SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Prest, 2011 NSSC 244

Date: 20110621
Docket: Ken No. 345579
Registry: Kentville

Between:

Todd Earle Prest — Appellant

and

Her Majesty the Queen — Respondent

DECISION

Judge: The Honourable Justice Gerald R. P. Moir

Heard: May 10, 2011

Counsel: David A. Daniels, for the Appellant

Robert Morrison, for the Respondent

Moir, J.:

Introduction

[1] Mr. Prest appeals his conviction for driving while suspended contrary to s. 287(2) of the *Motor Vehicle Act*. He relies on the failure of the Registrar of Motor Vehicles to deliver to him a notice of suspension as founding a defence of due diligence. He also relies on advice given to him by a prosecutor to found a defence of officially induced error.

[2] Mr. Prest wishes to introduce new evidence. I shall summarize the facts, and discuss the decision of Her Honour Judge Claudine MacDonald, before turning to the preliminary issue of fresh evidence and the two substantive issues of due diligence and officially induced error.

Facts

[3] Last summer, Mr. Prest was charged with driving without insurance, an offence under s. 230 of the *Motor Vehicle Act*. This is one of the offences for which the Registrar must "forthwith" suspend the offender's licence under s. 205(1)(c).

[4] On September 15, 2010 Mr. Prest came to court intending to plead guilty. The events before Mr. Prest's guilty plea are important for the defence of officially induced error. The trial judge accepted Mr. Prest's testimony, and his is the only evidence of what happened at that time.

[5] Mr. Prest testified that he had earlier pleaded not guilty. He arrived at court on September 15 and talked to the prosecutor:

> ... [I] told her I'd change plea, I was wondering if I would lose my licence because of my job. She assured me no that they would not be seeking for me to lose my licence, which was fine. I plead guilty and I had a year to pay the fine. And, so that was it…

The subject was explored in greater detail during cross-examination:

Q. She was the Crown Attorney at the time, was she?

A. Yes.

Q. Would it be fair to say, Mr. Prest, that you asked her about what the Court would do with respect to the no insurance ticket, and would the Crown be seeking the suspension of your license?

A. I just asked her, would I lost my license, right, I need them for my job…

Q. Would you lose your license?

A. Rrr, right.

Q. And isn't it fair to say that she would have responded, "Crown is not seeking to have you suspended".

A. I can't really recall. I remember her just saying no, right, that I wouldn't lose my license.

Q. So, you don't recall her saying "the Crown is not seeking but I'm not sure what Motor Vehicle Registry would do"?

A. No, but I can't say for sure.

Q. You can't say for sure that she didn't say that.

A. There was an officer there too. The officer that pulled me over for that and I ask him as well. We..., three of us were standing there.

Q. Okay, so it may be that she said that to you, it may be that she said "look, I'm not going to be seeking as the Crown Attorney in Court today but Motor Vehicle Registry, they may.

A. She could have, yes.

[6] So, Mr. Prest left court on September 15, 2010 believing that his licence remained in effect. He had purchased insurance, and he continued driving.

[7] The Crown proved a Registrar's certificate at the trial of the driving while suspended charge. It includes these entries:

15/09/10	No Insurance	15/09/10	230	1
16/09/10	'Suspended DL Only' Letter was Produced on 20100916 and sent via Priority Courier			
30/09/10	Lic Susp (sec 205) 2 year(s) Eff: 20100930 Expy: 20120930			

This proves that on the day after Mr. Prest spoke with the prosecutor and pleaded guilty, the Registrar sent a letter by Priority Post courier advising that his driving licence was to be suspended. Also, the suspension took place on September 30, 2010 and it was to last until September 30, 2012, as s. 205 provides.

[8] The certificate shows Mr. Prest's address to be 9635 Commercial Street in New Minas. He told the judge that he moved to Highway 221 in Canning, but his ex-wife continued to live at 9635 Commercial Street and she "gave me all the mail".

[9] Mr. Prest was not exactly sure when he moved out of 9635 Commercial Street but, with the assistance of the trial judge, he gave testimony that is consistent only with the view that he moved from there well after September, 2010, when he pleaded guilty and his licence was suspended. During the exchange with the judge, Mr. Prest reaffirmed that he never received the Registrar's letter.

[10] Having heard the prosecutor's advice and not having received the Registrar's letter, Mr. Prest continued to believe his licence was in effect and he continued to drive. On the first day of December the police set up a routine check point outside Canning. Mr. Prest was stopped, and he produced his licence. Later, the police learned that the licence was suspended, and the charge was laid.

Trial Judge's Decision

[11] The trial judge accepted Mr. Prest's testimony. In fact, she found him "very forthright and truthful". So, she believed what he said about not getting the Registrar's notice.

[12] The trial judge found that the prosecutor of the driving without insurance charge "would have" told Mr. Prest that "The Crown isn't seeking anything with respect to your licence". The judge said that Mr. Prest was "very truthful" about his discussion with the prosecutor, and she emphasized the final response in the exchange on cross-examination.

[13] The trial judge referred to s. 205. She expressed her interpretation that suspension under that section occurs by operation of law. She pointed out that ignorance of the law is not an excuse. Mr. Prest was convicted because he had no licence when he was stopped by the police last December.

[14] The trial judge's statements about Mr. Prest's credibility and her findings make it clear that Mr. Prest never received the Registrar's letter and he continued to drive because he believed his licence remained in effect.

Fresh Evidence

[15] The trial was held in early March of this year. A week later, Mr. Prest went to the Kentville Post Office, from which mail is supposed to be routed to the New Minas Post Office. A clerk found the Registrar's letter of September 16, 2010 in a drawer. It was waylaid there either without any attempt at delivery or after a failed attempt.

[16] Mr. Prest seeks to introduce on appeal the letter, evidence about its being waylaid, and some further evidence concerning his change of residence.

[17] *R. v. Palmer*, [1979] S.C.J. 126 recognized, at para. 21, four principles that emerge from decisions on admitting evidence at an appeal under the *Criminal Code*:

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases… .
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.

> (3) The evidence must be credible in the sense that it is reasonably capable of belief…
>
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

Through the *Summary Convictions Act*, these principles apply when a party seeks to introduce fresh evidence on the appeal of a conviction under provincial law.

[18] The evidence proposed by Mr. Prest could have been discovered before trial and produced by him at trial. He acted on his own and, no doubt, failed to direct his mind to the relevance of the letter and of the circumstances of its non-delivery until after his experience in court. That failure was, in my assessment, a failure to act with sufficient diligence.

[19] Furthermore, the main reason Mr. Prest wants to introduce this evidence is to show that the letter went wayward. As I said, the trial judge accepted Mr. Prest's testimony, and she found that the Registrar's letter was never delivered to him. The mechanics of the letter going wayward were relevant at trial, but the judge's finding about the failure of delivery makes the evidence immaterial to the result. The new evidence could have affected the outcome of the trial.

[20] Mr. Prest's second reason for wanting to introduce the new evidence is to show what he would have learned about suspension, and about possible reinstatement, had the letter been delivered. The Crown has no objection to my noticing what the Registrar advises for s. 205 suspensions. I will admit the letter for that limited purpose.

Principles of the Due Diligence Defence

[21] On behalf of Mr. Prest, Mr. Daniels submits that the mistake to which Mr. Prest testified was one of fact, rather than one of law. Mr. Daniels contrasts the revocation provisions at issue in *R. v. MacDougall*, [1982] S.C.J. 89 with the suspension provision at issue in *R. v. Lowe*, [1991] N.S.J. 182 (S.C., A.D.). He says that provisions of the *MacDougall* kind make loss of licence automatic by operation of law, but the loss of licence under provisions of the *Lowe* kind occurs only as a matter of fact, when the Registrar of Motor Vehicles does certain things.

[22] For the Crown, Mr. Morrison submits that the suspension on conviction for driving without insurance is immediate and automatic. The Registrar has no

choice, and there is no need for notice. He refers me to *R. v. Pontes*, [1995] S.C.J. 70.

[23] The defence of due diligence or mistake of fact stems from the categorization of regulatory offences in *R. v. Sault Ste. Marie*, [1978] S.C.J. 59 and the recognition that the intermediate category carries with it something less than the *mens rea* requirement of pure criminal liability and something more than the irrelevance of intentionality for absolute liability. Justice Dickson, later Chief Justice, described the intermediate category, strict liability, and the defence attached to it at para. 60:

> Offences in which there is no necessity for the prosecution to prove the existence of mens rea; the doing of the prohibited act prima facie imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability. Mr. Justice Estey so referred to them in Hickey's case.

[24] It may be that this describes two defences, due diligence and mistake of fact, but they have usually been treated as separate aspects of a single defence related to intention in strict liability offences. In addition to "due diligence" and "mistake of

fact", the defence is sometimes referred to as a defence of "reasonable care" or a defence of "justification".

[25] *R. v. MacDougall* held that the Nova Scotia provision prohibiting driving after revocation or suspension is a strict liability offence. The section number has changed since then, but neither the text of the prohibition nor its significant surrounding context has changed. The prohibition is now in s. 278(2) of the *Motor Vehicle Act*.

[26] The revocation provisions at issue in *MacDougall* are in the present s. 278 of the *Motor Vehicle Act*. That section provides for revocation twice over, by the Registrar and automatically.

[27] Under s. 278(1), the Registrar is required to revoke a licence when the Registrar receives a certificate of conviction for certain *Criminal Code* offences, such as motor manslaughter and similar offences in which death or injury results from wrongful driving, dangerous driving offences, theft of a vehicle, and leaving the scene of an accident, the underlying offence in Mr. MacDougall's case. The provision says:

> Subject to subsections (3) and (4), the Registrar or the Director of Highway Safety shall revoke effective the date of the conviction the driver's licence of any person upon receiving a record of his conviction for any of the following crimes or offences… .

[28] Under s. 278(2) there is an automatic revocation in addition to that required of the Registrar. It says:

> Notwithstanding subsection (1) but subject to subsections (3) and (4), when a person is convicted of any of the crimes or offences mentioned in subsection (1), the driver's license or the privilege of obtaining a driver's license is thereupon and hereby revoked and shall remain revoked.

[29] Subsection 278(3) applied in MacDougall. It revives the revoked licence in the course of an appeal and uses the same language as in s. 278(2) to impose another revocation when the appeal fails: "shall be thereupon and hereby revoked".

[30] Mr. MacDougall appealed a conviction for leaving the scene of an accident. The appeal was dismissed and Mr. MacDougall's lawyer told him so, but he continued driving because he knew it to be the practice of the Registrar to suspend by sending a notice. He was caught driving before the notice arrived.

[31] On those facts, Mr. MacDougall could not establish a defence of due diligence. The revocation under s. 278(3) was automatic: para. 15. Section 19 of the *Criminal Code* is a codification of the common law principle that "Ignorance of the law by a person who commits an offence is not an excuse for committing that offence" and it "undoubtably applies in the present case": para. 12. Thus, Mr. MacDougall's failure to appreciate the duty imposed by law upon him could not found his defence: para. 15.

[32] The suspension provision at issue in *Lowe* concerned accumulation of points. Subsection 282(6) reads:

> Subject to subsection (7), when ten or more points are entered on the record of a person in respect of convictions for violations of the Act entered against him within a period of twenty-four months, the Registrar shall suspend the driver's licence, or the privilege of obtaining a driver's licence, of the person for a period of six months.

[33] Justice Hallett referred to *MacDougall* as having settled that driving while suspended is a strict liability offence to which Mr. Lowe could attempt to prove a due diligence defence. He failed in his attempt.

[34] Mr. Lowe accumulated too many points. He was awaiting a notice from the Registrar. It was mailed to the address the Registrar had for Mr. Lowe, but he had moved. Contrary to what is now s. 71(2) of the *Motor Vehicle Act*, Mr. Lowe had failed to notify the Registrar of the change in his "residence address".

[35] Justice Hallett referred to *R. v. Sault Ste. Marie* and, at para. 12 of *Lowe*, he repeated Justice Dickson's description of the due diligence defence:

> The defence is available if an accused reasonably believed in a mistaken state of facts which, if true, would render the act or omission innocent or if he took all reasonable steps to avoid the particular event.

On the need for notice, Justice Hallett had this to say at para. 14:

> In my opinion, although there is no requirement in the Act for the Registrar to give notice of a suspension, the principle of natural justice requires such a notice be given. Otherwise, the driver has no way of knowing when the suspension starts. The only thing a driver would know from a reading of the Act is that the suspension would not be made for at least thirty days after his conviction for the offence that put his point total up to ten.

[36] The provision for notifying the Registrar of a change in residential address is integral to the suspension system: para. 15. The failure of Mr. Lowe to comply with this obligation defeated the due diligence defence: para. 15 and para. 16.

[37] A majority of five in *Pontes* reviewed *MacDougall* because it was thought to be irreconcilable with two earlier Supreme Court decisions and because it predated the *Charter*. The minority of four were of the view that *MacDougall* was inconsistent with one of the earlier decisions, but they preferred the dissent, also by Justice Ritchie. On the second point, they were of the view that *MacDougall* was consistent with decisions rendered later under the *Charter of Rights*.

[38] Mr. Pontes was charged under the British Columbia *Motor Vehicle Act* with driving while his licence was suspended. Subsection 92(2) of the B.C. statute provided that a person who commits one of several offences under the *Act* or the *Criminal Code* "is automatically and without notice prohibited from driving a motor vehicle for 12 months" from sentencing.

[39] Justice Cory wrote for the majority. He rather turned the middle category of *Sault Ste. Marie* on its head. Subsection 92(2) deprives a person accused under s. 94 of a due diligence defence. Therefore, driving while suspended in British Columbia is an absolute liability offence.

[40] Sections 92 and 94 were not offensive to s. 7 of the *Charter* because legislation in British Columbia had removed imprisonment as a possible punishment for, and as a consequence for not paying a fine imposed for, an absolute liability offence.

[41] Justice Gonthier wrote for the minority. For him, driving while suspended was properly characterized as a strict liability offence, although s. 92(2) and the principle that ignorance of the law is no excuse denies the accused a defence of due diligence based on lack of notice. A defence of due diligence based on lack of knowledge of the underlying conviction would, for example, still be available.

[42] Justice Gonthier criticized Justice Cory's reasons on the basis that they open the door to a mistake of law defence for strict liability offences. He said at para. 106:

> I do not believe that the "principles of fundamental justice" under s. 7 of the Charter require that an accused who is charged with a regulatory offence be entitled to claim due diligence in relation to the existence of the relevant statutory prohibition or its interpretation -- that is, to avail himself of the defence of ignorance of the law. The defence of due diligence does not need to be expanded to meet the exigencies of the Charter. Indeed, to do so would eviscerate the ignorance of the law rule and render many of our laws unenforceable.

[43] Justice LeBel delivered the judgment of the court in *Lévis v. Tétreault*, [2006] S.C.J. 12. At para. 19 he expressed criticism for the approach adopted by the majority in *Pontes* under which a legislative intent to exclude a due diligence defence was a ground for finding absolute liability. Justice LeBel said, "it would be better to return to the clear analytical framework and classification approach adopted in *Sault Ste. Marie*." I take the unanimous decision in *Lévis* to override the majority opinion in *Pontes*.

[44] *Lévis* discusses the due diligence defence at para. 13 to 19 and the defence of officially induced error at para. 20 to 27.

[45] As for due diligence, the decision traces the development of the categorical approach then it makes several points about it. Categorization into absolute liability offences, strict liability offences, and offences that require *mens rea* is "a question of statutory interpretation": para. 16. However, the *Sault Ste. Marie* categories are based on "a presumption of statutory interpretation" (para. 18) that prefers strict liability for regulatory or public welfare offences.

[46] The presumption is overcome in favour of a *mens rea* requirement by a statute that employs express words such as "willfully", "knowingly", "intentionally", or "with intent". It is overcome in favour of absolute liability by a statute that makes it clear that the Legislature was departing from the principle that punishment is not inflicted without fault. See, para. 16 and 17 of *Lévis*.

[47] The *Sault Ste. Marie* approach accords with the *Charter*. The only change made by post-*Charter* decisions is the restriction on absolute liability offences that prevents imprisonment as a penalty. See, para. 18.

[48] There were two respondents in *Lévis v. Tétreault*. The second was a numbered Quebec company. Acquittals were set aside in both cases. Of M. Tétreault, the Court said, at para. 29:

> In this case, as I explained above, the charge brought by the city of Lévis was one of operating a motor vehicle without a valid driver's licence, contrary to s. 93.1 of the *Safety Code*. Nothing in the words of this provision indicates an intention to create a *mens rea* offence or, conversely, to impose absolute liability so as to exclude a due diligence defence. The provision in no way places the burden of proving *mens rea* on the prosecution. Nor does it include any expression of the legislature's intent to create an absolute liability offence. Furthermore, such an intent cannot be inferred from the scheme of this provision, which seeks to ensure that the requirements of the regulation of highway safety are met by monitoring drivers' licences without it being necessary to deprive an accused of a due diligence defence. A strict liability scheme responds adequately to the concern to ensure that vehicle operators are aware of their legal obligations and, in

> particular, of their duty to do what is necessary to ensure that their licences remain valid and to drive only while they are valid. The only issue in dispute thus consists in determining whether the defence of the accused is consistent with the concept of due diligence.

The courts below had mistaken passivity for diligence.

[49] The numbered company also raised a defence of officially induced error, and I will return to *Lévis* when discussing that defence.

Whether Defence of Due Diligence Available?

[50] The simple answer is that *R. v. MacDougall* and *R. v. Lowe* are binding on this court. Any doubt about Justice Ritchie's reasons in *MacDougall* cast by the split decision in *Pontes* was put to rest by the unanimous decision in *Lévis*.

[51] Subsection 287(2) of the *Motor Vehicle Act* creates a strict liability offence for driving while suspended. Therefore, Mr. Prest could attempt to prove a due diligence defence.

Mistake of Law or of Fact?

[52] In light of the trial judge's findings, which affirm that Mr. Prest operated under a mistaken belief that his licence was not suspended, we must start with this question: Was he mistaken about the law or about facts?

[53] Does s. 205 suspend a licence by its own terms, i.e. automatically? If so, a mistake about the operation of s. 205 is a mistake of law and, as the trial judge said, ignorance of the law is no excuse. The due diligence defence must fail if s. 205 suspends a licence by operation of law.

[54] Much of the *Motor Vehicle Act* is devoted to a licencing scheme for drivers, and it is that legislative scheme that supplies the textual context for the exercise in statutory interpretation that is demanded by the question about Mr. Prest mistaking the law or facts.

[55] The legislative scheme contains numerous provisions for suspensions. Mandatory suspensions involving the Registrar are a subset, albeit the largest

subset. There is no central provision for mandatory suspensions and none are worded exactly the same. Therefore, the Legislature intended to treat these different kinds of mandatory suspension, differently. Let us look at the contrasts so we can better understand s. 205.

[56] Section 278, which was at issue in *MacDougall*, provides for suspension in the strictest terms. Subsection 278(1) imposes an obligation on the Registrar arising when he receives a record of conviction for one of the listed offences. The obligation is without qualifications, "shall revoke effective the date of conviction".

[57] Subsection 278(2) takes this a step further. The subsection additionally provides for suspension by operation of law "when a person is convicted of any of the crimes or offences mentioned in subsection (1)". Not content to only provide "the driver's licence is thereupon...revoked", the Legislature added the words "and hereby", that is to leave not even the slightest doubt: "by this law it is revoked".

[58] The "thereupon and hereby revoked" is repeated in s. 278(3), which led to Justice Ritchie's comment at para. 15 of *MacDougall*: "It wold be difficult to conceive of more clear or imperative language..." . The provision is similar to the

British Columbia suspension provision at issue in *Pontes*. Both clearly suspend by operation of law.

[59] None of the other mandatory suspension provisions use anything like the "thereupon and hereby revoked" device of s. 278(2) and (3).

[60] Subsection 227(1) concerns an unsatisfied judgment for damages caused by a motor vehicle. The debtor's licence "shall be forthwith suspended by the Registrar, upon receiving a certificate of such final judgment". It remains suspended until the debt is satisfied to the extent of the minimum statutory limit and the driver provides proof of financial responsibility. Section 239 provides for court approved installment payments and restoration of the licence by the Minister.

[61] Subsection 231(1) provides for suspension because of accidents: "the Registrar, on receipt of notice in writing of the accident, shall suspend the licence..." . Despite this wording, subsections 231(2) and (3) provide for restoration, or the avoidance of suspension, on proof of financial responsibility.

[62] Except for s. 278, these mandatory suspension provisions are triggered by an event that happens as a matter of fact, not law. What is more, the driver does not necessarily know of the fact: receipt by the Registrar of a certificate of judgment, receipt of a notice in writing of an accident, receipt of a request from the Director of Maintenance Enforcement, or the Registrar's tabulation of points. So, each seems to be subject to the comments made about the need for notice in *Lowe*.

[63] With these related provisions in mind for context, let us examine s. 205 closely. Subsection 205(1) provides:

> The Registrar or, in his absence or incapacity, the Director of Highway Safety shall forthwith suspend the driver's license or privilege of obtaining a driver's license and owner's permit or permits of every person who has been convicted of or who has forfeited his bail after arrest on a charge of any of the following offences, namely:
>
> > (a) any offence against Sections 101, 102 or 104 if injury to a person or property occurs in connection therewith;
> >
> > (b) an accident having occurred, failing to remain at, or return to the scene of the accident in violation of Section 97;
> >
> > (c) an offence against Section 230;
> >
> > (d) such offence against public safety on highways as may be designated by the Governor in Council.

Sections 101, 102, and 104 are about speeding. Section 97 is about failing to stop for an accident, as required by the *Motor Vehicle Act* as opposed to leaving the scene as proscribed by the *Criminal Code*. Section 230 is Mr. Prest's offence, driving without insurance.

[64] Subsection (3) reinstates the licence in certain circumstances. It provides:

> Every license or privilege of obtaining a driver's license and every permit suspended pursuant to this Section shall remain so suspended, and shall not thereafter be renewed, nor shall any new license be thereafter issued to, or a permit for the same or any other motor vehicle be thereafter issued to a person so convicted or who has so forfeited his bail until he has satisfied any penalty imposed by the court in respect of such offence, and until two years have elapsed from the date of the suspension or until he has given proof of financial responsibility to the satisfaction of the Registrar or until his conviction has been quashed.

[65] Section 205 is unlike s. 278 because it contains no language suggesting that the *Motor Vehicle Act* does the suspending. Also, unlike s. 278 and like the other mandatory suspension provisions we discussed, s. 205 contains an escape from suspension. Further, the offences covered by s. 205 are less serious than those in s. 278. Ensuring financial responsibility appears to be the main purpose of s. 205, which compares with getting bad drivers off the road under s. 278.

[66] Unlike the other mandatory suspension provisions except s. 278, this provision does not expressly rest the Registrar's obligation on the receipt of a document (or the tabulation of points). Taken literally, the conviction is the fact that triggers the Registrar's obligation.

[67] Subsection 205(1) cannot be given such a literal interpretation. Express or not, the Registrar's obligation cannot arise until the Registrar is made aware of the conviction. In light of its context and purpose, s. 205(1) must be taken to mean that the Registrar is obligated to suspend when the Registrar is notified of the conviction, not when the conviction is entered.

[68] As with s. 227, the Registrar is obligated to act with speed. Mr. Morrison referred me to authorities in which courts took "forthwith" to mean "immediately or without delay". The Oxford English Dictionary gives a similar statement of the word's sense. It is a nice, precise word.

[69] The certificate introduced at trial shows that the Registrar does not, in fact, act "forthwith". And, the new evidence shows that he does more than to suspend. He offers reinstatement on proof of financial responsibility, which Mr. Prest had

obtained, and the payment of a small administrative fee. These just highlight the factual nature of the s. 205 suspension.

[70] Mr. Prest's suspension turned on two events. Someone had to report the conviction to the Registrar. And, the Registrar had to act as he is obligated to do. These are facts. The suspension did not occur by operation of law alone.

Whether Mr. Prest Proved the Due Diligence Defence?

[71] The defence of due diligence is established by proof, on a balance of probabilities, that "the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent", *Sault Ste. Marie* at para. 23 above. (The alternative, "he took all reasonable steps to avoid the particular event", does not apply in this case.)

[72] It is a difficult defence to mount when the charge is driving while suspended. It is simply not available for a s. 278 conviction, unless the mistaken belief is that a conviction was not entered: *MacDougall* and the dissent in *Pontes*.

A driver's failure to comply with obligations to support the notice system will undermine reasonable belief: *Lowe*.

[73] Furthermore, on three occasions this court has recognized that reasonable belief may be undermined by a duty to inquire about one's licence after certain convictions, including driving without insurance. In *R. v. Hill*, [1994] N.S.J. 201 (S.C.), Justice Nathanson held that a driver convicted of point-accumulating offences had a duty to inquire after the status of his licence. Justice Robertson followed him in *R. v. Wile*, [2001] N.S.J. 316 (S.C.) affirmed [2001] N.S.J. 523 (C.A.). And, Associate Chief Justice MacDonald, as he was then, applied *Wile* to a suspension based on a driving without insurance conviction in *R. v. Watters-Kimbrough*, 2003 NSSC 260.

[74] In my assessment, the evidence given by Mr. Prest, which was accepted without condition by the trial judge, established the due diligence defence.

[75] Mr. Prest believed in mistaken facts: that his licence was not suspended and he was allowed to drive. Had this been true his driving last December would have been innocent. The mistake was reasonable because it was based on the answer the

prosecutor gave to Mr. Prest's question. More on that in connection with the defence of officially induced error.

[76] In oral submissions, Mr. Morrison suggested that Mr. Prest's defence might go the way of *R. v. Lowe* because he did not send a notice of change in residential address to the Registrar. Respectfully, I disagree. Firstly, the evidence seems to be that Mr. Prest was living at the New Minas address when the Registrar's letter was waylaid. Secondly, residency can be a complicated question, especially when a couple are separating, and I do not see that subject sufficiently explored during Mr. Prest's testimony to support a finding that he failed in his obligation to notify the Registrar.

[77] In conclusion, Mr. Prest proved due diligence on a balance of probabilities. He should have been acquitted.

Officially Induced Error

[78] In *R. v. Jorgensen*, [1995] S.C.J. 92 at para. 13, Chief Justice Lamer recognized that this defence was first introduced in Canada by Judge O'Hearn when he wrote *R. v. Maclean*, [1974] N.S.J. 384 (Co. Ct.). In *Jorgensen*, Lamer, C. J. concurred with Justice Sopinka's reasons for the rest of the court, but the Chief Justice took the opportunity to develop his thoughts on this defence.

[79] As I said, *Lévis* contains an instructive discussion of the offence of officially induced error at para. 20 to 27. Justice LeBel summarized Chief Justice Lamer's analysis and, writing for a unanimous court, he adopted the Chief Justice's proposed elements of the defence.

[80] The defence is a rare exception to the principle that ignorance of the law does not excuse criminal behaviour: *Lévis*, paras. 22 and 23. Like entrapment, the accused commits a criminal act but the circumstances leading up to it demand release from criminal liability: para. 25. (So, the result is a stay rather than an acquittal: para. 25.)

[81] At para. 26, *Lévis* provides a summary of the elements discussed by the Chief Justice in *Jorgensen*:

> (1) that an error of law or of mixed law and fact was made;
>
> (2) that the person who committed the act considered the legal consequences of his or her actions;
>
> (3) that the advice obtained came from an appropriate official;
>
> (4) that the advice was reasonable;
>
> (5) that the advice was erroneous; and
>
> (6) that the person relied on the advice in committing the act.

The accused must prove each of these elements on a balance of probabilities to make out a defence of officially induced error.

[82] (1) An error of law, or of mixed law and fact, was made. Mr. Prest asked the prosecutor, and the police officer who had charged him, whether he would lose his driver's licence. It was important to his job.

[83] The reply to this question was that the Crown would not seek a suspension or a revocation. The judge found that the prosecutor said this. There was no

evidence upon which she could have taken her findings any further. Mr. Prest's evidence that the prosecutor "could have" said something about the Registrar is, in the absence of evidence from the prosecutor or the police officer, no evidence that she actually said it. Certainly, no finding could be made, and no finding was made, that the possibility of a suspension by the Registrar, rather than the judge, was communicated to Mr. Prest.

[84] Mr. Prest's concern was not with the mechanics of licence suspension. The prosecutor and the police officer were being asked about the effect of conviction on the licence. The prosecutor's response would lead a reasonable person to conclude that the power to suspend was with the judge, and the Crown was not going to ask the judge to do so.

[85] (2) Mr. Prest considered the legal consequences of his actions. Mr. Morrison makes the point that Mr. Prest had determined to plead guilty regardless of the advice he received about suspension. This subject was not delved into during testimony, but the way Mr. Prest put it makes it appear that he had determined to plead guilty and only wanted to know what the consequence was for his licence. The guilty plea was not *quid pro quo*.

[86] The important point is not that Mr. Prest pleaded guilty, but that he continued to drive after having done so. The whole point of his question was for him to know the legal consequence of the guilty plea on his ability to drive.

[87] (3) The advice came from an appropriate official. It came from a Crown attorney who prosecutes *Motor Vehicle Act* offences, who chose to give an answer to Mr. Prest's question, and who did so in the presence of a police officer who enforces the *Motor Vehicle Act*. Who could expect a misleading answer from an official in those circumstances?

[88] (4) The advice was reasonable. I discussed the complexities of the numerous and various *Motor Vehicle Act* provisions on suspension. The advice was that the Crown sought no suspension. This implies that the court can order a suspension and such was Mr. Prest's only peril. That is not what the *Motor Vehicle Act* provides, but it could reasonably have done so.

[89] (5) The advice was erroneous. The court does not appear to have power to suspend a driver's licence for driving without insurance, and the Registrar has a duty to do so and a power to reinstate.

[90] (6) Mr. Prest relied on the advice. He continued driving. Indeed, had he been given the correct advice he would have learned not only about the automatic suspension of his licence, but also about how easily he could have got it reinstated. Instead, he sought no reinstatement and he unknowingly committed a serious *Motor Vehicle Act* offence.

Conclusion

[91] Mr. Prest established, on a balance of probabilities, both a due diligence defence and an officially induced error defence to the charge of driving while suspended. He was entitled to an acquittal on the first and, had that not been, a stay of proceedings on the second.

[92] I reverse the conviction and enter an acquittal.

J.