

Citation: *R. v. Andre*, 2022 YKTC 9

Date: 20220308  
Docket: 19-00144  
Registry: Whitehorse

**IN THE TERRITORIAL COURT OF YUKON**  
Before His Honour Judge Chisholm

REGINA

v.

ANTHONY ANDRE

Appearances:  
Leo Lane  
Malcolm Campbell

Counsel for the Crown  
Counsel for the Defence

**REASONS FOR JUDGMENT**

[1] CHISHOLM T.C.J. (Oral): Mr. Anthony Andre is charged with three *Criminal Code* (the “Code”) offences, namely, two counts of driving a conveyance with a blood alcohol level exceeding the legal limit causing death (s. 320.14(3)), and one count of driving a conveyance with a blood alcohol level exceeding the legal limit causing bodily harm (s. 320.14(2)).

[2] Mr. Andre has admitted that on May 13, 2019, he was operating a conveyance while his blood alcohol level exceeded the legal limit.

[3] Additionally, Mr. Andre has admitted that, as a result of his vehicle leaving the roadway, it collided with a light standard, resulting in the death of two passengers and bodily harm to a third passenger. However, he disputes that he caused this collision.

[4] The Crown led evidence from six witnesses. Additionally, exhibits at the trial included a report from T. Ames, a forensic toxicology reporting scientist, and, a warned statement, the voluntariness of which was not contested, taken from Mr. Andre. One witness testified for the defence.

### **Summary of the Relevant Facts**

[5] The Crown and defence filed an Agreed Statement of Facts:

1. On the morning of May 13, 2019, Anthony Andre was driving a Subaru sedan southbound on a divided section of Hamilton Boulevard in Whitehorse, Yukon.
2. There were four passengers in the vehicle: Faith Papineau, Stallion Smarch, Jay Charlie and Laurence Patterson-Smith.
3. At approximately 6:26 a.m., the Subaru went off the roadway into the median strip and collided with a light standard before coming to rest on the far edge of the northbound lane.
4. Ms. Papineau and Mr. Smarch were killed in the collision.
5. Mr. Charlie suffered two lacerations (4 cm and 5 cm) of his liver without evidence of vascular injury, fractures to his right radius and ulna (forearm bones), and fractures to his right first and fifth metacarpals (hand bones). He underwent orthopedic surgery for the forearm injuries at Vancouver General Hospital on May 18, 2019.
6. The defence admits Jay Charlie's injuries amount to bodily harm for the purposes of Section 320.14(2) of the *Criminal Code*.
7. Mr. Andre's blood alcohol concentration at the time of the collision was not less than 160 milligrams of alcohol in 100 millilitres of blood.

8. At 11:00 pm on May 13, 2019, Anthony Andre gave an audio and video recorded statement to Constable Michael Wiltse at the Whitehorse RCMP detachment. The defence admits that the statement was voluntary.

[6] Additionally, the parties made the following admissions as to the location of the passengers in the vehicle driven by Mr. Andre when Emergency Medical Services (“EMS”) arrived at the scene of the accident.

- The person in the front passenger seat with a broken arm was Jay Charlie;
- The person between the two seats, whose torso was mostly in the front of the vehicle, was the deceased Faith Papineau;
- The deceased male in the right rear passenger seat was Stallion Smarch, who was lying in the lap of Mr. Andre;
- The individual who was no longer in the vehicle was Laurence Patterson-Smith.

*Brady Bonnycastle*

[7] Mr. Brady Bonnycastle is a Whitehorse resident. He testified that on the day in question, he departed his home in the early morning hours to attend work. He travelled down Falcon Drive and ultimately turned right onto Hamilton Boulevard. Before doing so, he observed a vehicle driving from left to right on Hamilton Boulevard. After turning onto the boulevard, Mr. Bonnycastle travelled in the same direction as this vehicle. He testified that he was approximately three to four car lengths behind it. He did not

observe anything unusual in the way this car was being driven, and estimated that it was travelling between 60 and 70 kilometres per hour.

[8] In his testimony, Mr. Bonnycastle described the vehicle he was following leave the roadway suddenly just before a big gradual bend to the left in the roadway. The vehicle went off the road on the left side. Although he was not paying complete attention to the vehicle, he believed that it left the roadway without the brakes being activated. He described the vehicle making a sharp, sudden movement to the left. When it left the roadway, it struck a street light causing a large cloud of dust. When the dust settled, the vehicle was on the roadway on the other side of the median, having come to rest pointed in the opposite direction to which it had been travelling.

[9] Mr. Bonnycastle stopped his vehicle in order to assist. As he approached the vehicle, he noted that the driver had already exited it. The driver advised him that he was alright. Mr. Bonnycastle then noted another passenger in the vehicle. He called 911 and awaited the arrival of EMS. The passenger exited the rear driver's side door. He stated, "I don't want to go on anymore; this is too much". When this passenger had exited the vehicle, the person who he understood to have been the driver, got into the back seat just vacated, and was holding onto the female passenger, apparently trying to comfort her.

*Rian Buchanan*

[10] Mr. Rian Buchanan had been working as a paramedic for approximately nine years when he attended a single motor vehicle accident on May 13, 2019. When he

arrived on scene, he noted that firefighters were already present. Mr. Buchanan did triage and assessed the patients in the vehicle.

[11] Mr. Buchanan testified that he observed two males in the back seat. The driver's side back door of the vehicle was open. One male was holding onto a deceased male, who was lying across the back seat, and rocking back and forth. He appeared very agitated, and he stated repeatedly, "I killed them".

*Duncan MacRae*

[12] Mr. Duncan MacRae, a paramedic, was dispatched to a motor vehicle accident on Hamilton Boulevard on the morning in question. He was in the second ambulance to be sent to the scene. He testified that upon arrival, he noted firefighters working on a vehicle that was on the opposite side of the road against the guardrail. After approaching the vehicle, he observed the individuals inside the vehicle, including two who were deceased.

[13] Mr. MacRae noted that there was no one in the driver's seat. He spoke to a male who was seated in the driver's side rear seat. The individual indicated that he was uninjured. He admitted that he was the driver of the vehicle and stated that he had just killed two people, or words to that effect. He indicated that he had exited the driver's seat and sat in the driver's side rear seat. Mr. MacRae described the male as very upset and difficult to calm down and console. He noted a smell of alcohol in the vehicle, and testified that the male admitted to having consumed alcohol.

*Laurence Patterson-Smith*

[14] Mr. Laurence Patterson-Smith testified that he was 21 years old and a resident of Haines Junction. At the time of this incident, he was living in downtown Whitehorse.

[15] On the evening of May 12, and the early morning hours of May 13, 2019, Mr. Patterson-Smith was at home with his spouse and young child. He was drinking a mickey of hard liquor with his spouse while watching movies. His spouse went to bed at approximately 2:00 a.m. He decided to go for a walk and met up with Stallion Smarch and Faith Papineau on 3<sup>rd</sup> Avenue. He described himself as a good friend of Mr. Smarch. He had never met Ms. Papineau previously. He joined them in drinking a bottle of vodka. They then decided to walk to a nearby convenience store. On the way, they ran into Mr. Andre and Jay Charlie who were parked in a car in a parking lot. Mr. Patterson-Smith knew Mr. Andre from seeing him in social settings, and was friends with Mr. Charlie. On this occasion, he described Mr. Charlie as being drunk. He testified that Mr. Andre, who was in the driver's seat, seemed alright in terms of his sobriety.

[16] Eventually, Mr. Patterson-Smith, Mr. Smarch and Ms. Papineau got in the vehicle driven by Mr. Andre. They ended up at a gas bar on the Alaska highway where they fueled the vehicle. Mr. Patterson-Smith, who described himself as drunk, testified that he did not pay much attention to Mr. Andre's driving except to tell him that he was driving too fast. He recalled them pulling off the Alaska highway at some point before continuing on to where the accident occurred. Although he testified that he did not fall asleep, he does not remember the part of the drive leading to the accident. He

described “coming to” after the crash, and being in shock. He believed that he had been knocked out as a result of the crash.

[17] In a statement to police, Mr. Patterson-Smith stated that he had been asleep at the time of the car accident, and later told police that he started passing out after they refueled. In his testimony, he agreed that he may have been “blacking in and out” leading up to the accident.

[18] In cross-examination, Mr. Patterson-Smith agreed that he asked Mr. Andre on a number of occasions if he could drive the vehicle, and each time, Mr. Andre declined his offer. He denied, however, ever interfering with Mr. Andre’s driving. Specifically, he denied that he caused the accident by grabbing Mr. Andre by the head and pushing it against the driver’s side window.

*Cst. Joshua Savill*

[19] At 6:27 a.m. on May 13, 2019, Cst. Savill was dispatched to a motor vehicle accident on Hamilton Boulevard. He arrived at this location in less than 10 minutes. The WatchGuard video system in his police vehicle was operational and recorded the scene of the accident. Cst. Savill testified that he interacted with Mr. Patterson-Smith at the scene. Mr. Patterson-Smith had alcohol on his breath, but was steady on his feet. He did not appear to be angry or aggressive, nor did he appear to be injured.

[20] Cst. Savill testified that he also interacted with Mr. Andre who was visibly upset. His emotional demeanour ranged from crying to angry outbursts. At one point, Mr. Andre punched the hood of his vehicle, while at another time, he asked Cst. Savill to

shoot him. Cst. Savill observed a smell of alcohol on his breath, but also that he was relatively steady on his feet. Based on the totality of his observations, Cst. Savill formed the opinion that Mr. Andre's ability to operate a motor vehicle was impaired by alcohol. He arrested him for the matters before the Court.

[21] Cst. Savill was concerned about Mr. Andre's medical state as he had just been in an accident and was covered in blood. Mr. Andre was taken to the hospital by ambulance. Cst. Savill attended the hospital with him. Once Mr. Andre was cleared medically, Cst. Savill accompanied him to the police detachment where he provided breath samples. He also testified that the police obtained a warrant to seize blood samples of Mr. Andre, as well as medical records, including laboratory results, from Whitehorse General Hospital.

*Tanya Ames*

[22] Having the consent of the defence, the Crown filed the *curriculum vitae* of Tanya Ames, a forensic toxicology reporting scientist. She has previously provided expert opinion evidence in a number of areas, including, the pharmacology of alcohol, as it relates to the effects of alcohol on the human body, and the effects of alcohol on the human body and the ability to safely operate a motor vehicle.

[23] The Crown also filed, on consent, a report of Ms. Ames, in relation to this incident, dated May 19, 2021. The defence took no issue with respect to her qualifications or with the content of her report.



[24] In her report, Ms. Ames explains that the consumption of alcohol results in a deterioration of “visual acuity, depth perception, glare recovery, and peripheral vision”. She also describes the consumption of alcohol negatively impacting gross and fine motor control, coordination, and the speed of a response in a changing environment. Additionally, the deterioration of driving functions caused by drivers impaired by alcohol results in them making driving errors. She explains that driving errors include having “difficulty negotiating turns and maintaining proper distances from other vehicles”.

[25] Ms. Ames explains that all individuals with a blood alcohol concentration in the range of 160 mg% are impaired in their ability to operate a motor vehicle.

*Cpl. Louis Allain*

[26] Cpl. Louis Allain was qualified to give expert opinion evidence in the field of motor vehicle collision analysis. At the time of his testimony, he was stationed with the RCMP in Kamloops, B.C. as a full-time accident reconstruction officer.

[27] On May 13, 2019, he attended the scene of the collision at 7:30 a.m. After his investigation, he produced a report with appendices, including his observations, analysis, and conclusions. This document became Exhibit 10 at trial.

[28] Cpl. Allain determined that as the vehicle in question proceeded southbound on Hamilton Boulevard, it left the roadway after entering a gentle curve. The vehicle went off the left side of the road surface and entered “an earthen median” containing light standards. The vehicle sideswiped a light standard, after which it continued into the northbound lane of travel. The vehicle came to rest against the northbound guardrail.

[29] Cpl. Allain testified that the weather was just above the freezing point. He found that the surface of the asphalt roadway was dry and in good condition. The vehicle left the road surface more than 33 metres north of a portion of roadway containing potholes filled with tar. Cpl. Allain determined that the sun would not have been in the driver's eyes. Additionally, he ruled out mechanical issues being the cause of the collision.

[30] Cpl. Allain determined that the vehicle "continued to drive in the ditch with the same path of travel" as when it left the roadway (Exhibit 10, p. 11). He also found "no evidence of significant steering input to bring the vehicle back on the roadway", nor any evidence that the driver of the vehicle "was attempting to brake" before leaving the roadway, or before striking a light standard (Exhibit 10, at pp. 11-12).

[31] Cpl. Allain concluded that the vehicle left the roadway surface for "an unknown reason". In cross-examination, he agreed that the incident would have happened quickly. He testified that he was only able to speak to what the vehicle did, as opposed to what occurred in the vehicle.

*Anthony Andre*

[32] Mr. Andre provided a video recorded warned statement to police on the evening of May 13, 2019. The interview and a transcript of the statement became Exhibits 8 and 9, respectively, at trial. In explaining what happened earlier that day, he stated, "...when we're going just down that corner, my car swayed, like the back end kinda like kicked out...". He explained that he was going the speed limit or just over, that "it just went black", he lost control, and his airbag deployed.

*Jay Charlie*

[33] In the early morning hours of May 13, 2019, Mr. Charlie was in a vehicle with Mr. Andre. They were parked in downtown Whitehorse when they ran into Mr. Smarch, Mr. Patterson-Smith, and a woman named Faith. Mr. Charlie testified that he was a good friend of Mr. Smarch, and that he knew Mr. Patterson-Smith.

[34] Mr. Andre, the operator of the vehicle, agreed to give these three individuals a drive, on the understanding that Mr. Smarch would pay for gas. Mr. Charlie was seated in the front passenger seat, while Mr. Smarch, Mr. Patterson-Smith, and Faith sat in the back seat. At some point, Faith moved to the front passenger seat and sat on Mr. Charlie's lap. Mr. Smarch was seated behind Mr. Charlie, while Mr. Patterson-Smith was seated behind Mr. Andre.

[35] Mr. Charlie testified that he was talking to Faith and listening to music. An argument occurred between Mr. Andre and Mr. Patterson-Smith, although he does not remember what the argument was about. He said that Mr. Patterson-Smith then pushed Mr. Andre's head against the driver's side door window. Within a couple of seconds of this action, the car accident occurred.

[36] Mr. Charlie suffered serious injuries as a result of the collision, which resulted in him being medevaced to, and treated in, Vancouver General Hospital.

[37] Mr. Charlie initially testified that the car crash occurred before the McIntyre subdivision, however, when he continued his testimony on a later date, he recalled that the accident occurring on the Alaska Highway.

## Issue

[38] The issue to be determined in this case is whether the Crown has proved beyond a reasonable doubt that Mr. Andre caused the accident that occurred on May 13, 2019.

## Analysis

[39] The relevant provisions of the *Code* with respect to this matter are:

320.14 (1) Everyone commits an offence who

...

- (b) subject to subsection (5), has, within two hours after ceasing to operate a conveyance, a blood alcohol concentration that is equal to or exceeds 80 mg of alcohol in 100 mL of blood;

...

(2) Everyone commits an offence who commits an offence under subsection (1) and who, while operating the conveyance, causes bodily harm to another person.

(3) Everyone commits an offence who commits an offence under subsection (1) and who, while operating the conveyance, causes the death of another person.

[40] As indicated, the defence admits that Mr. Andre's blood alcohol concentration was, at least, 160 mg%, or double the legal limit. However, the Crown must still prove beyond a reasonable doubt that Mr. Andre caused the crash that led to the deaths of Mr. Smarch and Ms. Papineau, and the bodily harm to Mr. Charlie.

[41] There is a substantial body of case law in this area decided under the former provisions of the *Code*, namely ss. 255(2.1) and 255(3.1). The language of those previous sections is very similar to ss. 320.14(2) and (3), in that a person who was

driving a motor vehicle with a blood alcohol concentration exceeding the legal limit, and who “cause[d] an accident” that resulted in “bodily harm” or “death” was guilty of an indictable offence.

[42] In considering the test for causation in the context of drinking and driving causing death or bodily harm, the Court in *R. v. Gentles*, 2016 BCCA 68, at para. 14, relied on the decision of the British Columbia Court of Appeal in *R. v. Andrew* (1994), 91 C.C.C. (3d) 97:

While it is true, having regard to the structure of s.253, that the focus is on the condition of the driver as distinguished from the manner of the driving, I am not persuaded that Parliament could have intended that a person guilty of an offence under that section should, in the absence of proof of any causal connection between that condition and the ensuing bodily harm or death, be convicted of the more serious offence. To do so would be to ignore the word "causes". Were it otherwise, Parliament could simply have prescribed, as it has in s. 255(1) for successive convictions for driving while impaired simpliciter, heavier penalties in the event that bodily injury or death ensues. But it has not. Instead, Parliament has created a separate and more serious offence, of which a person may be convicted if his infraction of s. 253 causes either bodily harm or death. Accordingly, I am satisfied that, so long as one bears in mind the distinction between a motorist driving in an impaired condition who is involved in an accident, and the motorist driving in an impaired condition whose impaired driving ability (as evidence by driving conduct, or failure to react or to make a certain judgment) comprises a contributing cause outside of the *de minimis* range to the victim's bodily harm or death, the *Smithers* test is appropriate to apply to the offences under s. 255(2) and (3): See *R. v. Power*, April 14, 1994, 23566 (S.C.C.) [since reported 89 C.C.C. (3d) 1, [1994] 1 S.C.R. 601, 29 C.R. (4th) 1].

[Emphasis added.]

[43] The Court in *R. v. Phan*, 2015 ONSC 2088, at para 69, discussed the causation requirement:

The law recognizes, and as this case demonstrates, events or consequences may have more than one cause. In *Smithers v. The Queen*, [1978] 1 S.C.R. 506, the Supreme Court held that liability may attach when it is proved that the accused is a *contributing* cause "beyond the *de minimis* range." The Court's decisions in *Nette* and *Maybin* favour the use of more straightforward language -- the Crown must prove that the accused was a "significant contributing cause" of the relevant consequence. This new formulation is meant to envelope both factual and legal causation: see *R. v. Talbot* (2007), 217 C.C.C. (3d) 415 (Ont. C.A.), at p. 437.

[44] In *R. v. McCluskey*, 2019 YKTC 10, the accused was charged with drinking and driving causing bodily harm offences. He admitted that his blood alcohol level was well above the legal limit. The vehicle he was driving left the roadway, crossed a median, and struck the vehicle in which the victims were located. A police officer described the roadway surface as having icy patches. The Court noted that there was no evidence that the accused's vehicle had come in contact with an icy patch on the road.

[45] At para. 44 and 45, Cozens J. stated:

44 On the evidence, I am satisfied that Mr. McCluskey's failure to maintain control of the vehicle he was driving is for reasons attributable to his actions or inactions, notwithstanding that I cannot point to any particular action or inaction that, in and of itself, can be shown to have been the reason for him to lose control.

45 Mr. McCluskey had a responsibility to maintain control of the vehicle and he failed to do so, thus causing the accident. I find that there was no other factor outside of his control that raises a reasonable doubt in this regard.

[46] In the case at bar, the Crown concedes that if I accept the evidence of Mr. Charlie, or if it raises a reasonable doubt regarding the issue of causation, the Crown will not have discharged its burden of proof beyond a reasonable doubt with respect to

the three charges that Mr. Andre faces. In other words, the Crown agrees that if the accident was unavoidable, it has not proved legal causation (see **Gentles**, at para. 8).

[47] The defence admits that there were issues with Mr. Charlie's evidence, but that he was, nonetheless, consistent as to the cause of the accident. The defence argues that this evidence should, at the very least, raise a reasonable doubt on the issue of causation.

[48] It is important to consider Mr. Charlie's evidence in some detail. He admitted in his testimony to drinking alcohol prior to the collision, including drinking vodka without mix at the house where he was staying. Although he described himself only as moderately intoxicated – which to him meant that despite his intoxication, he could still remember everything before the crash – his statement to police and evidence in court strongly indicate otherwise.

[49] Approximately three weeks after the incident, Mr. Charlie provided a statement to police. In that statement, he told police that he and Mr. Andre were driving around, and at about 6:00 a.m., they picked up Mr. Smarch, Mr. Patterson-Smith, and Faith in the Riverdale subdivision. Mr. Charlie agreed, at trial, that this statement was inaccurate, as they did not pick up their passengers in Riverdale.

[50] Mr. Charlie also stated to police that when they were in the Independent store parking lot, Mr. Smarch volunteered to put gas in the vehicle, and that they did so at Tags on 4<sup>th</sup> Avenue before travelling to Porter Creek and then returning to the downtown area. He also told police that they may have bought gas at Goody's as well. However, during his first day of testimony, he advised the Court that they had not

obtained gas at Tags, and that they only did so at Goody's in Porter Creek before returning to the downtown area. On his second day of testimony, some months later, he testified that they bought gas at Tags, and stayed in the downtown area before driving up South Access road.

[51] Mr. Charlie also provided inaccurate and confusing evidence as to where the collision occurred. In his first day of testimony, his evidence suggested that they drove up the South Access, and, although he could not remember the name of the road, continued on Hamilton Boulevard towards the Granger and McIntyre subdivisions. On his second day of testimony, he stated that the accident occurred on the Alaska Highway.

[52] Additionally, Mr. Charlie displayed confusion about other details. Initially, he testified that he did not recall when Faith moved to the front seat to sit on his lap. However, on his second day of testimony, he stated that she moved to the front seat after they turned onto the Alaska Highway. His testimony also changed regarding how she was seated. He initially said that her back was facing the passenger door, while on the second day of testimony, he described her facing forward with her feet in front of the seat.

[53] Finally, Mr. Charlie recalled Faith still seated on his lap after the accident. This evidence is contradicted by the first responders' evidence.

[54] As a result of numerous inconsistencies, I find that Mr. Charlie's evidence is wholly unreliable.



[55] I also find that the evidence of Mr. Patterson-Smith is not especially reliable, due to his level of intoxication.

[56] Mr. Bonnycastle, who was following the accused's vehicle, believed that it made a sudden move to the left before crashing; however, he admitted that he was not paying complete attention to the vehicle.

[57] Despite the unreliability of Mr. Charlie's evidence, the defence, nonetheless, contends that Mr. Charlie's evidence is corroborated to some extent by Mr. Patterson-Smith's agreement that he was arguing with Mr. Andre in the vehicle. The defence contends that Mr. Patterson-Smith's acknowledgement of a verbal argument with Mr. Andre, combined with Mr. Patterson-Smith's state of intoxication and lack of memory, as well as a recent criminal record for violence, should raise a reasonable doubt as to what occurred in the vehicle, and, as a result, the issue of causation.

[58] The difficulty with this argument is that the physical evidence at the scene of the crash is inconsistent with Mr. Andre being assaulted in a violent fashion by Mr. Patterson-Smith while driving. If he had been assaulted in this fashion, one would expect an abrupt movement of the steering wheel. The uncontradicted physical evidence reveals that the vehicle left the roadway in a gradual and uniform fashion. As viewed in Exhibit 10, diagram 3, tire mark T1, and as described by Cpl. Allain, the vehicle exited the road surface and entered the ditch almost in a straight line. Cpl. Allain testified that there was no physical evidence of a sudden movement or jerking of the steering wheel to the left. He testified that, had there been such a movement, tire mark T1 would not have run in almost a straight line.

[59] Cpl. Allain's evidence also clearly establishes that no mechanical issue, meteorological condition, road defect, or other external factor, caused the accused to lose control of his vehicle.

[60] Mr. Andre's statement to the police is also significant. When he spoke to the police more than 16 hours after the incident, he described losing control of the vehicle just before the crash. However, at no time did he indicate that a passenger had interfered with his driving by assaulting him.

[61] The evidence establishes that as Mr. Andre entered a gradual turn in the highway, he was unable to maintain control of his vehicle. He did not apply the brakes before colliding with a light standard. Even though I cannot pinpoint his action or inaction that precipitated this loss of control, I am satisfied that there was no external factor, outside of his control, that led to his leaving the roadway. I find that his elevated blood alcohol concentration negatively affected his driving ability, leading to him making a driving error, and resulting in him causing this accident.

[62] In conclusion, based on the evidence that I do accept, I find that causation has been proved beyond a reasonable doubt. Therefore, the Crown has proved each of the essential elements of these offences beyond a reasonable doubt.

[63] Accordingly, I find Mr. Andre guilty of the three offences before the Court.