PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Morrison*, 2024 NSPC 28

Date: 20240515
Docket: 8599145-6
Registry: Sydney

Between:

His Majesty the King

v.

Marcella Morrison

TRIAL DECISION

Judge:	The Honourable Associate Chief Judge D. Shane Russell
Heard:	March 28 and April 15, 2024 in Sydney, Nova Scotia
Decision:	May 15, 2024
Charge:	Sections 320.15(1) and 320.14(1)(a) of the *Criminal Code*
Counsel:	Darcy MacPherson for the Public Prosecution Service of Nova Scotia Ogemdi Egereonu, for the Defence

By the Court:

Introduction

[1] Ms. Morrison is charged with two offences:

1. failure or refusal to comply with a demand contrary to s. 320.15(1) of the *Criminal Code*; and
2. operating a conveyance while her ability to do so was impaired by alcohol contrary to s. 320.14(1)(a) of the *Criminal Code.*

[2] The Defence brought a *Charter* application grounded in lost evidence. The police failed to preserve video of the breath room which captured independent evidence relating to the refusal. The Crown, recognizing viable *Charter* concerns, invited an acquittal on the s. 320.15(1) charge. As a result, I find Ms. Morrison not guilty on that count.

[3] This decision will explore whether the Crown has proven the requisite *actus reus* and *mens rea* for the offence of impaired operation pursuant to s. 320.14(1)(a). More specifically, it will examine what, if any, evidentiary use may be made of a single breath reading when evaluating whether an accused's ability to operate a conveyance was impaired.

The Law: Core Principles

[4] The accused is presumed innocent. The fundamental principles underpinning every criminal trial were succinctly summarized by Judge Buckle in *R. v. Bateman*, 2023 NSPC 25, between paragraphs 14 to 20:

> ….The Crown bears the burden of proving each element of the offences beyond a reasonable doubt. …The Crown does not have to prove guilt beyond any doubt or to an absolute certainty but the standard of proof beyond a reasonable doubt falls closer to absolute certainty than it does to proof on a balance of probabilities. (*R. v. Starr*, 2000 SCC 40; *R. v. Lifchus*, [1997] 3 S.C.R. 320).
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> I am entitled to accept all, some or none of the testimony of any witness. I have to assess the testimony of each witness to determine whether it is credible and reliable. Credibility relates to a witness' sincerity - meaning their willingness to tell the truth. Reliability relates to the accuracy of a witness' testimony - meaning whether they accurately observed or perceived events and accurately recalled events when testifying. …Demeanour can be deceiving… …As such, in assessing the evidence of all the witnesses, I have focussed on the more objective means of assessing credibility and reliability: internal consistency; external consistency; and plausibility - whether the evidence accords with logic, common sense and human experience.
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> …
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> A criminal trial is not about simply choosing whether I prefer the testimony that supports guilt over that which does not. Where there is evidence that is inconsistent with guilt, if I believe it or find that it raises a reasonable doubt, I must acquit. Even if I reject that evidence, I must examine the remaining evidence that I do accept and acquit if it leaves me with a reasonable doubt. (*W.(D.)*, [1991] 1 S.C.R. 742; *R. v. Dinardo*, 2008 SCC 24).
>
> The charges can be proven through direct evidence or through circumstantial evidence or a combination. …
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> The burden on the Crown in a circumstantial case is to prove beyond a reasonable doubt that guilt is the only reasonable inference to be drawn from

> the evidence (*R. v. Griffen*, [2009] S.C.J. No. 28, paragraph 34). There is no burden on the defence to persuade me that there are other more reasonable or even equally reasonable inferences that can be drawn. A reasonable doubt may be logically based on a lack of evidence (*R. v. Vilaroman*, 2016 SCC 33, at para. 36). I am permitted to draw logical or common sense inferences, but only where those inferences are grounded in or flow from the evidence (*R. v. Pastro*, 2021 BCCA 149). The question is "whether the circumstantial evidence, viewed logically and in light of human experience, is reasonably capable of supporting an inference other than that the accused is guilty" (*Vilaroman*, at para. 38). If so, then the accused must be acquitted.

The Law: Impaired Operation

[5] The *actus reus* and *mens rea* for the offence of impaired operation are well settled. The principles established under the now repealed s. 253(1)(a) continue to apply with respect to offences under s. 320.14(1)(a).

[6] Judge Gorman in *R. v. Payne*, [2021] N.J. No. 228 (P.C.) provided a helpful overview of these principles at para. 32:

> ...the Crown must prove that the accused's ability to operate a conveyance was impaired by a drug, alcohol, or a combination thereof. It is sufficient if this is established to any degree. In determining if an accused's ability was impaired, a Court may consider the nature of the accused's actual driving. However, the section's purpose is directed at an accused's ability to drive not his or her actual driving. Finally, it is not sufficient for the Crown to simply prove that the accused was impaired. It must prove that the accused's ability to operate a conveyance was impaired.

[7] The leading case on proof of impairment is *R. v. Stellato* (1993), 12 O.R. (3d) 90 (C.A.), aff'd [1994] 2 S.C.R. 478. The offence of impaired operation is made out by proof of any degree of impairment ranging from slight to great. There is no requirement of proof of a marked departure from normal behaviour. The

Nova Scotia Court of Appeal in *R. v. Harding*, [1998] N.S.J. No. 133 cited the following passage from *Stellato* with approval at para. 3:

> … impairment is an issue of fact which the trial judge must decide on the evidence. The trial judge must be satisfied as to the accused's guilt beyond a reasonable doubt and thus, before convicting, the trial judge must be satisfied that the accused's ability to operate the motor vehicle was impaired by alcohol or a drug. If the evidence of impairment is so frail as to leave the trial judge with a reasonable doubt then the accused must be acquitted.

[8] Further in *R. v. Schofield*, 2015 NSCA 5, the Nova Scotia Court of Appeal stated at para 47:

> …Slight impairment to drive relates to a reduced ability in some measure to perform a complex motor function whether impacting on perception or field of vision, reaction or response time, judgment, and regard for the rules of the road: *Censoni*, at para. 47.

[9] In addition, a court "must not fail to recognize the fine but critical distinction between 'slight impairment' generally, and 'slight impairment of one's ability to operate a motor vehicle'" see *R. v. Andrews*, 1996 ABCA 23 at para 16, leave to appeal to the SCC refused, [1996] S.C.C.A. No. 115.

[10] The bottom line is that even if a person's ability to function is affected in some respects by the consumption of alcohol, this does not automatically equate to proof beyond a reasonable doubt that their ability to operate a conveyance is impaired. If the observed conduct is only a slight departure from the norm, it is unsafe to rush to judgment and conclude that their ability to operate was impaired

by alcohol. More obvious, a person's ability to operate a conveyance is not necessarily impaired just because they consumed alcohol and/or a drug.

The Law: Guidance When Assessing Impairment

[11] Judge Hoskins, as he then was, provided excellent guidance to trial judges in *R. v. Bonang*, 2016 NSPC 73 at paras. 157-159:

> The question is not whether the individual functional ability is impaired to any degree. Rather, as stated in *Andrews*, the question is whether the person's ability to drive is impaired to any degree by alcohol or a drug. In considering this question one must be careful not to assume that, where a person's functional ability is affected in some respects by consumption of alcohol or a drug, his or her ability to drive is also automatically impaired.
>
> One drink may impair a person's ability to do brain surgery, or a person's ability to thread a needle, but the question is whether the person's ability to operate a motor vehicle is impaired to any degree by alcohol or a drug.
>
> The general principles which emerge in an impaired driving offence are set out in *Andrews*, at para. 29, as follows:
>
> (1) the onus of proof that the ability to drive is impaired to some degree by alcohol or a drug is proof beyond a reasonable doubt;
>
> (2) there must be impairment of the ability to drive of the individual;
>
> (3) that the impairment of the ability to drive must be caused by the consumption of alcohol or a drug;
>
> (4) that the impairment of the ability to drive by alcohol or drugs need not be to a marked degree; and
>
> (5) proof can take many forms. Where it is necessary to prove impairment of ability to drive by observation of the accused and his conduct, those

> observations must indicate behaviour that deviates from the normal behaviour to a degree that the required onus of proof be met. To that extent the degree of deviation from the normal conduct is a useful tool in the appropriate circumstances to utilize in assessing the evidence and arriving at the required standard of proof that the ability to drive is actually impaired.

[12] I would add that when a court is assessing evidence of impairment, general and conclusive statements from witnesses that express a judgment rather than a fact are not nearly as helpful as specific, descriptive, and contextual testimony. For example, a witness may describe an accused as "unsteady on their feet". Such a blanket statement lacks detail and context. It is not nearly as helpful as the testimony from a witness who describes what they actually observed, such as the manner of movement and/or degree of unsteadiness. For example:

1. Were the movements slow and/or deliberate?
2. Did the accused need assistance?
3. Was the unsteadiness fleeting or sustained?
4. Where was the accused located and what were they doing when they were observed to be unsteady?
5. What were the external conditions like?

[13] There are no singular indicia of impairment. Proof of impairment or lack thereof is found in the totality of evidence. As outlined by Judge Ross in *R. v.*

Kelly, 2019 NSPC 73, a court must look at the "constellation of factors" arising out of the accepted evidence.

[14] When applying the "constellation of factors" approach to impairment, the types of relevant evidence may include:

1. breath/blood test results;
2. drug recognition evaluation results;
3. voluntary admissions relating to consumption;
4. driving evidence;
5. expert opinion evidence;
6. smell from breath;
7. descriptive observations of physical impairment relating to coordination, speech, fine motor skills, redness, or glossiness of the eyes; and
8. evidence supporting lack of alertness and comprehension.

[15] A court must be cautious not to place undue weight on the presence or absence of one piece of evidence from the list of narrow and non-exhaustive categories outlined above. The simplest illustration is that the smell of alcohol alone on an accused's breath falls far short of meeting the requisite standard of proof. Smell of alcohol may be evidence of consumption. However, consumption is not impairment. Another consideration is that a specific behavioural impairment

may not necessarily equate to impairment of an accused's ability to operate a conveyance.

[16] Finally, despite having to closely examine the various sources of evidence, a court must evaluate the evidence as a whole and not in a piecemeal fashion. It is an error to weigh each piece of evidence "separately… and conclude…that the totality of the evidence [does] not overcome the equivocal nature of the parts" (*R. v. Andrea*, 2004 NSCA 130 at para. 19). At the end of the day, the collective whole of the evidence must be examined before a conclusion is reached on whether the Crown has met its burden with respect to proving impairment. The "indicia must be evaluated in total" (*Andrea*, at para. 19).

The Law: Impaired Operation - *Mens Rea*

[17] *R. v. King*, [1962] S.C.R. 746, continues to be the leading authority with respect to the *mens rea* element of impaired operation. The Supreme Court of Canada held at para. 63:

> …when it has been proved that a driver was driving a motor vehicle while his ability to do so was impaired by alcohol or a drug, then a rebuttable presumption arises that his condition was voluntarily induced and that he is guilty of the offence... and must be convicted unless other evidence is adduced which raises a reasonable doubt as to whether he was, through no fault of his own, disabled when he undertook to drive and drove, from being able to appreciate and know that he was or might become impaired.

[18] The *mens rea* element of impaired operation was also summarized by the Newfoundland Court of Appeal in *R. v. Mavin*, [1997] N.J. No. 206 at para. 39:

> …An individual is considered to have had the requisite *mens rea* to support a conviction for impaired driving under s. 253(a) of the *Code* if his or her impairment resulted from self-induced voluntary intoxication which comprehends instances of voluntary ingestion of alcohol or a drug intentionally for the purpose of becoming intoxicated, or acting recklessly, aware the impairment could result, but persisting despite the risk.

[19] Furthermore, I adopt Judge Gorman's summary of the *mens rea* element as outlined in *R. v. Taylor*, [2021] N.J. No. 33 (P.C.) at para 71:

> If the Crown establishes that the accused operated a motor vehicle while his or her ability to do so was impaired by a drug or alcohol, a rebuttable presumption arises that the accused's condition was voluntarily created, i.e., that the accused's impairment was caused by the voluntary consumption of the alcohol or drug. The Crown does not have to prove that the accused intended for his or her ability to operate a motor vehicle to become impaired.

[20] Finally, Judge Duffy in *R. v. Adams*, 2023 NSPC 13 at paras. 58-61 provided a concise, detailed, and helpful overview of the *mens rea* element of impaired operation. I have considered, and I adopt, her summary of the law.

The Evidence: Tom MacDonald and Eddie Marr

[21] It was a typical summer Saturday night in Cape Breton. The Branch 3 Legion was hosting karaoke. The parking lot was bustling with activity as the hour approached midnight.

[22] Tom Macdonald and Eddie Marr were employed with Marg's Taxi. Both gentlemen combed the parking lot, working hard to earn the last of the late-night fares.

[23] Mr. MacDonald first noticed the accused an hour earlier "having a puff" behind the legion. As the evening advanced, the parking lot became busy. There was "commotion". Cars were moving about the lot. The competition, "Sonny's Taxi", also had a notable presence.

[24] Mr. Marr was parked side-by-side with a cab from Sonny's in the rear entrance laneway. He had a clear view as he watched the accused exit the legion, enter her car, and back up. As she reversed towards them, both cabs were forced to back up themselves. In Mr. Marr's words, "she almost hit the two of us".

[25] It was suggested to Mr. Marr that he was the one who was not properly parked. Although equivocal at first, he later agreed with the suggestion. He first answered, "I don't really know", then, "that's just the way the taxis park there", and finally, "okay I agree with you". Unlike Mr. Marr, the accused was in a designated parking space.

[26] After the accused backed up, she turned and proceeded straight in Mr. MacDonald's direction. They were facing each other as she moved down the

unmarked, two-lane driveway of the parking lot. The accused attempted to pass on the "wrong side". In other words, she attempted to pass on Mr. MacDonald's passenger side. The space was narrow and, in Mr. MacDonald's opinion, not suitable for passing.

[27] Mr. MacDonald expected the accused to stop as she approached. She didn't. She "barged right through" and side-swiped his vehicle. Consistent with Mr. MacDonald's evidence, the police photos depict damage confined to the passenger side of both vehicles.

[28] Mr. MacDonald immediately "rammed" his vehicle into park and jumped out. He yelled, "hold it, hold it right there". Despite initially stopping, the accused began "taking off". He hollered "block her off, she hit me, she's trying to get away". John, a fellow cab driver, blocked her in. Mr. MacDonald called 911 and awaited the arrival of the police. He later watched the police arrest the accused.

[29] Mr. Marr never witnessed the actual collision. His evidence, to some degree, conflicted with that of Mr. MacDonald. Mr. Marr "thought she might be able to get through" along the passenger side. He expressed that there wasn't enough room for her to pass on the driver's side. However, he later contradicted himself and stated

that there was only enough room to pass along Mr. MacDonald's driver's side. He added, "why she went the other way I'll never know".

[30] At some point Mr. Marr looked inside the accused's vehicle. Mr. Marr observed the accused sitting in her vehicle with an open pint of beer located in the centre console cup holder.

[31] During cross-examination both Mr. MacDonald and Mr. Marr agreed that the accused was neither swerving nor speeding. Mr. MacDonald was challenged on his belief that the accused had attempted to leave the scene. The Defence suggested that the accused was simply trying to park after the collision. Mr. MacDonald was unmoved. He reiterated that he had hollered for her to stop and that she had kept going.

[32] Mr. MacDonald also disagreed with the suggestion that the accused simply could have miscalculated the distance between the vehicles while passing. In his words: "not a chance"; and "it wasn't wide enough for a car to get through, but she just barged right through, she never stopped at all and I'm not sure now, but I think I laid on the horn too, but she was just coming right through. She kept going.".

[33] In contrast, during cross-examination, Mr. Marr testified that although the space was "tight" it could have been a simple "miscalculation" on her part. Mr.

Marr also testified that the accused stopped when Mr. MacDonald tapped on her window.

The Evidence: Investigating Officer Cst. Kyra Clark – Arrest and Transport

[34] Cst. Clark was first on scene. She arrived shortly after midnight and described a “dark” parking lot. After gathering particulars from Mr. MacDonald, she approached the accused. Cst. Clark detected a “strong smell” of alcohol emanating from the accused’s breath. Without prompting, the accused uttered that she was driving and “only had one drink”. The Defence conceded the admissibility and voluntariness of both statements.

[35] Based on the information gathered from Mr. MacDonald, the collision, and her own observations of the accused, Cst. Clark formulated reasonable grounds and arrested the accused for impaired operation. The accused was chartered, cautioned, and agreed to provide breath samples. The accused began to cry. Cst. Clark transported her to central lock-up and awaited the arrival of Cst. Ian Parsons, the qualified technician. Cst. Clark described the accused as “happy”, “talkative”, and “cooperative”.

[36] Cst. Clark remained outside the breath room while Cst. Parsons attempted to take breath samples from the accused. Cst. Clark offered little relevant admissible

evidence with respect to the interaction between the accused and Cst. Parsons. She agreed with the suggestion that she could have missed several parts of their interaction. Furthermore, some of Cst. Clark's knowledge derived from what she was told by Cst. Ashley MacDonald, the second officer to arrive at the scene.

[37] During cross-examination, the Defence challenged Cst. Clark on her recollections. The Defence referred Cst. Clark to her police report. In this report she noted that the accused told her that she had three drinks. This conflicted with her direct testimony of one drink. In responding to this inconsistency, the officer stated, "I'm going to have to say that's a misprint". Cst. Clark doubled down and added that she could not recall being told three drinks.

[38] In addition to the police report, the Defence also referred Cst. Clark to a notebook entry. The accused's utterance was listed as being, "I only had a few drinks". The officer attempted to clarify, and in doing so, admitted that she could have gotten confused. Her evidence evolved to there now being two utterances made, one at the roadside and one on the way to lock-up. Cst. Clark also agreed that "a few drinks" could have meant multiple drinks from one alcoholic beverage.

[39] Cst. Clark was also challenged with respect to her observations of impairment. She agreed with the suggestion that the only observation she made

consistent with possible impairment was the smell of alcohol. She testified that there was nothing unusual or noteworthy with respect to the accused's eyes, speech, balance, coordination, or coherency.

The Evidence: Cst. Ashley MacDonald -Photographs of Damage to Vehicles and Observations of Open Liquor

[40] Cst. MacDonald arrived on scene after Cst. Clark had left. She took photos depicting damage to two vehicles. These photos are consistent with a side-by-side collision between Mr. MacDonald's vehicle and the accused's vehicle. The photos depict various scuffs, scratches, and paint transfers confined to the passenger side of both vehicles.

[41] Cst. MacDonald located a Molson Canadian beer bottle in the front centre cup holder of the accused's vehicle. She described the beer bottle as being "nearly full" and in plain view.

[42] Cst. MacDonald was asked about the quality and clarity of some of the photos. Similar to Cst. Clark's evidence, she testified that the parking lot was "dark" and added that the lighting was "poor".

The Evidence: Cst. Parsons -The Qualified Technician

[43] Cst. Ian Parsons is a qualified technician with 14 years of policing experience. At 12:31 a.m. he arrived at central lock-up to take breath samples from the accused. When Cst. Clarke escorted the accused to the breath room, Cst. Parsons detected a smell of alcohol from her breath. He described her speech as "loud and boisterous". However, during cross-examination, the officer agreed that neither of those observations were documented in his notes.

[44] Before attempting to take breath samples from the accused, Cst. Parsons conducted a 15-minute observation period. The purpose of the observation period was to ensure that potential contaminating external factors, such as burping, did not affect the process. Between 12:46 a.m. and 1:24 a.m. the accused made nine attempts to provide suitable samples of her breath. With the exception of the fifth attempt at 12:58 a.m., which registered a reading of 130 mg/100 ml, all others resulted in insufficient samples.

[45] The Defence asked the officer whether there is a "magic number" of permissible attempts. Cst. Parsons indicated that his practice was to allow nine attempts. When asked why he decided to stop after the ninth attempt he stated:

> Well throughout the whole process, it was explained a number of times, you know the length of time to blow; how to blow, what's, basically after each time. After, actually, she gave a good sample than we were telling her to do the same thing again. And, but the issues were not blowing long enough, not blowing hard enough, not making a proper seal on the mouthpiece. It just went on and on.

[46] The Defence suggested in cross-examination that there was a problem with the mouthpiece. Cst. Parsons disagreed and testified that he had followed standard procedure and switched it out after every attempt.

[47] There was no certificate or *viva voce* evidence regarding the alcohol standard used, whether it was certified by an analyst, the target value of the standard, the results of any system calibration checks, or the results of any system blank tests.

Analysis: Evidentiary Use of the Single Breath Reading

[48] The presumption of accuracy means that the breath readings are accurate measures of the accused's blood-alcohol concentration. The law is very clear. Certain criteria set out in s. 320.31(1) of the *Criminal Code* must be met before a court can conclude that the results of the analysis of the samples are "conclusive proof of the person's blood alcohol concentration at the time when the analyses were made".

[49] The prerequisites for the presumption of accuracy have not been established in this case. The Crown has not established what alcohol standard was used, whether it was certified by an analyst, the target value of the standard, whether system calibration checks or blank tests were conducted, and the results of those

tests. Traditionally this is established via either of the two permissible routes: certificate; or *viva voce* evidence.

[50] There was only one reading in this case and no certificate was tendered. As well, the qualified technician did not give *viva voce* evidence outlining the established hallmarks of the breath instrument's accuracy and reliability. As a result, the fundamental question is as follows: What use can this court make of the single 130mg/100ml breath reading when evaluating whether the accused's ability to operate a conveyance was impaired?

[51] Counsel takes the position that the single reading of 130 mg/100 ml can only be used for a limited purpose. Specifically, it is evidence of alcohol *use*, and that the accused had *some* alcohol in her body. It is further argued that it is one piece of circumstantial evidence to be used in assessing whether the accused's ability to operate a conveyance was impaired by alcohol.

[52] In Nova Scotia, courts are conflicted on what use may be made of breath readings when examining a charge of impaired operation. In one corner there is a trilogy of cases: 1) *R. v. Devison*, 2016 NSPC 43; 2) *R. v. Kelly*, 2019 NSPC 73; and 3) *R. v. Lamond*, 2021 NSPC 9. In the other corner stands the decision of *R. v.*

Watts, 2021 NSPC 8. All four cases vary slightly on their facts but grapple with the same issue.

[53] In *Devison*, the Crown was unable to rely on the presumption. This resulted in the accused being found not guilty on the charge of "over 80 causing bodily harm". The court went on to consider what, if any, use could be made of the accused's blood alcohol readings in the context of the remaining charge of impaired driving causing bodily harm. At paragraph 101 the question was framed as follows:

> "Items of circumstantial evidence are not to be viewed in isolation but the entirety of the evidence must be considered in determining whether the prosecution has discharged the burden of proof." -- per Hill, J. in R. v. Elvikis [1997] O.J. No. 234 at par [26]. In the preceding sentence he referred to possible evidence of impairment as "driving conduct, physical symptomology or physical test results, or some combination thereof". If this is not a closed list, then may blood alcohol concentrations be added to it? May I also consider the BAC of the accused more than 2 hours later, less than 2 hours later? What importance does this have? ***May I consider the actual levels, higher being associated with a greater degree of impairment? May I note the latter point as a general truism?***

[Emphasis added.]

[54] The Court held that it was permissible for the trier of fact to take an expansive view of the evidentiary value and weight to be attached to specific breath readings. Even in the absence of interpretive expert evidence the Court found that it could consider and attach weight to the actual blood alcohol content when determining whether an accused's persons ability to operate a vehicle was

impaired by alcohol. The evidentiary value was not constricted to proof that the accused had alcohol in their body.

[55] Subsequently, the same analytical approach was applied in both *Kelly* and *Lamond*. In short, *Devison*, *Kelly*, and *Lamond*, stand for the proposition that when considering the simpliciter offence of impaired operation, a court can take the evidence of the blood alcohol readings as "evidence at face value -- as evidence of the actual BAC's -- not merely as evidence of ingestion of alcohol as earlier case law might suggest" (*Lamond* at para. 24).

[56] In contrast, the court in *Watts* takes a very different view as outlined at paras. 139 and 141:

> In this case there is no expert evidence to explain the readings contained in the certificate. Thus, absent expert opinion evidence relating blood alcohol concentration readings to Ms. Watts' ability to drive, consideration of breathalyzer test results assessment does not permit the court to speculate as to the qualified impact of the documented readings on Ms. Watts' level of impairment and her ability to operate a vehicle. It does, however, confirm that Ms. Watts had alcohol in her system, which weighs in the circumstantial inference-drawing exercise. The authority for this proposition is found in *R. v. Dinelle*, [1986] N.S.J. No. 246 (CA)….
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> …
>
> Let me be clear, in determining the extent to which the certificate of analysis (Exhibit 1), may be relied upon in regard to the offence of impaired operation (s. 320.(1)(a)), I can only rely on the certificate for the limited purposes of establishing Ms. Watts consumed alcohol on the date in question. The evidence cannot be used to infer any particular amount of alcohol was consumed, or what, if any, impact the alcohol consumption had on impairment. As previously mentioned, an expert was not called in this case to interpret the readings contained in the certificate of

> analysis. Therefore, I cannot speculate as to the qualified impact of the results of the breath analysis, the reading…, on Ms. Watts' ability to operate her vehicle. It does, however, confirm that she had consumed alcohol and therefore requires an examination of all the evidence relating to the issue of Ms. Watts' impairment….

[57] I adopt the approach taken in *Watts*. It appears to be consistent with my reading of the Appeal Court in *Dinelle*. In *Dinelle* the accused appealed his conviction for impaired operation. At trial the Court dismissed the companion "over 80" charge. The Defence argued that the trial court had erred when it considered the breath results as part of the evidence relating to the charge of impaired driving. The Court dismissed the appeal and held that it was permissible for the trial judge to consider the readings in the context of the total matrix of the evidence, which included erratic driving, confused behavior, and the smell of alcohol.

[58] It is important to note, however, that while the Appeal Court in *Dinelle* found that a trial court may consider the breath readings as one element in evaluating the charge of impaired driving, it did not specify the exact scope of permissible use. Furthermore, the Court of Appeal did not specifically endorse attaching particular significance to the level of the readings without a supporting evidentiary record. In fact, the Court seemed to suggest otherwise when it stated at para. 9:

> An examination of the record persuades us that [the trial judge] drew no technical or special knowledge from the certificate which is "unknown to persons of intelligence generally."

[59] I struggle with the notion that a court can assign, interpret, and attach weight to a specific reading without some form of expert evidence. Interpreting and attaching weight to readings without expert evidence strikes me as impermissibly drawing upon “technical or special knowledge”. When “technical or special knowledge” is at play, inferences ought to be grounded in, and flow from, the evidence presented - in this case, expert evidence. How a specific blood alcohol reading relates to impairment and or level of impairment is outside the scope of general knowledge and common sense.

[60] While it is tempting for a court to weigh in by interpreting and attaching significance to blood alcohol readings without assistance from the evidentiary record, this feels like a trap. Every day, courts make common sense inferences about evidence. However, drawing inferences and generalizing about what a particular blood alcohol reading means to a particular accused in a particular context isn’t so straight forward. Considerations such as whether there is a universal entry reading by which all individuals have an impaired ability to operate a motor vehicle are outside the realm of common sense. Expert evidence is necessary for a trier of fact to answer this question. Similarly, one may be inclined

to presume that the higher the reading, the higher the level of impairment. This is a fair point. However, what impact does 130 mg/100 ml of blood have on this specific accused in these particular circumstances? Again, without expert evidence, or at a minimum, some evidentiary basis on the record to explain the significance of this reading, it is dangerous for the Court to speculate or make generalized assumptions.

[61] As a result, I find that the single 130 mg/100 ml of blood reading confirms only that the accused had alcohol in her system. In the absence of expert evidence, the Court will not attach any significance to the specific reading. The fact that the accused had alcohol in her system will be one consideration in the "constellation of factors" during the exercise of drawing circumstantial inferences.

[62] Consistent with the *Watts* approach, several courts from other provinces have also taken the same narrow reading of *Dinelle*. While not a comprehensive list, several cases include:

- *R. v. Letford*, [2000] O.J. No. 4841 (Ont. C.A.) at para. 22:

> With respect to the impaired count, the trial judge was wrong in law in proceeding on the basis that he could use the results of the breath test in support of a finding of the degree of impairment, absent expert evidence relating the results to that issue. [Emphasis added.]

- *R. v. MacConnell*, 2008 BCSC 505 at para. 111:

> ... The parties agree that I may rely on the certificate for the limited purpose of establishing Ms. McConnell consumed some alcohol on the night of the accident. The evidence cannot be used to infer any particular amount of alcohol was consumed or what effect, if any, the alcohol consumption had on impairment. I note here that no expert evidence was called to interpret the readings contained in the certificate of analysis. … [Emphasis added.]

- *R. v. Vrban*, 2018 BCPC 159 at para. 26:

> …. Pursuant to s. 258(1)(d) of the *Code* and the reasons of the court in *R. v. Smurthwaite*, 2001 BCPC 287, at paragraph 22, and *R. v. Tusiuk*, [2000] O.J. No. 802, at paragraph 4, the certificate can only be used as evidence that Ms. Vrban had alcohol in her system…. [Emphasis added.]

- *R. v. Grajewski*, [1992] O.J. No. 2527 (Gen. Div.) at para. 26:

> The mere fact of having more than 80 milligrams of alcohol in 100 millilitres of blood at the time the offence is alleged to have been committed does not constitute impairment: *R. v. Good*, a judgment of the Ontario Court of Appeal, delivered December 10, 1991; [1991] O.J. No. 2183.

- *R. v. Smurthwaite*, 2001 BCPC 287 at para. 22:

> …therefore it is proper and permitted by law for me to have regard to the certificate here for the limited purpose of showing that she had alcohol in her system at the time of driving, based on Regina v. Dinelle (1986), 44 M.V.R. 109 (N.S.C.A.)… [Emphasis added.]

- *R. v. Shewchuk*, 2006 SKQB 33 at para. 23:

> ...The trial judge in this case clearly used the certificate to determine not only whether the accused had consumed alcohol that night but also to what extent the accused had consumed alcohol. Consistent with the *Randell* decision and cases following it, that was an error in law. Furthermore, while the trial judge may have concluded that the accused was driving impaired without consideration of the Certificate of Analyses, it is by no means clear that he would have concluded such beyond a reasonable doubt. Put plainly, the trial judge erred in law in using the Certificate of Analyses as he did. Accordingly, the appeal on this ground is allowed with regard to the impaired driving count.

[63] If I am in error in finding that the reading can only be used for the limited purpose of establishing that the accused had alcohol in her system, I would draw an important factual distinction between this case and the trilogy of *Devison*, *Kelly*, and *Lamond*. Unlike those cases, this court has only one reading. In conjunction, this court lacks the robust evidentiary record outlining the hallmarks of accuracy with respect to the police's operation of the instrument. Without these details this court cannot even presume the accuracy of the single 130 mg/100 ml reading. I cannot attach weight, meaning, or significance to the quantum of a single breath reading without knowing the strength of the foundation from which it was fashioned.

Analysis: Has the Crown Proven that the Accused's Ability to Operate a Conveyance was Impaired by Alcohol?

[64] I am mindful that the Court is not to view individual items of circumstantial evidence in isolation. A piecemeal approach to assessing the evidence in not appropriate. Rather, the Court must look at the collective whole – that is, at the entirety of the evidence - when determining whether the Crown has proven that the accused's ability to operate her vehicle was impaired by alcohol. The Court must evaluate the cumulative effect of all of the evidence: *R. v. Bush,* 2010 ONCA 554 at paras. 54-58; *R. v. Reeves*, 2018 ONSC 5082 at para. 76.

[65] Furthermore, I must not approach the question of impairment as a box-ticking exercise on an “impaired driver scorecard”, noting which indicia are present and which are absent: *Bush*, at paras. 54-58; and *Reeves*, at para. 76. The Court must always consider the totality of the circumstances: *Reeves*, at para. 76.

[66] Finally, as outlined in *Kelly* at para. 114:

> I should not consider an alternative explanation for each of these observations and then eliminate that piece of evidence as a possible indicator of impairment. I should instead consider the probative value of the entire "constellation of factors" listed above.

[67] After a comprehensive review of the evidence, I am satisfied that the Crown has established the following:

1. The accused was leaving a place which served alcohol. As she exited the parking lot, she side-swiped the passenger side of Mr. MacDonald’s taxi. Both cars sustained damage.

2. The accused consumed alcohol that evening. The exact amount and the precise time of consumption remain unclear. As outlined earlier, there were several inconsistencies in Cst. Clarke’s evidence relating to this point. The noted inconsistencies and the evolving, equivocal nature of her evidence with respect to whether it was one or three drinks, compromises the reliability of her evidence on this point.

3. The accused had a strong smell of alcohol emanating from her breath while on scene.

4. At the scene the police located a “nearly full” bottle of beer in the front centre cup holder of the accused’s vehicle.

5. While being arrested the accused began to cry. However, at various points she was described as being “happy”, “talkative”, and “cooperative”.

6. A short time after the collision the accused provided one sample of breath which confirmed the presence of alcohol in her system.

[68] I remain mindful that the Court must not engage in a piecemeal assessment of the evidence and that it is the cumulative total of all the evidence which ultimately answers the question of whether the accused’s ability to operate a conveyance was impaired by alcohol. However, it is disingenuous and improper for this court to ignore other facts which are also apparent from a review of the evidentiary record.

[69] There is evidence from two police officers that this was a dark, poorly lit parking lot. This is consistent with the scene photographs. It was also a busy parking lot. While the accused was properly parked, Mr. Marr’s taxi was not.

When the accused backed up, Mr. Marr was forced to move his vehicle. However, when challenged, Mr. Marr agreed that he was in the rear entrance laneway which was not a properly designated parking spot. It is not surprising he had to move his vehicle.

[70] There were no marked laneways exiting and entering the parking lot. Furthermore, the evidence from both of the civilian witnesses on whether there was sufficient room to pass Mr. MacDonald's vehicle on the passenger side was inconsistent. According to Mr. Marr, he "thought she might be able to get through". This is to be contrasted with the testimony from Mr. MacDonald who certainly didn't think so. This conflict again makes it more challenging for this court to evaluate the evidence of the accused's driving. However, what is consistent is that both gentlemen agree that the accused was neither swerving nor speeding as she exited. Given the diverging evidence I can not safely attribute the collision to an impaired ability to operate her vehicle.

[71] I will now address other concerns about the evidentiary record on the issue of impairment.

[72] Despite having interacted in close proximity with the accused, Cst. Clarke's observations were limited. Apart from the strong smell of alcohol, there was

nothing unusual or noteworthy with respect to the accused's eyes, speech, balance, coordination, or coherency.

[73] Again, I am mindful that a court need only be satisfied that the Crown has established proof of impairment to "any degree". The Crown did not bear the onus to prove a marked departure from normal human behaviour. In short, the evidence of impairment alone in this case is pretty thin, and that is even setting aside the ultimate requirement for the Crown to demonstrate that any such impairment impacted the accused's ability to operate a conveyance. The limited indicia related to her ability to operate a conveyance, combined with the paucity of other evidence, falls short of proof beyond a reasonable doubt.

Conclusion

[74] While a court may have its suspicions, the Crown carries a heavy burden. After considering all of the evidence in totality, I am not satisfied that the accused's ability to operate a conveyance was impaired to "any degree" by alcohol.

[75] I find the accused not guilty of the s. 320.14 (1)(a) charge of impaired operation.

D. Shane Russell, ACJPC