall within the scope of the conjuncture "if necessary". Thus, until the pedestrian leaves the danger zone, the vehicle must remain stopped. This is necessary in case the pedestrian suddenly drops a coin, forgets something, becomes startled, or reverses himself or herself and backtracks through the crosswalk. Remaining stopped also warns other motorists that there is a pedestrian crossing the street. This is especially beneficial for pedestrian safety when there is more than one lane of traffic in each half of the roadway.

(d) Danger zone

¶ 45 I referred to a danger zone in the objective endangerment test to be used for s. 140(1)(b). At this time, I need to explain the extent and the conceptualization of this danger zone. It is obvious that various factors may affect the reaction time of motorists, which in turn affect the safety of pedestrians in crosswalks. There is the speed of the vehicle, the speed limit for the road, the age of the pedestrian, the volume of traffic, the weather, the time of the day, the number of lanes and the road conditions. Therefore, to establish a uniform and reliable zone in which it can be determined objectively whether a pedestrian would be endangered by the proximity of a vehicle, taking into account these factors, I have determined that all of the same half of the crosswalk on which the vehicle is travelling towards should comprise the danger zone.

¶ 46 Making the entirety of the same half of the crosswalk as the danger zone is not unreasonable. Section 140(1)(a) already provides that a driver of a vehicle must yield when a pedestrian is already in the same half of the crosswalk that the vehicle is travelling on. This clearly was intended to protect pedestrians. It is only logical that a pedestrian in any part of this half of the crosswalk would be placed in danger by the proximity of a vehicle, even when this half is comprised of more than one lane. Therefore, to decide whether a pedestrian would be endangered by the proximity of a vehicle, the objective test to be answered is whether a pedestrian will have entered the danger zone before a vehicle travelling at an appropriate rate of speed can completely pass through the crosswalk.

(e) Objective endangerment test

¶ 47 To ultimately decide the issue in this case of whether the defendant had been required to yield, it has to be ascertained whether the pedestrian would have entered the danger zone (or entered the half upon which the defendant's vehicle was travelling on) before the defendant's vehicle travelling at an appropriate speed could have passed completely through the crosswalk. This is an objective projection of where the vehicle would be situated when the pedestrian enters the danger zone. If the vehicle cannot pass through the crosswalk before that event, then the pedestrian is considered to be endangered and the defendant would be required to yield the right of way. This test allows for a margin of error in favour of pedestrian safety. Although the extent of the danger zone may seem overly large for the purposes of s. 140(1)(b), it is no bigger than the zone used in s. 140(1)

(a). But bear in mind, s. 140(1)(b) still allows motorists the ability to proceed through crosswalks at a safe speed when pedestrians are on the far side of the crosswalk. Moreover, they still maintain the defence of due diligence.

¶ 48 The defence, on whether the pedestrian pausing in the crosswalk to let the defendant's vehicle pass is an indication that the pedestrian was being endangered by the vehicle, replied that the pedestrian's hesitation could have be an indication of other actions. That is, the pedestrian could have been startled, had forgotten or dropped something and stopped to retrieve it, or had stopped for another reason other than stopping for the defendant's vehicle.

¶ 49 There may be many visible indicators of when a pedestrian in a crosswalk has been endangered by a motor vehicle entering or passing through a crosswalk. The pedestrian may display overt gestures such as yelling obscenities, making finger gestures, striking the vehicle with his hand or foot, jumping back, being touched by the vehicle, or if the pedestrian abruptly stops or changes his gait. However, the pedestrian's gestures must be objectively considered in relation to other relevant factors. A pedestrian's gestures are only one factor.

¶ 50 Although a pedestrian is in a crosswalk where he or she is entitled to the right of way, he or she may relinquish that right of way by visibly waving the vehicle through the crosswalk, and thereby allowing the vehicle to enter the crosswalk. The pedestrian's waiver of his right to proceed must be obvious from his hand gestures.

¶ 51 The evidence in this case shows that the pedestrian had to stop his advance to possibly avoid being hit by the defendant's vehicle, although this vehicle may have been a lane away from the pedestrian. Therefore, on objective basis, the defendant's vehicle could not have completely passed through the crosswalk before the pedestrian would have entered the danger zone. Hence, under this test the pedestrian was endangered by the proximity of the defendant's vehicle. The pedestrian in addition had been walking prudently, did not suddenly change his pace, was not visually impaired, or did anything abnormal.

¶ 52 In sum, the pedestrian would have been in the danger zone before the defendant's vehicle could have completely or safely traversed through the crosswalk. Hence, the motorist was required to slow down or if necessary, stop. In this scenario, it would have been necessary for the defendant to stop his vehicle and wait until the defendant had reached the near side curb before he could proceed again. The defendant had failed to do this and instead drove through the crosswalk.

5. CONCLUSION

¶ 53 For the purpose of s. 140(1) of the Highway Traffic Act, R.S.O. 1990, c. H-8, a crosswalk or pedestrian crossover is divided into two halves. Depending on which half a pedestrian is positioned will determine when a motorist approaching that crosswalk must yield. Under s. 140(1)(a), if the pedestrian is in the same half or near half of the crosswalk that the vehicle is travelling towards, then the motorist is required to yield to the pedestrian. To cede that right of way, the motorist must either slow down, or if necessary, stop his vehicle. The conjuncture "if necessary" only applies to the act of stopping.

¶ 54 Under s. 140(1)(b), where the pedestrian is not in the near half of the crosswalk, but in the far half approaching the near half, a motorist travelling towards the crosswalk may still be required to yield if the pedestrian would be endangered by the proximity of the vehicle. To determine this, an objective endangerment test must be used. If the motorist's vehicle cannot completely pass through the crosswalk before a pedestrian enters the danger zone, then the pedestrian is considered to be in danger and the motorist must yield. The danger zone, for the purpose of s. 140(1)(b), is the entirety of the near half or the same half of the crosswalk that the vehicle is approaching, which is identical in size to the zone described under s. 140(1)(a). This danger zone would encompass all the lanes of traffic that are in that same half of the crosswalk. Although this danger zone appears overly large, it is not unreasonable considering its extent provides a margin for error in favour of pedestrians. Moreover, using this danger zone as part of the objective test for endangerment is balanced by motorists still having the defence of due diligence.

¶ 55 In the present case, the defendant is charged for failing to yield to a pedestrian in a crosswalk under the second scenario. The police officer that had observed the event testified that the pedestrian was at the halfway point of the crosswalk when the pedestrian had to stand still to possibly avoid being struck by the defendant's vehicle. The defendant's vehicle was entering or had just entered the crosswalk. Under the objective endangerment test, the defendant's vehicle could not have passed through the crosswalk completely before the pedestrian had entered the danger zone. Therefore, because the pedestrian was considered to be endangered under this test, the defendant was required to yield. To fulfill the yielding requirement of s. 140(1)(b), the defendant must slow down to an appropriate speed for the circumstances, but cannot enter the crosswalk until the pedestrian has cleared the danger zone and set foot on the curb. Since the defendant's vehicle would have likely entered the crosswalk before the pedestrian could have set foot on the nearside curb, it was necessary for the defendant to stop his vehicle before the crosswalk for the safety of the pedestrian.

¶ 56 Because the defendant's vehicle entered the crosswalk without yielding, he is liable for breaching the strict liability offence contained in s. 140(1)(b), unless he can show that he was duly diligent in slowing down or stopping, or that through no fault of his own the pedestrian or another motorist had been negligent, his vehicle had mechanical problems, or that some unforeseen event had occurred.

¶ 57 In conclusion, there was no evidence that the defendant had slowed down or stopped, that he had been diligent in performing either of these actions, nor could due diligence be implied from the evidence. As well, there was no indication of the pedestrian's negligence, improper activity or waiver of his right of passage. Finally, there was no evidence of another motorist's negligence, mechanical problems, or that some unforeseen event had occurred.

6. DISPOSITION

¶ 58 For these reasons, it is the finding of this Court that the prosecution has proven beyond a reasonable doubt that the defendant, Piotr Krupa, is guilty of failing to yield to pedestrian within a crosswalk contrary to s. 140(1)(b) of the Highway Traffic Act, R.S.O. 1990, c. H.8. A conviction will be entered against the defendant.

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