<u>IN THE SUPREME COURT OF NOVA SCOTIA</u>
Citation: ***R. v. Ellis***, 2008 NSSC 178

‘Date: 20080616
Docket: SK 285373
Registry: Halifax

Between:

John Floyd Ellis

Appellant

v.

Her Majesty the Queen

Respondent

Judge: The Honourable Justice Gregory M. Warner

Heard: May 22, 2008 at Kentville, Nova Scotia

Final Written Submissions: May 28, 2008

Counsel: **Christopher Manning**, for the Appellant
M. Ingrid Brodie, for the Respondent

By the Court:

The Issue

1. What is the minimum factual basis for finding care or control in “change of mind” situations, when the 258(1)(a) presumption is rebutted?

2. In ***R. v. Kim***, 2003 CarswellOnt 3825 (OSCJ) at ¶20, Thomas J. identified the three “risk of danger” situations when an impaired driver uses a vehicle for non-driving purposes as follows:

1. the vehicle will unintentionally be set in motion.

2. through negligence, a stationary or inoperable vehicle may endanger the individual or others. and,

3. the individual who has decided not to drive will change his or her mind.

3. With respect to the first category, the trial judge decided, in this case, that there was no risk of the vehicle being unintentionally set in motion (“negligible if at all”). Because of the factual matrix in this case, the second category is not relevant.

4. The only relevant category is the third. The trial judge determined that the appellant had discharged the onus of rebutting the presumption that he entered the vehicle for the purpose of setting it in motion. In the result, the only issue before this Court is whether the trial judge erred in determining, on the facts before the Court, that the Crown had proved beyond a reasonable doubt that the accused’s acts involving the use of the vehicle, its fittings or equipment, or his course of conduct associated with the vehicle, met the threshold factual element of risk that the accused may change his mind and set the vehicle in motion, thereby creating danger.

The Law

5. In ***R. v. Lockerby***, 1999 NSCA 122, the Nova Scotia Court of Appeal wrote:

> “13. 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. That 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 wanted to. In my view, when a person with more than the legal limit of alcohol in his or her blood has 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.
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> . . .
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> 15 Mr. Lockerby was at the controls of the vehicle and admitted using them. He had possession and superintendence of the vehicle; he was in charge of it. Although it was not his intention to set the vehicle in motion, he was in a position to make the vehicle do what he wanted and used the ignition key, the clutch and the gear shift to carry out his purpose. In both the everyday sense of the word and as the word is used in s. 253(b), Mr. Lockerby was in control of the vehicle. He had more than the legal limit of alcohol in his blood. That is the conduct which is criminal under s. 253(b) of the *Criminal Code*."

6. Lockerby has been interpreted by some as deciding that care or control is proven whenever an accused:

   a) is impaired;

   b) has the keys to the vehicle; and,

   c) has the present ability to make the vehicle respond to his or her wishes.

7. The Supreme Court of Canada has not addressed this issue since ***Lockerby***, but other Courts of Appeal have. They include:

   a) ***R. v. Wren***, 2000 CarswellOnt 685 (OCA);

   b) ***R. v. Decker*** 2002 NFCA 9;

   c) ***R. v. Burbella*** 2002 MBCA 106;

   d) ***R. v. Shuparski*** 2003 SKCA 22;

   e) ***R. v. Ogrodnick*** 2007 ABCA 161; and,

   f) ***R. v. Mallery*** 2008 NBCA 18.

8. In the latter decision, Robertson, J.A. provided a synopsis of the relevant pre- and post-***Lockerby*** case law. While pre-***Lockerby*** decisions were diverse in their conclusions, post-***Lockerby*** decisions have consistently required a higher level, or history, of interaction than described in ¶ 6 to find care or control.

9. I am not satisfied that ***Lockerby*** does stand for as minimal a fact scenario as some suggest. I note that the Supreme Court of Canada stated, in ***Toews***, ***Penno*** and ***Whyte***, that the offence

requires more than simply being impaired in the driver's seat with the present ability to set the vehicle in motion, that the subsequent appellate decisions are uniform in their conclusions that more is required, and that the Court wrote "assuming without deciding that risk of setting the vehicle in motion is an essential element of the offence".

10. This decision seeks to clarify the issue of risk assessment in care and control cases involving "change of mind" situations.

11. In ***R. v. Smith*** 2005 NSSC 191, I attempted, at ¶ 10 to 29, to demonstrate that the case law supports the following propositions:

> "17. In this event (that is, the presumption does not apply), the assumption of care or control involves proof of three elements: (a) acts involving the use of the vehicle, its fittings or equipment, or a course of conduct associated with the vehicle; (b) an element of risk of setting the vehicle in motion whether intentionally or unintentionally; and (c) an element of dangerousness arising from the risk of setting the vehicle in motion.
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> 25. A key element of the *actus reus* of the offence is an assessment of the risk that the vehicle may intentionally or unintentionally be put in motion. The risk assessment requires the court to look at all of the circumstances leading up to the time of discovery. While the actus reus related to the proof that the BAC exceeds 80 is confined to the "critical overlap period", the aspect of the actus reus related to the risk assessment makes relevant all acts and , as Jackson J.A. said, " all reasons, past and at the moment of discovery".
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> 26. The dictionary defines conjecture and speculation as "guesswork" or "an opinion or theory based on insufficient evidence". Risk assessment should not involve conjecture (***Shuparski***) or speculation (***Decker***). It may be speculation or conjecture to conclude that every driver whose BAC exceeds 80, might change his or her mind; however, it would be wrong to preclude a trial court from assessing the risk of a change of intention, on the facts of the individual case, especially where it is accepted that one effect of the consumption of alcohol is the impairment of judgment. In both ***Shuparski*** and ***Decker***, the courts did make an assessment of whether there existed a risk that the accused might change his mind, and, in each instance, did so based on events that preceded the "critical overlap period".
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> . . .
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> 28. As noted by Jackson, J.A., in ***Shuparski*** at paragraph 85, the first of the three elements of the *actus reus* have the function of narrowing the reach of the offence of care or control, but this is done without detracting from the underlying reason for the care or control offences, which Cameron, J.A., in ***Decker***, at paragraph 22, properly described as the protection of persons and property from danger, by the assessment of risk of danger.
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> 29. **While I agree with the view that mere presence in a vehicle by [sic, of] an impaired driver is not, in and of itself, sufficient to satisfy the requirement for care or control, each trial court is required to assess the sequence of events that led up to the time of discovery, and the circumstances existing at the time of discovery, to assess the risk that the driver**

may, while impaired or with a BAC over 80, set the vehicle in motion and thereby cause danger." (emphasis added)

12. In ***Mallery***, Robertson, J.A. conducts a thorough analysis of the case law and policy reason behind the interpretation by Courts of Appeal of the meaning of the Supreme Court of Canada's decisions in ***R. v. Saunders*, [1967] 1 SCR 231, *R. v. Ford*** [1982] 1 SCR 231, ***R. v. Toews*** [1985] 2 SCR 119, ***R. v. Penno*** [1990] 2 SCR 865, and ***R. v. Whyte*** [1988] 2 SCR 3.

13. In ***Toews***, the Supreme Court dismissed an appeal from BCCA's decision to overturn a conviction of a person sleeping in a vehicle with a key in the ignition and the stereo playing. The court wrote: "It has not been shown then that the respondent performed any acts of care or control. . .".

14. The appellate decisions listed in ¶ 7, and a few summary conviction appeal court decisions such as ***R. v. Hannemann*** 2001 CarswellOnt 1538 (Hill J.) reviewed in ***Mallery,*** are, I believe, the relevant post- ***Lockerby*** appellate decisions.

15. Of the post-***Lockerby*** appellate decisions, only ***Ogrodnick*** does <u>not</u> specifically state that the factual situation of an impaired driver with keys and a present ability to make a vehicle respond to his/her wishes, without more - that is, in the absence of a greater interaction with the vehicle, or alternatively history of interaction with the vehicle, is insufficient to meet the minimal threshold for care or control. (In ***Ogrodnick***, the Court of Appeal reversed the summary conviction appeal court for two reasons: (1) the trial judge's conclusion, that the presumption in s.258(1)(a) was not rebutted, was reasonable, and (2) "the intent to set a vehicle in motion is not an essential element of de facto care or control . . . While the Crown has to show involvement with the motor vehicle that could create a risk, such risk may arise in many combinations of an alcohol influenced individual and a motor vehicle. . . The ultimate question is a factual one for a trial judge to decide,. . .".)

16. The other post-***Lockerby*** appellate decisions state that mere presence of an impaired driver in the driver's seat, with the present ability to change his or her mind and set the vehicle in motion, is not enough. A review of all the background circumstances to give context to the assessment of risk is a prerequisite; to speculate or conjecture that all impaired drivers could change their mind is not enough. <u>The case-specific background must provide the reasons for a finding of care or control</u>.

17. The most recent decision (***Mallery***) is consistent with the reasoning of the others. Its major principles are:

- "If danger is not already an essential element of the offence, it should be, with one exception [where presumption is not rebutted]" ¶ 46.

- "It seems draconian in the age of the Charter to hold that a person may be convicted of having care or control of a vehicle while impaired, even though the accused had no intention of putting

the vehicle in motion and the facts do not otherwise support a finding of risk to public safety.” ¶ 47.

- “There is no purpose to invoking the statutory presumption and asking the accused to establish that he or she had no intention of driving if all that the law requires is proof of three simple facts: the accused was inebriated, the accused was found sitting behind the wheel, and the motor was running” ¶48.

- “what constitutes sufficient interaction for the purposes of establishing guilt? If one reviews the jurisprudence, there is only one obvious answer: when the accused starts the motor. . . .[it is not sufficient to put the key in ignition and operate a stereo (***Toews***), or use a taxi radio to report an accident (***Whyte*** respecting ***Appleby***)]. . . Nor has anyone attempted to explain why the law should not look into all of the circumstances leading up to the accused’s arrest before deciding whether care or control has been established.” ¶ 49.

The Evidence

18. The facts are not complicated.

19. A 911 dispatcher testified that she received a call at 5:05 p.m. on January 20, 2007 from the Appellant. A brief part of the call - much of which was not decipherable, was recorded (before the dispatcher transferred the call to a non-911 line). She assumed from his slurred speech that he had been drinking. He said that he did not want to drink and drive. She asked him if his car was turned on and he replied no. She agreed with defence counsel’s statement: “You had a conversation where he agreed with you that he didn’t want to do anything. He wanted help to come and get him.”

20. Two Kentville police officers attended the scene as a result of contact from 911.

21. Constable MacDonald testified that he received two calls from 911. ***Constable MacDonald’s evidence as to the contents of the calls were admitted as part of the narrative only and not for the truth of their contents.*** The first was to the effect that the Appellant was sitting in a white Neon behind the community college and did not know where he was. The officer stated that the accused made a second 911 call to say that he had asked and was on Richard Street, a dead end cul-de-sac.

22. Constable MacDonald arrived where the vehicle was parked at the end of the cul-de-sac on Richard Street at 5:15 p.m. The appellant got out of the driver’s door as the officer arrived, but was directed (for officer safety) to get back in. No one else was in the vehicle. The Constable asked for the keys because the accused appeared to be very intoxicated. The Appellant said they were in his pocket and handed them over to the second officer. He was arrested by the second officer (Corporal Reade) at 5:17 p.m. At 5:23 p.m. the appellant was turned over to the RCMP for a breathalyzer test.

23. At that time, the weather was chilly and there was some snow on the ground. When the driver's door was opened, there was no evidence of heat emanating from the vehicle. There was no evidence that the vehicle or its fittings or equipment had been used in any way. This included the motor, windshield wipers, radio, headlights or heater. The vehicle was properly parked at the end of the sul-de-sac. There was no evidence that the vehicle had been moved, or when or how the vehicle came to be where it was parked.

24. There was no evidence as to how the appellant came to be in the vehicle, where he can from or where he might be going, or of any of his activities before the 911 call. His address was not in evidence.

25. Corporal Reade testified that the occupier of the residence at the end of the driveway where the vehicle was parked came out and "confronted" the officers in the driveway and asked them why they were taking the appellant away and stated that he had done nothing wrong.

26. The appellant's breathalyzer readings taken at 7:11 and 7:33 p.m. read 190 and 180 respectively.

Trial Decision

27. The learned trial judge found, based on the 911 tape and other evidence to the effect that the accused wanted help to come get him and did not want to drive, that the presumption of care or control had been rebutted.

28. The trial judge cited ***Ford***, ***Toews***, ***Lockerby*** and ***R. v. Hein*** (1999) 180 NSR (2d) 81. She reviewed and applied ***Hein*** and ***Lockerby***, and concluded, beyond a reasonable doubt, that the accused had care or control. She stated:

> "He was the person who was seated behind the wheel. He was the person when asked to pass over the keys, retrieved the keys from his front right-hand pocket. There was no one else with him in that vehicle. There was no one else there with him who would be in a position to drive. And although he made the call to the effect that he did not want to drive, although he made that call, there was a real risk that, for example, rather than wait for help to come that he might change his mind and decide to drive wherever it was he wanted to drive."

Standard of Review

29. By reason of Section 822(1) of the *Criminal Code* respecting Summary Conviction appeals, section 686(1)(a), respecting powers of the Court of Appeal, applies to this appeal.

30. Two recent decisions of the Nova Scotia Court of Appeal discuss the standard of review.

31. In ***R. v. Taylor*** 2008 NSCA 5, ¶s 35 to 39, Saunders J.A. writes:

> [35] Appeals restricted to questions of law alone generally engage a standard of correctness. **Housen v. Nikolaisen**, [2002] 2 S.C.R. 235.
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> [36] The interpretation of a legal standard has always been considered a question of law. The application of a legal standard to the facts, while a question of law for jurisdictional purposes, is treated as a mixed question of law and fact for standard of review purposes. **R. v. Araujo et al** (2000), 149 C.C.C. (3d) 449 (S.C.C.); **R. v. Oickle**, [2000] 2 S.C.R. 3, at ¶ 22; and **R. v. Grouse**, [2004] N.S.J. 346, at ¶ 32-44 (C.A.).
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> [37] A question of mixed fact and law may, upon further reflection, constitute a pure error of law subject to the correctness standard. **Canada (Director of Investigation and Research) v. Southam Inc.**, [1997] 1 S.C.R. 748, 144 D.L.R. (4th) 1; **Housen**, supra.
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> [38] Legal conclusions based on factual conjecture, possibility, or speculation on important matters where there is a complete absence of evidence on the record, will constitute a misapplication of the law requiring appellate intervention. See for example **R. v. Torrie,** [1967] 3 C.C.C. 303 (Ont. C.A.); **R. v. Coote**, [1970] 3 C.C.C. 248 (Sask C.A.); and **R. v. Leblanc**, [1981] 64 C.C.C. (2d) 31 (N.B.C.A.).
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> [39] As noted by Chipman, J.A. in **R. v. White** (1994), 89 C.C.C. (3d) 336 at 351:
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>> These cases establish that there is a distinction between conjecture and speculation on the one hand and rational conclusions from the whole of the evidence on the other. The failure to observe the distinction involves an error on a question of law. This court is, therefore, empowered and obliged to intervene when such error has occurred.

32. In ***R. v. Abourached***, 2007 NSCA 109, at ¶ 24 to 29, Fichaud, J.A. reviewed the decision of the Supreme Court of Canada in ***R. v. Beaudry*** [2007] 1 S.C.R. 190 in respect of an allegation that a verdict was unreasonable. The Court concluded that it was the Appellant Court's role to determine whether the findings essential to the decision are demonstrably incompatible with evidence that is neither contradicted by other evidence nor rejected by the trial judge.

Analysis

33. The lack of evidence of any interaction or history of interaction by the appellant with the vehicle, except that he was seated alone and impaired, in the driver's seat of his vehicle, with the present ability to interact with the vehicle, is significant. As a matter of common sense, any impaired person with the keys to a vehicle, regardless of his or her intention, is at risk of changing his or her mind about driving, and thereby causing danger. The consumption of alcohol is itself an ingredient of the offence.

34. The Supreme Court has stated that this risk is not enough. While there is no exhaustive list of acts (***Toews*** ¶ 9), and each case depends on its own facts and circumstances, the Court in ***Toews***, for example, held that keys in the ignition and the radio on, were not enough in that case to establish care or control.

35. In ***R. v. Whyte*** [1988] 2 SCR 3, at ¶ 34, Dickson C.J.C. cited ***Appleby*** as demonstrating that occupying the driver's seat of a taxi to use the radio was insufficient. At ¶ 47 he continued:

> "Parliament wished to discourage intoxicated people from even placing themselves in a position where they could set a vehicle in motion, while at the same time providing a way for a person to avoid liability when there was a reason for entering the vehicle other than to set it in motion. The position adopted is admittedly a compromise. It is an attempt to balance the dangers posed by a person whose abilities to reason are impaired by alcohol with the desire to avoid absolute liability offences."

And at ¶ 49:

> "On the one hand, the Crown need only prove a minimal level of intent on account of the fact that consumption of alcohol is itself an ingredient of the offence. On the other hand, where an accused can show that he or she had some reason for entering the vehicle and occupying the driver's seat other than to drive the vehicle, the accused will escape conviction."

36. This quotation underlies the conclusion in ***Mallery*** that there would be no purpose to invoking the presumption and asking the accused to establish that he or she had no intention to drive, if all that the law requires is proof that the accused was impaired, in the driver's seat, with the motor running (or with the keys and ability to set the vehicle in motion).

37. In the case at bar there was no evidence that the appellant, at the time of the 911 call or his involvement with the police or at any prior time, carried out any acts involving the use of the vehicle, its fittings or equipment, or any course of conduct associated with the vehicle, from which one could find a risk that he may change his mind. His only act was to call 911 to state that he did not want to drive and to ask for help.

38. There was no factual basis upon which the trial judge could find existence of a real risk that the appellant may change his mind, other than the general assumption that any impaired person (*ipso facto*, a person lacking in good judgment) with the present ability to put the vehicle in motion could do so. This general assumption does not conform to my understanding, from ***Toews***, ***Whyte***, and the appellate decisions since 1999, of the minimal factual matrix necessary to find care or control in "change of mind" situations. The learned trial judge made no other factual finding that could support a finding of care or control. There were no other admissible facts or circumstances upon which the trial judge could have found that an element of risk of the appellant putting the vehicle in motion, and thereby a risk of danger, existed. On the contrary, the evidence showed that the appellant - an impaired person with the present ability to put the vehicle in motion, did what one would hope such a person would do - not interact with the vehicle, call 911, and ask for help.

39. If all it takes for conviction is an impaired driver in the driver's seat with the present ability to engage the vehicle, then the presumption in 258(1)(a) is superfluous. This would not accord with the normal rules of statutory interpretation. Said differently, the presumption becomes an irrefutable fact, if this minimal factual matrix is all that is required.

40. This case is unlike ***Smith***, where the trial judge found several factors (nine are summarized in ¶ 32) supporting the conclusion that the risk of the accused changing his mind about driving and creating danger, was real and substantial. It is unlike ***Hein***, where the evidence contained at least seven factors (summarized in ¶ 16) that supported the overwhelming conclusion that the risk of the accused changing her mind and deciding to drive was a real and substantial danger.

41. The evidence (which was admissible for its truth) before the trial court was not capable of supporting the conclusion of a real risk of the appellant changing his mind and setting the vehicle in motion.

42. To the extent that the error in this case is the interpretation of a legal standard, or an error in the application of the legal standard to the facts, or basing a legal conclusion on conjecture (an absence of evidence on the record necessary to support a conviction), ***Housen v. Nikolaisen*** applies. Alternatively, to the extent that the conviction at trial rested on a finding of fact that is demonstrably incompatible with uncontradicted evidence that was not rejected by the trial judge, the verdict is unreasonable per ***Beaudry***.

43. While in my view the error was in respect of the application of the legal standard to the facts; that is, basing the risk of danger on speculation or conjecture that the accused could change his mind (per ***Housen***), my conclusion is, in the alternative, supportable on the basis that findings of fact essential to a conviction are incompatible with the only evidence, which evidence involved no issue of credibility and no contradicted evidence (per ***Beaudry***).

44. The appeal is allowed, and a verdict of acquittal entered.

J.