

LITIGATION UPDATE

AUGUST 2011

The “Tough on Drivers” Agenda

By Carole McAfee Wallace and Jordan Glick

A proposed amendment to the Ontario *Highway Traffic Act* (“HTA”) calls for heightened penalties for drivers convicted of offences where injury or death occurs. With the increased gravamen for these offences, the number of contested trials involving counsel will surely grow. Further, the evidence required at trial will, as of necessity, become more complicated and may come to include medical and expert evidence in cases of alleged bodily harm, resulting in increased costs to defend these charges.

In a move reminiscent of the Harper government’s “tough on crime” agenda, the provincial government has taken the first steps to amend the HTA to impose mandatory minimum sentences for driving offences which result in death or bodily harm. Bill 174 calls for the mandatory imposition of a \$1,000 to \$10,000 fine, or six-month prison sentence, or both, for a contravention of Part X of the HTA where death or bodily harm ensues.¹ The Bill, which passed through its first and second legislative readings on March 30, 2011 and April 14, 2011 respectively, has now been referred to the Standing Committee on Justice and Policy. Once reviewed by Committee, the Bill will be read again, debated and voted upon before it becomes law.

Despite the good intentions of its authors, the Bill suffers from conceptual flaws which create both legal and practical concerns. As a starting point, the Bill was conceived as a response to a singular incident that, while tragic, has not been shown to represent a widespread problem or cause for concern. In that case, a driver ran a red light 42 kilometres over the speed limit and collided with another vehicle, killing its passenger on impact. The police investigated the accident and found no evidence of impairment. The driver had no past driving record or history of speeding and the

black box inside the car indicated that the vehicle was not speeding just a few minutes before the accident. The driver blamed car malfunction, claiming that she did not understand why her car sped up when it did. The police, having looked at all of the circumstances surrounding the accident, determined that they did not have grounds to lay criminal charges. The driver was prosecuted solely for running a red light and received a fine and demerit points.

It is not clear how the new legislation would address what precipitated the accident or curb the incidence of similar wrongdoing in the future. The police, who thoroughly investigated the matter, concluded that the accident was not caused by the willful intention of the driver, nor was it caused by the driver’s own carelessness. Tragic as it was, it was an accident.

There is no indication that we are trending upwards with respect to the number or severity of driving related accidents that lead to death or bodily harm. Ontario’s roads are among the safest in North America and collision-related injuries and fatalities continue to decline. There is little evidence that prosecutors are unable to effectively prosecute those who commit driving-related offences.

There is also no clear link between conduct and outcome for driving offences and therefore there is no just reason to impose greater penalties on those whose conduct leads to more undesirable consequences. For driving offences, luck and chance often have as much to play in the outcome of an accident as the severity of misconduct.

Another issue is that the Bill has been devised to apply only to Section X offences entitled “Rules

of the Road". The Bill does not apply to Section IX offences, including speeding and careless driving. This is strange when one considers that careless driving is largely considered to be the most serious of all HTA offences, the one most likely to result in death or injury and the one most likely to lead to a jail sentence. Indeed, the courts have noted that "Careless driving is not a criminal offence, although it has many of the trappings or descriptors of a criminal offence."² The Bill additionally does not apply to speeding-related offences despite the fact that the incident precipitating this Bill was a case of speeding.

Finally, the Bill does not account for practical concerns with respect to the prosecution of these offences. In most jurisdictions, the cost of prosecuting HTA offences has been left to municipalities who are ill-equipped with the resources to fund protracted HTA proceedings. Many prosecutors hired by municipalities are not lawyers, nor do they have extensive training

in evidence law. Municipalities may find that they are unprepared to deal with more rigorously defended prosecutions.

Proponents of the Bill have suggested that the new legislation will create a record for these aggravated HTA offences that can be used by police and prosecutors to better protect against the most serious offenders. This goal is also mired with problems. First, more serious HTA offences are already distinguished by virtue of their prosecution under Part III of the Ontario *Provincial Offences Act*. In Part III prosecutions, defendants are not issued a ticket but rather a summons to appear in court. For these more serious matters, as well as for all ticketed matters where a trial is requested, a transcript is already created for HTA offences.

Second, there is a question as to the lawful use of such a driving record in the future. A past record has little probative value for prosecutors in subsequent proceedings.

Further, the police already have at their fingertips the criminal and driving records of every driver on the road. Presumably, a record indicative of a long history of driving-related infractions will provide more information to an officer investigating a driving-related offence than a single conviction under the HTA that happened to result in injury. Given the mandatory nature of the Bill in its current form, it is unclear what useful information will be gleaned from the record at either the investigative or prosecutorial stage.

Despite these shortcomings, it seems that the proposed legislation is well on its way to becoming new law.

1. Part X of the HTA is entitled "Rules of the Road" and includes a majority of moving vehicle violations.
2. *R. v. Messercola*, [2005] 16 M.V.R. (5th) 82 at para. 16.

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