

HOW DOES A DRIVER PRESENT DUE DILIGENCE EVIDENCE?

A driver faced with an offence will need to give direct testimony about all the steps he/she took to avoid the prohibited act. In a driving charge the due diligence testimony should be geared towards the isolated incident.

Because the driver will give testimony on his/her own behalf credibility is a major component of the due diligence defence.

The driver will need to focus the testimony on what actions were performed by the driver that directly illustrate the reasonable care exercised. Testimony about what the driver "normally does" or "would do" is not evidence of due diligence.

Evidence of a good driving record or of good character are not evidence the court can consider in assessing the evidence of due diligence.



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The Defence of Due Diligence



What do I need to know?



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WHAT IS DUE DILIGENCE? —————

Due diligence is a legal defence to a charge categorized as strict liability. The term means that the defendant took reasonable actions to avoid the offence from happening; however, through no fault of the defendant the unlawful act took place nevertheless.

Black's Law Dictionary defines the term as "The diligence reasonable expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation."

Black's Law Dictionary, 8th ed. 2008

In 1992 a helpful definition of the defence of due diligence was pronounced by Justice Fitzpatrick in the case of R. v. Courtaulds Fibres Canada. Wherein the Honourble Court found that "Reasonable care and due diligence do not mean superhuman efforts. They mean a high standard of awareness and decisive, prompt, and continuing action. To demand more, would, in my view, move a strict liability offence dangerously close to one of absolute liability."

R. v. Courtaulds Fibres Canada, [1992] O.J. No. 1972

WHEN CAN I ADVANCE A DUE DILIGENCE DEFENCE? ———

In 1978, in the case of R. v. Sault Ste. Marie, Justice Dickson recognized the availability of the defence of due diligence where the offence was one of strict liability. This means that the prosecution need not prove the intent of the defendant to commit the offence, but only that the prohibited act was committed. The defendant can then choose to avoid liability by showing that all reasonable care was taken.

R. v. Sault Ste. Marie [1978] S.C.J. No. 59

WHAT IS THE STANDARD OF PROOF IN A COURT OF LAW? —————

The defence is required to prove that all reasonable care was taken by showing evidence that the judge will weigh on a balance of probabilities. The prosecution however must prove their case by proving that the prohibited act was committed beyond a reasonable doubt. The defence's burden is far less ridged that that of the prosecution.

When assessing the due diligence evidence the court is directed to ask itself "what would a reasonable person do in like circumstances?" This is known in law as the test of the reasonable person. If the defendant's evidence fits within the generate image of the reasonable person then the defendant will likely be successful in his/her defence.

HOW DO I KNOW WHAT EVIDENCE I NEED? ———

The evidence required to prove the defence of due diligence is directly related to the type and nature of the offence. It is the actions of the accused that matters, not what the person was thinking or intending to do that is considered by the court. Also, evidence of post-offence conduct is irrelevant in the determination of what actions the defendant took to avoid the offence.

HOW DOES A CORPORATE DEFENDANT PRESENT ITS EVIDENCE OF DUE DILIGENCE? —————

Corporate defendants and natural persons have very different ways of presenting evidence relating to the due diligence. Corporate defendants are required to show policies, practices and procedures established by the company that illustrate the steps and actions the corporation took to address the very issue of the charge. For example, if a company is charged with permitting an hours-of-service violation, it would not be relevant for the company to show evidence that it trained its drivers how to perform a vehicle inspection.

Documentation that is prepared by someone who is not present in court to testify is inadmissible as evidence at the trial because it qualifies as hearsay. However, this same material is subject to an exemption rule. Where the defendant provides the evidence to the prosecutor along with a notice identifying the documents in advance of the trial date the material is admissible its evidentiary weight will however be determined by the judge.

It is necessary that someone with knowledge of the company's policies and procedures attend at the trial to give evidence and introduce the documentation that supports the oral testimony.

