IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Thynne, 2008 NSSC 153

Date: 20080521
Docket: SH 280303A
Registry: Halifax

Between:

Her Majesty The Queen

Appellant

and

Eldon Vance Thynne

Respondent

Judge:	The Honourable Justice Arthur J. LeBlanc
Heard:	December 10, 2007, in Halifax, Nova Scotia
Counsel:	Karen Quigley, Counsel for the applicant Brian Smith, Counsel for the respondent

By the Court:

[1] The Crown appeals the decision of Buchan J.P.C., in which she acquitted the respondent of two charges under the *Criminal Code*: (1) having control of a motor vehicle while his ability was impaired by alcohol and (2) having control of a motor vehicle while having a blood alcohol content in excess of 80 mg. of alcohol in 100 ml. of blood, contrary to s.253 (a) and (b).

Background

[2] The respondent, Mr. Thynne, is a long-distance truck driver. On September 29, 2006, Mr. Thynne was at home and was visited by his brother Robert Thynne, who had just returned from working some time on the offshore. Robert suggested that they go to a bar. At about 8 or 9 p.m. they left for the Newfoundland Club. Robert Thynne drove the respondent's vehicle, which they intended to park and pick up the next day, after taking a taxi home at the end of the evening. Robert Thynne testified that the respondent told him that he would not drive because he had been drinking. Robert Thynne parked the vehicle outside the club, and kept the keys. The respondent testified that he carried a spare key in his wallet, but did not have his wallet with him. He was only carrying some cash, having left the

wallet at home, which was his practice. Robert Thynne testified that he had the keys to the respondent's car, and did not return them until the next day.

[3] At the club, Robert Thynne and the respondent had drinks. Eventually, Robert was asked to leave by a bouncer. The two brothers left the club. Robert testified that he was waiting for a taxi and got into an exchange of words with the bouncer. He was unable to locate the respondent and left without him. The respondent testified that, being a regular at the club, he did not want to be involved in the dispute, and walked away. When he went back, his brother had left. He had no money and decided to go to his car as "a place to put his head." He did not intend to drive. He got into the car and lay down in the driver's seat.

[4] The police subsequently arrived at the scene, woke the respondent, and arrested him, initially for public intoxication. Upon securing the vehicle, however, Constable Phillip MacKenzie found keys on the floor; by his account, when he sat behind the wheel he immediately found several keys on a ring on the floor to the right of the driver's seat, one of which started the car. He gave the keys to Constable Daniel Berrigan. The respondent was ultimately charged with having care and control with a blood alcohol concentration over 80 mg./100 ml. (*Criminal*

Code, s. 253(b)) and impaired driving (s. 253(a)). The text of the relevant provisions is as follows:

> 253. Every one commits an offence who operates a motor vehicle or vessel or operates or assists in the operation of an aircraft or of railway equipment or has the care or control of a motor vehicle, vessel, aircraft or railway equipment, whether it is in motion or not,
>
> > (a) while the person's ability to operate the vehicle, vessel, aircraft or railway equipment is impaired by alcohol or a drug; or
> >
> > (b) having consumed alcohol in such a quantity that the concentration in the person's blood exceeds eighty milligrams of alcohol in one hundred millilitres of blood.

The trial decision

[5] The Provincial Court judge acquitted the respondent on both counts, concluding that the Crown failed to prove guilt beyond a reasonable doubt and that the presumption of care and control had been discharged. Judge Buchan stated that she accepted;

> as credible the testimony of Mr. Thynne and his brother as to their plans for the evening and that, when Mr. Thynne could not find his brother and without any

means of getting home, Mr. Thynne decided to use his car as a place to put his head, and indeed did just that.

Other than getting into the car through an unlocked door not requiring a key for entry, settling into the driver's seat then falling asleep, there was no evidence whatsoever of Mr. Thynne making any other use of the vehicle. There is no evidence of any course of conduct associated with the vehicle which would involve a risk of putting the vehicle into motion.

His intention was to have a place to put his head, not to obtain the care and control of the vehicle. Accordingly, he did not have the *mens rea* necessary to find care and control of the vehicle.

Robert Thynne testified that he had the keys with him at all times and did not return them to the defendant until the next morning. The doors to the vehicle were not locked, thus, the defendant did not even require the use of the key in order to gain access to the vehicle. [Transcript, p. 104.]

[6] The trial judge referred to the cases cited by counsel and concluded:

In this case, the key was some three feet away from the ignition. And I have accepted the testimony of Mr. Thynne that he had no knowledge that the keys were in the vehicle.

The police testified that the car had not been recently running and that it was parked in a proper manner. Mr. Thynne touched nothing in the vehicle which would involve taking any type of control of the vehicle at all. There was no risk of Mr. Thynne setting the vehicle in motion intentionally or unintentionally, I would find. He was in a deep sleep and the keys, unbeknownst to him, were on the floor.

> Therefore I find that the Crown has failed to either rebut the presumption of care and control, or to prove care and control beyond a reasonable doubt, and would therefore find Mr. Thynne not guilty on both counts.... [Transcript, p. 105.]

[7] The appellant Crown argues that the trial judge placed the obligation to rebut the presumption of care and control on the Crown rather than on the defendant where it belongs. The Crown also contends that the trial judge misapplied the law of care and control. As a result, the Crown asks the court to set aside the decision of the trial judge and enter a conviction or order a new trial.

The law

Summary Conviction Appeals

[8] The scope of a summary conviction appeal was described by Cromwell J.A., for the Court, in *R. v. Nickerson (W.S.)*, (1999), 178 N.S.R. (2d) 189 (C.A.):

> [5] Unlike appeals to this court in summary conviction matters, appeals to the Summary Conviction Appeal Court on the record may address questions of both fact and law. Hallett, J.A., for the court, recently described the role of the Summary Conviction Appeal Court judge in *R. v. Miller (G.C.)* (1999), 173 N.S.R.(2d) 26 ... at pp. 27-29:
>
> > "On an appeal to a summary conviction appeal court (in this Province, the Supreme Court of Nova Scotia), from a summary conviction, on the ground that the verdict is unreasonable or

unsupported by the evidence, the duty of the Supreme Court judge as an appellate court is explained in *Yebes v. The Queen* (1988), 36 C.C.C. (3d) 417. McIntyre, J., for the court, stated at p. 430:

> '... The function of the Court of Appeal, under s. 613(1)(a)(I) of the *Criminal Code*, goes beyond merely finding that there is evidence to support a conviction. The court must determine on the whole of the evidence whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered. While the Court of Appeal must not merely substitute its view for that of the jury, in order to apply the test the court must re-examine and to some extent reweigh and consider the effect of the evidence. The process will be the same whether the case is based on circumstantial or direct evidence.' [emphasis added by Cromwell J.A.]

...

> "On an appeal from a conviction for a criminal offence on the ground that the guilty verdict is unreasonable, the appellate court judge is required to review, and to some extent, reweigh the evidence to determine if the verdict is unreasonable engages the legal concept of reasonableness (*Yebes*, supra, at p. 427). Thus, the appellate review, on the grounds set out in s. 686(1)(a)(I) of the Code entails more than a mere review of the facts. The appellate court has a responsibility, to some extent, to do its own assessment of the evidence and not to automatically defer to the conclusions of the trial judge which is what the appellate court judge seems to have done in this appeal."

[6] The scope of review of the trial court's findings of fact by the Summary Conviction Appeal Court is the same as on appeal against conviction to the Court of Appeal in indictable offences: see sections 822(1) and 686(1)(a)(I) and *R. v. Gillis* (1981), 45 N.S.R.(2d) 137.... Absent an error of law or a miscarriage of justice, the test to be applied by the Summary Conviction Appeal Court is whether the findings of the trial judge are unreasonable or cannot be supported by

> the evidence. As stated by the Supreme Court of Canada in *R. v. Burns (R.H.)*, [1994] 1 S.C.R. 656 ... at p. 657..., the appeal court is entitled to review the evidence at trial, re-examine and reweigh it, but only for the purpose of determining whether it is reasonably capable of supporting the trial judge's conclusions. If it is, the Summary Conviction Appeal Court is not entitled to substitute its view of the evidence for that of the trial judge. In short, a summary conviction appeal on the record is an appeal; it is neither a simple review to determine whether there was some evidence to support the trial judge's conclusions nor a new trial on the transcript.

[9] The provisions of the *Criminal Code* governing summary appeals include ss. 686, 813 and 822:

> 686. [...]
>
> ***Appeal from acquittal***
>
> (4) If an appeal is from an acquittal or verdict that the appellant or respondent was unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal may
>
> (a) dismiss the appeal; or
>
> (b) allow the appeal, set aside the verdict and
>
> (i) order a new trial, or
>
> (ii) except where the verdict is that of a court composed of a judge and jury, enter a verdict of guilty with respect to the offence of which, in its opinion, the accused should have been found guilty but for the error in law, and pass a sentence that is warranted in

> law, or remit the matter to the trial court and direct the trial court to impose a sentence that is warranted in law.

....

Additional powers

(8) Where a court of appeal exercises any of the powers conferred by subsection (2), (4), (6) or (7), it may make any order, in addition, that justice requires.

...

813. Except where otherwise provided by law,

...

(b) the informant, the Attorney General or his agent in proceedings under this Part may appeal to the appeal court

> (i) from an order that stays proceedings on an information or dismisses an information...

and the Attorney General of Canada or his agent has the same rights of appeal in proceedings instituted at the instance of the Government of Canada and conducted by or on behalf of that Government as the Attorney General of a province or his agent has under this paragraph.

...

> 822. (1) Where an appeal is taken under section 813 in respect of any conviction, acquittal, sentence, verdict or order, sections 683 to 689, with the exception of subsections 683(3) and 686(5), apply, with such modifications as the circumstances require....

The presumption of care and control

[10] Where an accused is charged under s. 253, and it is proved that the accused occupied the driver's seat, the accused "shall be deemed to have had the care or control of the vehicle... unless the accused establishes that the accused did not occupy that seat or position for the purpose of setting the vehicle... in motion...": s.258(1)(a). The accused is entitled to attempt to displace this presumption, whereupon the Crown may attempt to prove care and control beyond a reasonable doubt.

[11] The Crown says the trial judge misapplied the law by placing a burden on the Crown to displace the presumption of care and control. It is, of course, the accused's burden to displace the presumption by way of evidence that the accused did not intend to exercise care and control at the relevant time. Consequently, when the trial judge stated that the Crown had failed to either rebut the

presumption of care and control, or to prove care or control beyond a reasonable doubt, such a statement was both incorrect and an error of law.

[12] It is my view however that it is necessary to review the entire record to determine if in fact this was merely a misstatement or a conclusion of law that was wrong. In submissions at trial, defence counsel acknowledged that "the onus is upon [the accused] with respect to the presumption of the section." He added:

> ... I would urge that the evidence dispels that presumption, and that it is open for you ... to find that Mr. Thynne's evidence is such that he did not have the care and control of the vehicle at the time in question which was probably, at least likely some two hours after the incident between he and his brother and the staff at the Newfoundland club. [Transcript, pp. 80-81.]

[13] Crown counsel submitted as follows:

> [T]he question... is: has there been evidence to rebut the presumption? ... [T]he presumption is very clear. The question of the cases that deal with what's the meaning of care and control... notwithstanding Mr. Thynne's clearly by his evidence today he says, look, I had no intention of driving the car.
>
> ...
>
> [T]he Crown's position is that the presumption ... hasn't been rebutted. [Transcript, pp. 83-84.]

[14] The trial judge stated that Mr. Thynne did not have the *mens rea* necessary to find care and control of the vehicle.

[15] In a review of the entire record, it is evident that no one, including counsel, suggested that the burden fell on the Crown to displace the presumption. The presumption favours the Crown's position. I see no need to canvass this point further. The transcript leaves no doubt that the presumption was correctly stated by counsel; the trial judge, it is clear, simply misspoke in the course of giving an oral decision.

The Crown's burden

[16] On the question of whether the Crown has proven that Mr. Thynne had care and control beyond a reasonable doubt in order to sustain a conviction under either section 253(a) or 253(b), the Crown argues that the trial judge failed to consider the accused's opportunity to set the car in motion at some future time or upon Mr. Thynne being aroused from sleep. There are a number of cases which establish the importance of preventing drivers whose ability is impaired from driving motor vehicles or exercising care and control of vehicles. In *R. v. Miller (A.J.)* (1995),

137 N.S.R. (2d) 313 (C.A.) the police found the accused in the driver's seat, with the door closed and the engine running. He was convicted of having care and control of a motor vehicle while the concentration of alcohol in his blood exceeded the legal limit, and with having care and control while impaired. The summary conviction appeal court set aside the conviction and entered acquittals on both counts. On further appeal, Chipman J.A. stated:

> [15] Although each case will depend on its own facts, the element of being in such control of the car as to be at risk of setting it in motion is the basis of the criminal liability. Here the respondent was in the driver's seat behind the steering wheel. The keys were in the ignition. The engine was running. The respondent said he "started to pull the emergency brake off" as the police arrived. In the face of this, the trial judge's finding of care and control was not unreasonable or unsupported by the evidence. It should not be disturbed. The legislation is aimed at the protection of the public. The respondent was, at the material time, at the controls of the vehicle and constituted an immediate danger to the public in the sense contemplated in the authorities.

[17] In *R. v. Legrow (W.J.)* (2007), 251 N.S.R. (2d) 117 (S.C.), the Court of Appeal affirmed the decision of Justice Douglas MacLellan dismissing an appeal from conviction. The trial judge convicted the appellant of having care and control of a motor vehicle with a blood-alcohol reading over 80 mg./100 ml. Justice MacLellan found that the trial judge had applied the correct and proper test to determine if the accused had care and control of the vehicle. The car was capable of being driven by simply putting it in gear and stepping on the gas. Although he

indicated an intention not to drive, the summary conviction court judge stated that the accused could easily have changed his mind about not driving. On summary conviction appeal, Justice MacLellan said:

> [25] In *R. v. Lockerby (B.)*, [1999] N.S.J. No. 349; 180 N.S.R.(2d) 115; 557 A.P.R. 115 (C.A.), the ... Court confirmed a conviction for care or control in circumstances where the trial judge found that the accused had no intention to put the car in motion. Cromwell, J.A., said:
>
> > "Mr. Lockerby's principal contention on appeal is that risk of setting the vehicle in motion is an essential element of the offence and that no such risk was present here. He argues that is not a crime to get behind the wheel of a car to turn it off and put it in gear while having more than the legal limit of alcohol in the blood. I do not accept this argument. Assuming without deciding that risk of setting the vehicle in motion is an essential element of the offence, the trial judge made a clear finding that such risk existed here. The factual finding was upheld on appeal to Davison, J., and it is supported by the evidence. Risk is not to be assessed with the benefit of hindsight or on the assumption that the appellant's actions would, in fact, accord with his intentions. The appellant's own testimony at trial is, in my view, conclusive on this issue. He agreed in his testimony (set out above) that he was sitting in the driver's seat, with the keys in the ignition and that he could have driven the car if he had wanted to. In my view, when a person with more than the legal limit of alcohol in his or her blood had the present ability to make the car respond to his or her wishes, there is a risk that the car may be placed in motion, even where the person's intentions are not to do so.
>
> "A person who has the present ability to operate the vehicle, who has its superintendence or management, is in control of it."

[18] Justice MacLellan observed that *Lockerby* had been followed in *R. v. Eric MacKay*, 2003 NSPC 054, where C.H.F. Williams J.P.C. said, at para. 4,

> ... our courts have decided that when a person whose blood alcohol concentration exceeds the legal limit has the present ability to make a vehicle respond to that person's wishes, there is always a risk that the vehicle may be placed in motion even though the person might not have entered it with the intention to do so.

[19] In *R. v. Hayes*, [2008] N.S.J. No. 100; 2008 NSCA 23, the Nova Scotia Court of Appeal considered the presumption of care and control of an inoperable motor vehicle. Mr. Hayes, a car mechanic was found guilty of having care and control of a motor vehicle by a provincial court judge, but this decision was overturned by the summary conviction appeal court. The accused was attempting to get his snowmobile moving. It was immobilized on the highway, with its engine running. Taking a break, he sat down to smoke a cigarette and fell asleep, with the engine running and no lights on. He was impaired by alcohol. The trial judge made the following conclusions, quoted by the Court of Appeal at para. 13:

> I am not satisfied the accused has established on the balance of probabilities that he would not put the snowmobile in motion if he could. It is clear, he said this at trial, but the evidence at the scene was that he was asleep. This statement is inconsistent with falling asleep and not having moved the snowmobile off the

> travelled portion of the highway. Additionally, by leaving the motor vehicle on the highway, he, in another way... while in care or control endangered other users of the highway.
>
> The Crown has established on all the evidence and beyond a reasonable doubt, *R. v. W.(D.)*), that the accused had voluntarily assumed, and continued to assume, care or control of his snowmobile all the while having consumed voluntarily alcohol to such an extent as to have been impaired....

[20] The Court of Appeal conceded that the vehicle was inoperable and that there was no dispute that Mr. Hayes was impaired by alcohol, nor was there a dispute that he was sitting in the driver's seat when the police found him. The issue was whether the accused had deemed or actual care and control of the snowmobile (para. 25). Hamilton J.A., for the court, said:

> [26] The Court in *R. v. Ferguson*, [2005] O.J. No. 182, Ontario Supreme Court of Justice, explains the consequences of deemed care or control when an impaired accused is in the driver's seat of an inoperable vehicle and fails to rebut the s.258(1)(a) presumption by not satisfying the trier of fact that s/he did not intend to set the vehicle in motion:
>
> > [12] When an individual is found in the driver's seat of a vehicle, there is a presumption of care or control pursuant to s.258(1)(a) of the *Criminal Code*. The presumption can be rebutted if the defendant establishes on a balance of probabilities that he or she was not in the driver's seat for the purpose of setting the vehicle in motion.
> >
> > [13] If the presumption is not rebutted, the individual is deemed to be in care or control of the motor vehicle and there is no need for the prosecution to prove beyond a reasonable doubt that the

> vehicle had some potential to create danger in the hands of the impaired defendant. When the presumption is not displaced, there is no need for the trial judge to address the issue of whether the vehicle is operable or immovable and/or the issue of dangerousness. (Emphasis by Hamilton J.A.)

[27] This was also dealt with by this Court in obiter in *R. v. Dennis* [2000] N.S.J. No. 57 (C.A.):

> [23] In short, nothing in the language used in the authorities dealing with the *mens rea* and the *actus reus* of care or control supports the proposition that where an individual is deemed to be in care or control of a motor vehicle by virtue of the presumption found in s.258 of the *Criminal Code*, in circumstances in which a vehicle cannot be moved, the presumption for that reason does not operate. To the extent that the reasoning of Ryan, J.C.C. in *Dairou*, supra, can be said to support such a conclusion, we do not agree with it. As Dickson, C.J.C. said for the court in *R. v. Whyte* ...:
>
> > "... If an accused does not meet this requirement [ie. of proving the absence of intent to set the vehicle in motion] the trier of fact is required by law to accept that the accused had care or control and to convict. But of course it does not follow that the trier of fact is convinced beyond a reasonable doubt that the accused had care or control of the vehicle ..."

[21] In *R. v. Hein (S.)* (1999), 180 N.S.R. (2d) 81 (S.C.) the accused had been drinking alcohol. After drinking at a bar with friends, she had intended to travel home by taxi and leave her car behind. Along with her friends, she sat in the car to keep warm while waiting for the taxi. The accused sat in the driver's seat. The

engine and heater were running. The trial judge concluded that the Crown had failed to prove beyond a reasonable doubt that the accused had care or control of the vehicle at the time, concluding that she had no intention of setting the vehicle in motion, and that there was no risk to the public in the circumstances. MacDonald , A.C.J. S.C. (as he then was), on summary conviction appeal, set aside the acquittal. He said:

> [9] The leading case on this issue is the Supreme Court of Canada decision of *R. v. Toews*, [1985] 2 S.C.R. 119; ... 20 D.L.R.(4th) 758 ..., I refer to p. 5 [D.L.R.] where McIntyre, J., for the court noted:
>
> > "The cases cited, however, illustrate the point and lead to the conclusion that acts of care or control, short of driving, are acts which involve some use of the car or its fittings and equipment, or some course of conduct associated with the vehicle which would involve a risk of putting the vehicle in motion so that it could become dangerous. Each case will depend on its own facts and the circumstances in which acts of care or control may be found will vary widely."
>
> [10] Such a danger can clearly exist even in the absence of an intention to set the vehicle in motion. For example there may be the danger of unintentionally setting the car in motion. This concern was addressed by the Supreme Court of Canada in *R. v. Ford*, [1982] 1 S.C.R. 231; ... 65 C.C.C.(2d) 392....
>
> [11] At p. 399, Ritchie, J., alluded to the danger of unintentionally setting the car in motion:

> "Nor, in my opinion, is it necessary for the Crown to prove an intent to set the vehicle in motion in order to procure a conviction on a charge under s. 236(1) of having care or control of a motor vehicle, having consumed alcohol in such a quantity that the proportion thereof in his blood exceeds 80 mg. of alcohol in 100 ml. of blood. Care or control may be exercised without such intent where an accused performs some act or series of acts involving the use of the car, its fittings or equipment, such as occurred in this case, whereby the vehicle may unintentionally be set in motion creating the danger the section is designed to prevent."

> [12] Furthermore the court's concern extends to more than the vehicle being unintentionally set in motion. It must also consider the danger of having an impaired person enter a car with no initial intention of setting it in motion only to have that person change his or her mind by deciding to drive sometime after entering the vehicle....

[22] MacDonald A.C.J. concluded that the trial judge erred by failing to assess the risk that the respondent, in her impaired state, would change her mind and decide to drive (para. 15). In entering a verdict of guilty on all the charges, he said:

> [16] The learned trial judge's exclusive concentration on the risk of unintentionally setting the vehicle in motion is evident in the case law he cited. He referred to the P.E.I. Supreme Court case of *R. v. Greenan (J.A.)* (1995), 135 Nfld. & P.E.I.R. 313 ... (P.E.I.T.D.). In that case the court considered only the risk of unintentionally setting the car in motion because the risk of the accused intentionally setting the car in motion was minimal. In that case, the accused was staying at a resort and had no reason to go anywhere. He simply entered his car to smoke marijuana because he did not want to do so in the hotel. In the case at bar the risk of the accused changing her mind and driving was far greater. She was not in a field or parking lot. She was on a public highway and intent on going home. Considering this risk of having her intentionally setting the car in motion in the context of all the facts of this case, I find beyond a reasonable doubt that the respondent did have care and control of the vehicle when approached by the police. My reasons for reaching this conclusion include:

1. It was her vehicle and she had the key.

2. She was in the driver's seat and in fact had started the engine.

3. She had adjusted the heating controls.

4. The car was parked on a pubic highway not off the highway as was the case in *Ford* and *Toews*, *supra*.

5. She had decided to go home.

6. Unlike *Ford* and *Toews*, *supra*, she made no specific arrangements to be driven home. Although she was waiting for a cab to come by, she had not actually called one.

7. She had changed her plans just moments earlier by deciding not to go for pizza.

[23] I also refer to the recent decision of the New Brunswick Court of Appeal in *Mallery v. R.*, 2008 NBCA 18. In that case, the accused had been drinking in a bar and was informed that the lights on his vehicle were on. He went out to shut off the lights and started the truck in order to check the battery. While he was returning to the bar after turning off the engine, he was charged with having care and control of the motor vehicle. The trial judge accepted the accused's account of the events leading to his arrest, including his assertion that he had made

arrangements for a drive home. He had only been in the truck for a "brief moment," according to the trial judge, and there was no suggestion that he knew the police were watching him. The trial judge accepted that there was no intention to exercise care and control, and found that the Crown had failed to show how Mallery's conduct created a risk of danger to the public. The summary conviction appeal court overturned the trial judge's decision and ordered a new trial.

[24] Robertson J.A., for the court, provided an extensive analysis of the question of whether "danger" is an essential element of "care and control." He reviewed several decisions of the Supreme Court of Canada – including *R. v. Saunders*, [1967] S.C.R. 284; *R. v. Toews*, [1985] 2 S.C.R. 119; *R. v. Whyte*, [1988] 2 S.C.R. 3 and *R. v. Penno*, [1990] 2 S.C.R. 865 – and concluded that the Supreme Court had left it ambiguous whether danger was a necessary element. He went on to consider subsequent appeal court decisions, commenting:

> [31] ... In the years following *Toews, Whyte* and *Penno*, no less than four provincial courts of appeal have adopted the position that an inquiry as to "risk of danger" is an essential element of the analytical framework for deciding care or control cases, save in one instance. In cases where the accused is unable to rebut the statutory presumption with respect to the intention to drive, the accused is deemed to have had care or control and, therefore, there is no need to undertake a danger inquiry. Danger is presumed. Subject to that exception, none of the courts found the Supreme Court jurisprudence an impediment to concluding that a finding of danger is an essential element of the offence. The first in time was the

> decision of the Ontario Court of Appeal in *R. v. Wren* 2000 CanLII 5674 (ON C.A.), (2000), 47 O.R. (3d) 544 (C.A.), [2000] O.J. No. 756 (QL), para. 25, leave to appeal refused, [2000] S.C.C.A. No. 235 (QL). That decision represents a direct challenge to *Saunders* as the accused in *Wren* was found sitting in the driver's seat, inebriated. The car was immoveable and inoperable because of the damage sustained after it slammed into a ditch. The accused was acquitted of the offence, having rebutted the presumption that he intended to drive and there being no risk of danger to the public....

[25] Other decisions in which danger was regarded as an essential element were *R. v. Decker* (2002), 209 Nfld. & P.E.I.R. 44 (NL. C.A.); *R. v. Burbella* (2002), 166 Man. R. (2d) 199 (Man. C.A.); and *R. v. Shuparski* (2003), 232 Sask. R. 1 (Sask. C.A.). There were also several pre-*Wren* decisions supporting the view that danger was not an essential element, including *Lockerby*, *supra*. Finally, Robertson J.A. considered two New Brunswick decisions referred to as the "sleeping-it-off cases": *R. v. Diotte* (1991), 115 N.B.R. (2d) 195 (C.A.) and *R. v. Clarke* (1997), 188 N.B.R. (2d) 123 (C.A.) (paras. 33-45). On a review of the caselaw and the policy considerations underlying the *Criminal Code*, Robertson J.A. reasoned as follows:

> [46] ... If danger is not already an essential element of the offence, it should be, with one exception. In cases where the Crown invokes the statutory presumption and the accused is unable to rebut it, the accused is deemed to have care or control of the vehicle pursuant to s.258(1)(a) of the *Criminal Code*. Hence, there is no need to embark on a danger inquiry. This leads us to identify valid policy reasons for accepting that danger is otherwise an essential element of the offence. I begin with the proposition that such an element is consistent with the purpose and objectives of the legislation. The provisions of the *Criminal Code* dealing

> with impaired driving have as their immediate objective the elimination of harm to the public. Section 253 makes it an offence to operate a vehicle (drive) when one's ability to do so is impaired by alcohol or, if the vehicle is not in motion, to have care or control of it. This provision empowers police officers to detain and arrest those who pose an immediate or potential threat to public safety. Those caught driving while impaired represent the immediate threat. Those who have care or control represent a potential threat or risk of harm. The elimination of danger or risk of harm is central to the objectives of the legislation. Hence, one would assume that if a person's interaction with his or her vehicle did not pose an immediate or potential risk of harm or risk to public safety, a conviction under s.253 would not fall within the objectives of the legislation. In other words, courts should not be convicting those who do not represent this threat. Legally, it makes no sense to eliminate danger as an essential component of the offence and to insist that a conviction can rest on the extent of the accused's interaction with the vehicle's fittings or equipment (the "sufficient interaction" test). Intuitively, every lay person knows that someone sitting drunk behind the wheel of car, with the motor running, has care or control of the vehicle, but it falls to the legally trained to explain why in criminal law the concept of care or control involves more.

[26] Robertson J.A. suggested that "[t]o hold that neither the intent to drive nor the presence of danger is an essential element of the offence is to risk the criticism that the offence bears too close a resemblance to an absolute liability offence." While the *mens rea* continued to be present, nevertheless, "the notion that the accused cannot speak to his or her presence in a vehicle while in a state of inebriation is arguably inconsistent with fundamental principles of criminal law." Robertson J.A. took the view that the "sufficient-interaction test" – that is, starting the motor – "is not truly a test, but rather a declaration that anyone who is found drunk behind the wheel of their vehicle with the motor running is guilty of the offence...". This, he said, would lead to arbitrary results. There was "no juridical

reason" for the result to be different where the accused had started the vehicle rather than only placing the key in the ignition (paras. 47-50). He summarized:

> [52] Accepting that danger is an essential element of the offence of having care or control of a vehicle, it is still incumbent on this Court to apply the proper analytical framework to determine whether the trial judge erred in acquitting the appellant. My understanding of the law is as follows. In care or control cases, the ultimate task of the trial judge is to decide whether the Crown has met the burden of establishing beyond a reasonable doubt that the accused's interaction with his or her vehicle presented a danger or, as it is sometimes phrased, a "risk of danger" or a "risk to public safety". If the facts establish beyond a reasonable doubt a risk of the accused putting the vehicle in motion, either intentionally or unintentionally, or if the facts otherwise support a finding of danger (such as from parking one's car in the middle of a public thoroughfare), then care or control will have been established. Obviously, this is a general framework. While an intention to drive (to put the vehicle in motion) is not an essential element of the offence, if proven a conviction may follow. In that regard, the Crown has the option of invoking the presumption set out in s.258(1)(a) of the *Criminal Code*. If it is established that the accused occupied the driver's seat, the onus falls on the accused to show that, on a balance of probabilities, it was not for the purpose of setting the vehicle in motion. An accused who fails to rebut the presumption will be deemed to have had care or control of the vehicle and, subject to any other defences, a conviction will follow. Moreover, the failure to rebut the presumption has the legal effect of dispensing with the need to conduct a danger inquiry. If, however, the accused rebuts the presumption, the Crown is still entitled to establish "actual" care or control by proving that there was a risk of putting the vehicle in motion unintentionally or of posing in some other manner an immediate danger to public safety (see *Decker* and *Hannemann*). In applying this general framework, the trial judge must have regard to all of the surrounding circumstances leading up to the intervention, typically by the police. Above all else, it is impermissible for the trial judge to isolate certain facts and to deem those facts sufficient for purposes of establishing a risk to public safety. One final point. With respect to the "sleeping it off" cases, the "change-of-mind" and "firm-plan" arguments are sometimes advanced and considered when dealing with the question whether the statutory presumption has been rebutted (e.g., *Hannemann*). In other cases, the trial judge may deal with those arguments after first ruling that the accused rebutted the presumption of an intention to drive. Either way, the result should be the same.

[27] Robertson J.A. went on to state that the Crown had invoked the presumption, establishing that the appellant had occupied the driver's seat while his blood alcohol level exceeded the limit. In turn, the trial judge accepted the appellant's argument that he did not occupy the driver's seat for the purpose of setting the vehicle in motion, a conclusion that had not been challenged. Nor had the Crown argued that there was a risk of the appellant putting the vehicle in motion unintentionally, or that the surrounding circumstances were such that the accused's interaction with the vehicle posed a risk to public safety. There no facts to support these arguments, nor were there facts to suggest that there was a risk that the appellant would change his mind and decide to drive during the moment when the vehicle was running. As such, the trial judge's decision was restored (paras. 53-54).

[28] In the present case, Judge Buchan concluded that the respondent had no intention of driving the vehicle. In fact, he did not have the keys to the vehicle. Although the car key was found on the floor by the police, there is no evidence that respondent knew it was there. On the contrary, his evidence, which the trial judge accepted, was that he did not have a key. His brother had retained one key, and the respondent believed that the extra key was in his wallet, which he left at home.

While the trial judge did not resolve the factual issue, this was not necessary in view of her clear conclusion with respect to the respondent's state of knowledge: he did not know there was a key in the car.

[29] Although Judge Buchan did not say that she was satisfied on the balance of probabilities that the presumption had been rebutted, I am satisfied that the trial judge would be fully familiar with the test set out in s.258(1)(a). Although she did not address the issue of the relative danger of Mr. Thynne setting the car in motion, I am satisfied that there was sufficient evidence upon which she could find that there was no danger of his putting the car in motion, and that she was in a position to conclude that the Crown had failed to establish the offences beyond a reasonable doubt. As MacDonald A.C.J. did in *Hein*, I will enumerate reasons for this conclusion:

> 1. It is accepted that the respondent was in his own vehicle, in the driver's seat, and was parked on the street.
>
> 2. The respondent believed that he did not have a key. He entered the car through the driver's door, which was left unlocked. He believed that the spare key was at home in his wallet, and that his brother had the primary key. His brother's evidence was that he returned the primary key to the respondent the next day.

> 3. The respondent had a specific plan for getting home without his car. That plan fell through, and he resorted to lying down in his car for shelter, as he did not have the money to get home another way. The trial judge found that his "intention was to have a place to put his head, not to obtain the care and control of the vehicle."
>
> 4. The trial judge held that there was "no evidence of any course of conduct associated with the vehicle which would involve a risk of putting the vehicle into motion." He was "in a deep sleep and the keys, unbeknownst to him, were on the floor."

[30] It is particularly significant that the respondent did not know the key was in the car, and specifically believed that it was at home in his wallet. To find that he had care and control in these circumstances would effectively nullify the requirement for *mens rea***.**

[31] I am satisfied that the trial judge did not make any reversible error in concluding that the presumption of care and control was rebutted, and that the Crown had not established actual care and control.

[32] Accordingly, the appeal is dismissed.

J.