COMMENT

Conceptualising owner liability for highway traffic offences: beyond *R.* v. *Gray*

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REGISTERED OWNERS of motor vehicles take care. Where the police are unable to identify the driver of a motor vehicle observed offending any provision in the *H.T.A.*, the registered owner may be traced through the licence plate number and held liable for that offence. The owner's liability is said to be vicarious rather than personal. Where an offender is stopped and charged he is personally liable for his driving offence. Where the offender is not stopped, however, the owner is said to be vicariously liable, and he may be charged and convicted of the offender's driving offence.

Some argue that the provision which allows this is constitutionally wrong. They argue that this vicarious liability offends an owner's section 7 *Charter* right not to be deprived of his liberty except in accordance with the principles of fundamental justice. In *R.* v. *Gray*[1] Simonsen J. rejected this argument, holding the provision to be constitutionally sound. Yet there remains a question of more fundamental importance. It is a question of conceptualisation. Is this really a vicarious liability provision and, if it is, must it be so in order to achieve the desired results?

I. THE PROVISION IN QUESTION

IN QUESTION IS section 229(1) of the *Manitoba Highway Traffic Act*.[2] It reads as follows:

> Liability of owner to conviction.
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> 229(1) Where an offence, consisting of a violation of any provision of this Act or of the regulations
> (a) is committed by means of,or with respect to,a motor vehicle; or

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1 [1988] 2 W.W.R. 759 (Man. Q.B.).

2 *Highway Traffic Act*, S.M. 1985-86, c.3.

(b) occurs by reason of,or with respect to, the ownership, use, or operation of a motor vehicle; the owner of the motor vehicle may be charged with commission of the offence and, if the judge or justice before whom the charge is tried, is satisfied that the offence was committed, the owner is guilty of the offence and is liable , on summary conviction, to the penalty herein provided for that offence unless, the owner satisfies the judge or justice that, at the time of the violation, the motor vehicle was in possession of a person other than the owner or his chauffeur without the consent of the owner.

This makes an owner liable for the misconduct of a driver of the owner's vehicle, and provides one defence: it must be shown that the vehicle was in possession of another without the owner's consent as, for example, where the vehicle was stolen. The courts tend to provide a second defence. As will be later shown, the section is judicially construed to be one of strict liability, and therefore the accused owner has the further defence of due diligence. The courts expect an owner to take reasonable care before entrusting his motor vehicle to someone else to drive. Failing these two defences, the owner is "guilty of the offence and is liable."

Note, however, that the owner is not liable for giving consent to the driver, nor for failing to meet the court's expectations by not exercising reasonable care before giving consent. Instead, the owner is guilty of the very same offence as the driver. So, rather than blame and punish the owner for failing to exercise due diligence, the section will blame and punish the owner for the driver's wrongdoing.

Yet, what wrong has the owner committed? Where the owner fails to determine whether "the intended driver is trustworthy and reliable and not one who will endanger the safety of other upon the highway",[3] the defence of due diligence makes sense, but the penalty for this failure makes no sense. Why penalise the owner with a driving offence when the real offence seems to be carelessness in lending the motor vehicle to a bad driver? The penalty does make sense, however, where the owner was the driver or where the owner is somehow made vicariously liable for the driver's actions. Personal liability explains why the owner is liable as driver. In such cases the owner liability provision need not be applied. Vicarious liability explains why the owner is liable as owner. It is by operation of law. However, vicarious liability cannot explain why the owner should be liable in the first place. This requires going to the further explanation of two things. The first is whether section 229(1) really operates to create vicarious liability in the owner. The second is why go to the additional lengths of imposing vi-

3 A test set out by Simonsen J. in *R.* v. *Gray, supra* note 1 at 764.

carious liability on the owner when personal liability will do. The *Gray* decision provides some insights.

II. *R* v. *GRAY*: THE CONSTITUTIONAL ISSUE

IN THIS CASE the accused had been charged as registered owner of a motor vehicle under s. 229(1) with driving carelessly, speeding, and failing to stop for a signal from a police officer. At provincial court the accused, on a preliminary motion, obtained an order that s. 229(1) infringed ss.7 and 11(c) and(d) of the *Charter*, and was therefore of no force or effect. The argument was twofold. First, the section violates s.11 of the *Charter* by compelling the accused owner to testify against himself and also by presuming guilt rather than innocence. Second, and the more important of the two, the section violates s.7 of the *Charter* because it deprives the accused owner of his liberty through the operation of vicarious liability, and such deprivation is not in accordance with the principles of fundamental justice. The Crown successfully appealed to the Queen's Bench. Here Simonsen J. brushed aside the s.11 issue by relying on the earlier decision in *R.* v. *Ross*[4] where Smith J. stated that though the evidentiary burden in a trial may shift, s.229 still places the onus flatly on the Crown to prove its case beyond a reasonable doubt. The accused is not compelled to testify against himself, nor is he presumed guilty. The second argument also did not go far. According to s.7, there can be no deprivation of liberty except in accordance with the principles of fundamental justice. To be successful the accused has to show two things. First, that s.229 placed his liberty in jeopardy. Second, that it did so in spite of the principles of fundamental justice. The accused failed on the first argument. Simonsen J. decided that the right to liberty set out in s.7 of the *Charter* was not infringed by s.229. Though he agreed that imprisonment would infringe an accused's liberty, he found that the maximum penalty that could be imposed was a fine.

Since no right guaranteed in s.7 was infringed by 229, there was no need to decide whether the vicarious liability created by 229 contravened the principles of fundamental justice. Still, this question was contentious and of great importance. So Simonsen J. addressed it, pointing out, however, that "the question is not essential to my decision"[5] He favoured the Crown's position, ruling that even if section 229 deprived an accused owner of his liberty, it did so in accordance with the principles of fundamental justice. This was decided in view of

4 (1985) 14 C.R.R. 7; 33 Man. R. (2d) 29 at 32.
5 *Supra*, note 1 at 763.

two cases: *R.* v. *Burt*[6] and *R.* v. *Watch*[7]. Both cases canvass the relevant area of law thoroughly and yet come to contrary conclusions.

In *Burt*, a majority of the Sask. C.A. ruled that their province's owner liability provision created an absolute liability offence and therefore contravened s.7 of the *Charter* whenever there existed a potential for imprisonment. Simonsen J. declined to apply this decision for two reasons. First, the Manitoba provision creates a strict, rather than absolute, liability offence. Second, there was no potential for imprisonment. Instead of applying *Burt*, Simonsen J. turned to the B.C.S.C. and the decision of Finch J. in *R.* v. *Watch*.

In *Watch* the issue was how to characterise the liability of an owner for a driver's failure to remain at the scene of an accident. Was the liability strict or absolute? If absolute, there are no defence but those provided in the statute. If strict, however, there is the additional defence of due diligence. It was clear that if the driver had been identified at the scene of the accident and subsequently charged, that charge would be one of strict liability. The ponderable question in *Watch* then, was whether holding an owner vicariously liable for a driver's failure to remain at the scene somehow transformed a strict liability offence into one of absolute liability. Finch J. held that the combination of strict liability offence with the owner liability provision created a strict liability offence. Characterised as such, the provision was held constitutionally valid because the accused owner could raise a defence of due diligence.

The determination in *Watch* involved an analysis of what characterises a strict liability offence. The starting place is *Sault Ste. Marie*[8], where the S.C.C. defined three classes of offences: (1) those requiring mens rea; (2) those not requiring mens rea, but leaving open the defence of due diligence; and (3) those of absolute liability where the defence of due diligence is not open. Offences which are criminal in the true sense of the word fall within the first category. There is a presumption that other offences fall within the second category and are free from absolute liability unless the legislation is clear that guilt follows mere proof of the prescribed act. To determine whether an offence falls within the third category a court should look to the regulatory scheme adopted by the legislature, the subject matter of the legislation, the importance or severity of the penalty, and the precision of the language used. When these factors do not show a legislative intention to creat absolute liability, the offence will be one of strict liability and subject to the defence of due diligence.

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6 (1987), [1988] 1 W.W.R. 385; 60 C.R. (3d) 372 (Sask. C.A.).
7 (1983) 37 C.R.(3d) 374; 10 C.C.C. (3d) 521; 24 M.V.R. 224 (B.C.S.C.).
8 *R.* v. *Sault Ste. Marie*, [1978] 2 S.C.R. 1299; 85 D.L.R.(3d) 161; 3 C.R. (3d) 30.

Applying the *Sault Ste Marie* framework, Finch J. held that the presumption favouring strict liability had not been rebutted.

Rather than rebut, Finch J. found the regulatory scheme to confirm the presumption of strict liability. Instead of being absolutely liable, the owner is provided with a statutory defence: that the owner did not entrust the driver with possession of his motor vehicle. The foundation for this defence rests on the owner's presumed control over who he authorises to drive his motor vehicle. Thus an owner may be held to account for the driving offences of an authorised driver, and yet may not be held to account for the driving offences of the thief who stole his motor vehicle. The obvious difference revolves around the concept of authorisation, and the scheme provides that where there is no authorisation there is no vicarious liability on the owner. Finch J. saw in this scheme nothing that would prohibit owners from arguing that they exercised reasonable care before authorising a particular driver to use their motor vehicle. Allowing this further defence would not frustrate the scheme, for in practice the owner will identify the authorised driver and thus enforcement of the law against the offender will be facilitated and thereby the ultimate goal of traffic safety will be furthered.

The subject-matter of the legislation also did nothing to rebut the presumption of strict liability. The primary purpose of motor vehicle legislation is to prescribe certain rules of conduct for motorists and pedestrians to facilitate the orderly control of traffic, which is integral to the safety of the public. Considering this, and cases which determined other B.C. *Motor Vehicle Act* offences, Finch J concluded that the subject- matter of the *Act* supported the presumption of strict, as opposed to absolute, liability.

The third factor to consider was the severity of the potential penalty. The penalty was "a fine of not more than $2000 or to imprisonment for not more than 6 months, or to both"[9] The accused was therefore liable, upon conviction, to a loss of liberty for up to 6 months. Finch J. held that the severe nature of this potential penalty supported the presumption of strict liability.

The final factor was the precision of the language used in the impunged section. Here, too, Finch J. decided that the presumption stood. Though the language used was "broad and imprecise",[10] it did not purport to preclude the defence of due diligence as did other sections in the *Act*. These other sections used clear and express language to create absolute liability. "That choice of language elsewhere in the *Act*, and its

9 *Ibid.* at 236.
10 *Ibid.*

absence from the section in question, is a clear indication...that creation of absolute liability was not the legislative intention."[11]

The findings on all four factors were unanimous and led to one conclusion. The owner liability provision, when combined with a charging section, creates a strict liability offence. This offence is open to the defence of due diligence and is therefore constitutionally valid. An accused owner may escape vicarious liability by showing that he did act with due diligence, or reasonable care, when authorising the use of his motor vehicle. This is aptly summarised by Finch J. when he states:

> On this view of the legislation, s.7 of the *Charter* is not contravened. According to s.7 there can be no deprivation of liberty except in accordance with the principles of fundamental justice. A statute which imposes criminal liability without the necessity of proving mens rea does not offend the principles of fundamental justice, provided that the accused has the opportunity to escape liability by showing that he acted with reasonable care.[12]

It was to this conclusion that Simonsen J. turned to solve the similar constitutional question in *Gray*. Unlike in *Watch*, however, where this conclusion was essential to the outcome because the accused owner faced a potential loss of liberty through imprisonment, the adoption of this conclusion in *Gray* did not form part of the actual decision since the accused owner had failed to show that he faced a potential loss of liberty. Still, in Simonsen J.'s opinion, s.229 did not affect the liberty of the accused owner, nor did its vicarious liability conflict with the principles of fundamental justice. The s.7 *Charter* challenge was a total failure.

III. *R* v. *GRAY*: THE CONCEPTUAL ISSUE

CONSTITUTIONAL QUESTIONS ASIDE, Simonsen J. goes on to provide the "sound policy goals"[13] justifying the existence of vicarious liability in the *H.T.A.* The goals are twofold. The first goal is to force owners to be responsible and act diligently before entrusting their motor vehicles to drivers. Drivers dangerous to the public should not be on the road, and those who own motor vehicles should be careful not to provide such drivers the means to be on the road. The second goal is to bring the offender to justice by having the owner identify the driver. Simonsen J. explains the goal like this:

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11 *Ibid.* at 237.
12 *Ibid.* at 238.
13 *Supra*, note 1 at 764.

Although it was not mentioned by the Crown, there is probably another underlying reason for the vicarious liabilty provision. If the owner of a motor vehicle chooses not to disclose the identity of the driver or does not admit that he is himself the driver, then he faces the potential for criminal conviction. If there were no vicarious liability provision in the statute, he would be able to escape criminal conviction if he entrusted the vehicle to a scoundrel or if he were the driver himself. He could successfully escape prosecution by making a successful getaway even though the police could identify his motor vehicle.[14]

Both goals are laudable, but do they necessarily entail the need for vicarious liability? Vicarious liability is a doctrine best known to tort law[15] where an employer may be liable irrespective of his own personal fault for atort committed by his employee. This transfer of liability is justified economically. As an employer reaps the benefits of his workers so he must bear the risks of their negligence. The application of vicarious liability in the criminal context is contentious since it involves the transfer of liability from a wrongdoer to someone who has done nothing at all, whether wrong or right. If he had done something wrong he would be personally liable, not vicariously liable. Moreover, unlike tort law, where the liability transfered is financial with a goal to compensate a victim, in the criminal context the liability transfered is criminal with a goal to punish the transferee irrespective of personal fault. But punishment requires personal fault, and for that reason the criminal law prefers personal over vicarious liability. Yet section 229 creates a situation where a person can be convicted and punished for a driving offence without having anything to do with the driving of the offending motor vehicle. The liability is thought to be vicarious and is based on mere ownership. However, notwithstanding this interpretation, it is arguable that s.229 is not intended to be a vicarious liability provision. Rather, it is intended to find and punish wrongdoers through the use of presumption. Confusion surrounds the provision because it cannot mean what it says if it is to fulfil its purpose. This leads to statements which tend to confuse what an owner liability provision ought to be with what it is in s.229.

With reference to Simonsen J.'s above statement, he claims that "if an owner of a motor vehicle chooses not to disclose the identity of the driver or does not admit that he himself is the driver, then he faces the potential for criminal conviction". The implication is that if the owner chooses to disclose the identity of the driver then he will not face the potential criminal conviction. This is how the provision ought to operate. Surprisingly, it does not.

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14 *Supra*, note 1 at 765.

15 See generally, J.G. Fleming, *The Law of Torts*, 7th ed., (Sydney: The Law Book Co.,1988) at 339*ff*.

Disclosing the identity of the driver does not erase the owner's liability unders.229. Nothing in that section prohibits holding the owner vicariously liable and the identified driver personally liable. Look at the defences open to the accused owner. To avoid vicarious liability, the owner must not only satisfy the judge that the vehicle was in possession of another, but also that it was in the possession of another without consent of the owner. And where consent was given, it must be shown that the owner took reasonable steps to determine that the driver was trustworthy and reliable and not one who would endanger the safety of others upon the highway. These defences make it clear that it is not enough for the owner to cooperate and identify the driver to the authorities. Cooperation may lead to charges being dropped, but it is not a defence. Any defence is established prior to the owner giving consent to the driver. After giving careless consent, all the coopeation in the world may not save the owner from the clutches of the vicarious liability charge.

Something seems amiss. Where the owner cooperates and identifies the driver, who is consequently charged and convicted for the driving offence, what is the purpose of also charging and convicting the owner for that same driving offence under vicarious liabilty? Under s.229 the owner is vicariously liable for the driver's wrongdoing, and not personally liable for carelessly entrusting his motor vehicle to a bad driver. The owner is blamed for lending his vehicle to someone who ought not to drive. The rationale for this blame presumably is based on causation: if the owner had been careful the motor vehicle would not have been loaned and the driving offences would not have occurred. Since they did occur, not only is the driver personally liable, but the owner is vicariously liable to the very same offences and punishment. That is the scheme. Yet, where the driver is known and punished for his wrongdoing, where is the justice in doing the same to the owner in the name of vicarious liability? Sure, an owner ought not to lend his motor vehicle to a bad driver. But all this suggests is the need for a separate provision making an owner personally liable for the failing to exercise reasonable care before lending his vehicle to an intended driver. It does not explain the need for a provision which makes an owner vicariously liable for the wrongdoing of that driver. This is a fundamental point. Not only does it call into question conceptualising s.229 as a vicarious liability section, it goes further to question the very purpose for placing vicarious liability on the owner.

Fundamental to the doctrine of vicarious liability is the transfer of liability from the wrongdoer to another party. The doctrine requires two entities to operate. Yet s.229 does not necessarily contemplate the existence of two parties. There is no mention that the owner is respon-

sible for the actions of the driver. On the contrary, the section states that "the owner of the motor vehicle may be charged with commission of the offence".

These words plainly reject the notion that the owner is to be vicariously liable. These words indicate personal liability. Instead of prescribing that the owner be responsible for the driver's offence, the section prescribes that the owner be charged with committing the offence.[16]

And yet, as shown above, though charged with committing the offence, it is no defence for the owner to show who actually committed the offence. So, while promoting personal liability, the section fails to acknowledge the very defence that negates personal liability – exposing who actually did it. The section is internally incoherent. It is at odds with itself.

Assuming the existence of a new provision which would make it an offence for an owner to lend his vehicle to a bad driver is an agreed good, what purpose is left for s.229?

An owner liability provision is still required for those instances where the only identity at the scene of an *H.T.A.* offence is the licence plate number of the offending vehicle. It is needed to thwart those who would commit an offence and then flee the scene to avoid personal identification. As Simonsen J. points out, the offender "could successfully escape prosecution by making a successful getaway even though the police could identify his motor vehicle".[17] With the provision a successful getaway is made difficult. It is much easier to remember a licence number than the details of a face seen briefly. It is much simpler to take down a licence number than cause a high speed chase racing to apprehend the offender. And where the driver's head is hidden inside a helmet, the only identification possible is the licence number of the offending motorcycle. The licence number is a valuable clue because through it the registered owner of the motor vehicle is found. And why is he found? Is it so he may be charged through s.229 with committing the offence, whether he did it or not? No. This cannot be and is surely not intended. When faced with the problem of uncovering the identity of the mystery driver, the answer cannot be to punish the

16 This interpretation is bolstered by s.229(2) which states that nothing in s.229(1) "relieves the driver of the motor vehicle from any liability to conviction of the offence to which he may be subject." This seems to indicate that the driver can be convicted of (say) leaving the scene of an accident as well as the owner who ought not to have entrusted his vehicle to that driver. This leads to the interesting question whether an owner, who was the driver, can be convicted twice where he was aware that he is a bad driver as, for example, where he knows himself to be suspended.

17 *Supra*, note 1 at 765.

owner. The object is to identify the actual offender, and there are times when the owner can do this.

As Simonsen J. points out, the goal is to have the owner identify the driver, ans s.229 tries to do just that. An owner unable to avail himself of the defences provided in s.229 is able to identify the driver. The driver was the owner himself or that person the owner entrusted with his motor vehicle. Where the owner was the driver then he is rightly charged with the driving offence. Where the owner knows the driver then he is compelled to cooperate with the authorities, for otherwise he is liable for the driving offence. The liability is personal, not vicarious. The goal is to find the driver, and the method employed is to presume the driver was the owner. The presumption is not one of guilt, but one of identity, and therefore not a true reverse onus provision. The owner is presumed to be the driver, but he remains an innocent driver until the prosecution proves the elements of the driving offence alleged. The presumption is rebuttable. Keeping in mind the purpose, to rebut the presumption the owner needs to say who was driving. The authorities will then charge that driver and use the testimony of the owner. With cooperation rendered and the presumption rebutted, the charge against the owner is dropped. Through s.229 the actual offender is found and justice is served.

Yet s.229 puzzles. It does not excuse the owner from liability once the actual offender is found. This deficiency must be changed to bring sense to the provision. Until it is changed the provision's intent remains obscured because it does not say exactly what it means. If the section is intended to create vicarious rather than personal liability, then it should say so. The trouble though, is that vicarious liability is difficult to justify and is not needed to achieve the required goals. To stop the careless lending of motor vehicles to bad drivers, make owners personally liable for that act. To thwart those drivers who seek to avoid personal identification by fleeing the scene of their driving offence, have the owner provide the identification where possible. Once identification is provided, however, do not also make the owner liable for the driving offence. That is senseless. The ultimate goal is not to convict both the owner and the driver for the same driving offence. It is rather to find and convict the actual offender. With the proper changes, s.229 should do that, and nothing more.

ADDENDUM

SUBSEQUENT TO WRITING the above comment, the Manitoba Court of Appeal heard this matter on *Gray's* appeal.[18] A three-member panel upheld the constitutionality of the provision, but did so with reasons that differ from the lower court decision of Simonsen J. Writing for the appeal court, Mr. Justice Huband, in short, stated that s.229 violates an owner's s.7 *Charter* right not to be deprived of liberty except in accordance with the principles of fundamental justice, but nevertheless remains constitutional owing to the highly remote possibility that an owner will be deprived of his liberty.

The Section 7 Issue Revisited

Contrary to the lower court decision, the appeal court held that s.229 violates an owner's s.7 *Charter* right. This determination required two findings: first, that the implementation of s.229 may lead to the deprivation of an owner's liberty; and second, that this deprivation offends the principles of fundamental justice.

It was plain to the appeal court that an owner convicted under s.229 could possibly end up in jail and thus be deprived of his liberty. The imprisonment may not be direct, but its possibility exists. At trial of a s.229 matter the presiding court may fine the convicted owner, but it may not imprison him. Alone, a fine constitutes no deprivation of liberty. Failure to pay the fine, however, gives rise to the spectre of imprisonment through the operation of s.6 of *The Summary Conviction Act*. Subsection 6(2) provides that a court may order that in default of payment of an imposed fine the person fined shall be imprisoned for a period of not more than 6 months. Where the court does not make such an order, subsection 6(3) fills the gap by providing that the person in default shall be imprisoned for a term equal to the total of 5 days plus one day for every $10.00 of the fine that is not paid. Clearly, imprisonment could be the automatic result for non-payment of a fine.

To allay this spectre, the Crown submitted that the potential for imprisonment was remote due to the fine option program and the general abhorrence to the concept of a debtor's prison. The relevance of this submission was rejected. Not to be side-tracked, the appeal court pointed out that the real question at this juncture of the constitutional review was not the degree of possibility of the potential, but rather the very existence of the potential. The fact remained that a convicted

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18 *Her Majesty the Queen* v. *William Gray*, Man. C.A., October 12 , 1988 (unreported: suit no. 87/88).

owner may end up in jail. The court therefore concluded that s.229 may deprive a convicted owner of his liberty.

The second stage of the inquiry was whether this deprivation offended the principles of fundamental justice. It would be offensive if the court found that s.229 created an absolute liability offence.

In the lower court, Simonsen J had concluded that s.229 created a strict liability offence, affording an owner a due diligence defence and hence the provision was constitutionally sound. To arrive at his decision, Simonsen J relied on the B.C.S.C. finding in *Watch*[19], wherein Finch J held that the similar B.C. provision created strict liability. Finch J's characterisation followed the approach set down by the Supreme Court of Canada in *Sault Ste. Marie*[20]. As between absolute and strict liability, unless it is crystal clear that absolute liability is intended by the legislature, the court is to presume the intent was to create strict liability. Where upon judicial scrutiny this presumption is not rebutted, the provision is one of strict liability and as a consequence an accused may argue a due diligence defence. The defence of due diligence need not be expressed in the legislation, for its existence is presumed, and the presumption remains so long as the presumption favouring strict liability remains. Therefore, the absence of an expressed defence of due diligence cannot be the determinative test for characterising a provision as absolute liability; that would be to put the cart before the horse. Rather, the test is to investigate whether the legislature intended to create absolute liability, and this is done by reviewing certain factors to determine whether the strict liability presumption is rebutted, keeping in mind that an occasion of absolute liability will be rare. After a thorough investigation of the B.C. owner liability provision, Finch J concluded that the presumption favouring strict liability stood, and therefore an accused owner could argue a due diligence defence. Simonsen J agreed with this finding.

The Manitoba Court of Appeal disagreed. They reasoned that the provision must create absolute liability because the legislature did not expressly include a due diligence defence. Curiously, and contrary to the *Sault Ste. Marie* approach, the appeal court used the absence of an expressed due diligence test as the determinative test. There was no presumption of strict liability nor any investigation into legislative intent beyond the wording of s.229. Huband J wrote:

> If a charge is laid under s.229(1), once proof of an ownership is established, and that the vehicle was involved in a violation of the driving code such as speeding, then the accused has no defence other than that specified in s.229(1), namely, that the vehicle

19 *Supra*, note 7.

20 *Supra*, note 8.

was in the possession of a person without the owner's consent. Reasonable care or due diligence in the lending of a vehicle are pertinent only in terms of sentencing.[21]

The conjunction of absolute liability with a potential for imprisonment was forbidden by the Supreme Court of Canada in the *B.C. Motor Reference* case,[22] and so the Manitoba Court of Appeal concluded that s.229 violated s.7 of the *Charter*. But this did not end the matter. A final task was to decide whether this violation was nevertheless constitutional under an appeal to s.1 of the *Charter*.

Section 1 Visited

It is interesting that to this point the Manitoba Court of Appeal's conclusions to the problem parallel those of the Saskatchewan Court of Appeal in *Burt*,[23] where, deciding on the same matter, it was said:

Having reached the conclusion that this case involves an absolute liability offence and that the prospect for imprisonment for non-payment of a fine brings it within the ambit of the principles drawn from the recent *B.C. Motor Reference* case, it follows that s.7 of the *Charter* has been violated.[24]

For both courts it then became necessary to turn to s.1 of the *Charter* to consider whether the violation might be acceptable as a reasonable limit which could be demonstrably justified in a free and democratic society. It was at this stage of the constitutional analysis where the two appellate courts parted ways.

Both courts began with the *Oakes*[25] decision to guide their analysis. The first problem encountered, however, was evidential. The onus of proving that the violation was a reasonable limit to the s.7 *Charter* right rested on the Crown. The problem was that both the Saskatchewan and the Manitoba Crown neglected to present any evidence whatever with a view to discharging this onus. The Saskatchewan court was not surprised by this omission because *Oakes* was rendered after the *Burt* appeal hearing. This did not stop the Saskatchewan court from applying *Oakes*, however, and demanding that the Crown meet its evidential onus and justify the violation. The Crown had argued that the justification for the legislation was self-evident, given the object and purpose of the *Act* and the existence of similar legislation in other provinces. The court summarily dismissed this self-evident approach to justification and held that the Crown failed to discharge its

21 *Supra*, note 18 at 9.
22 [1986] 1 W.W.R. 481 at 506, per Lamer J.
23 [1988] 1 W.W.R. 385 (Sask. C.A.).
24 *Ibid.* at 404 per Wakeling J.A.
25 *R* v. *Oakes* (1986), 26 D.L.R. (4th) 200 (S.C.C.).

evidential obligations. Unwilling to do the Crown's job and with no real evidence on which to exercise a s.1 analysis, the court held that the Saskatchewan owner liability provision was unconstitutional.

In *Burt*, it is clear that the Saskatchewan Court of Appeal wanted much more from the Crown than the bare claim that the justification for an owner liability provision to violate an owner's s.7 *Charter* right is self-evident.

In *Gray*, however, the Manitoba Court of Appeal wanted no more than this claim. The no-evidence barrier was easily hurtled by the court's belief that this was one of those kinds of issues "where it is undesirable to proceed on the basis of evidence." The court marked out its complete departure from the Saskatchewan approach by concluding that

> the legislation is [not] to be saved by a mountain of statistics and reports, but rather on the basis of a common sense analysis of what the legislation is intended to achieve and whether the objective is attained in a balanced and reasonable fashion.[26]

In contrast to the Saskatchewan court, the Manitoba court was quite prepared to provide its own s.1 analysis as to whether the impugned owner liability provision was constitutionally reasonable by applying, in the absence of Crown evidence, its own common sense.

Using *Oakes* for guidance, the court decided that though the owner liability provision violated the *Charter*, it remained constitutional because it passed both the objective and the means tests.

To pass the first test, the court must have thought the objective of the provision was of sufficient importance to warrant the limitation of an owner's s.7 *Charter* right. The court thought it not hard to divine the object and purpose of an owner liability provision: it is an answer to the "problem"[27] of identifying the driver of a vehicle seen to have committed a highway traffic offence. The court noted that all nine common law provinces have solved this problem with similar legislation and thought this solution made "considerable good sense."[28]

Having passed the objectives test, the inquiry moved the court to ponder whether the means chosen by the legislators are themselves reasonable and demonstrably justified. Here too the provision passed. The court noted that it would not pass if it operated in such a way as to automatically place convicted owners in prison. However, it does pass because imprisonment is highly remote. The point made here is that although there is always the possibility that a convicted owner may be

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26 *Supra*, note 18 at 14.
27 *Ibid.* at 15.
28 *Ibid.*

imprisoned due to the overall scheme, the probability of this occurring is slim. The unlikelihood of imprisonment equates to the unlikelihood that an owner's *Charter* right will actually be violated. The point is a practical one and on its basis the court thought the operation of the owner liability provision was reasonable. Huband J summarised the court's findings in this way:

> Given the inherent unlikelihood that the accused will ever be imprisoned with respect to the charges in question, I am of the view that the tests for sustaining a law under s.1 of the *Charter*, as explained by *R* v. *Oakes*, have been met, and consequently s.229(1) is valid legislation in terms of these charges.[29]

The aftermath of all of these court challenges leaves owners of motor vehicles in the same predicament as at start: they must still take care. What these challenges bring to light, however, is the need to reform this awkward piece of legislation.

29 *Supra*, note 18 at 16-17.