COURT OF APPEAL FOR YUKON

Citation: *H.M.T.Q. v. Schmidt*,
2012 YKCA 12

Date: 20121109
Docket: YU696

Between:

HER MAJESTY THE QUEEN

RESPONDENT

And

MICHAEL PETER SCHMIDT

APPELLANT

Before: The Honourable Mr. Justice Groberman
The Honourable Mr. Justice Hinkson
The Honourable Mr. Justice Harris

On appeal from: Supreme Court of Yukon, November 14, 2011
(*H.M.T.Q. v. Schmidt*, Whitehorse Registry No. 10-01520)

Oral Reasons for Judgment

Counsel for the Appellant:	K. Hawkins
Counsel for the Respondent:	E. Marcoux
Place and Date of Hearing:	Whitehorse, Yukon November 5, 2012
Place and Date of Judgment:	Whitehorse, Yukon November 9, 2012

[1] **HINKSON J.A.:** The appellant, Michael Peter Schmidt was tried by a Justice of the Supreme Court of Yukon, sitting without a jury, on two counts each of impaired driving causing bodily harm contrary to s. 255(2) of the *Criminal Code* R.S.C., 1985, c. C-46, driving an automobile with a blood alcohol concentration exceeding 80 milligrams in 100 millilitres of blood, thereby causing bodily harm, contrary to s. 255(2.1) of the *Criminal Code*, and dangerous driving, contrary to s. 249(3) of the *Criminal Code.*

[2] The trial judge acquitted the appellant on both counts of driving an automobile with a blood alcohol concentration exceeding 80 milligrams in 100 millilitres of blood, thereby causing bodily harm, and both counts of dangerous driving, and convicted him on both counts of impaired driving causing bodily harm. His reasons for judgment are indexed at 2011 YKSC 82.

[3] The appellant appeals from the two convictions.

Background

[4] The appellant was the driver of a vehicle involved in a single vehicle accident on the Alaska Highway north of Whitehorse on December 14, 2009. There was no dispute that the accident resulted in bodily harm to the occupants of the vehicle, as the trial judge found that the appellant and his two passengers, Jessica Frotten and Michael Sanderson were all injured in the accident. Ms. Frotten was permanently paralyzed as a result of her injuries.

[5] The trial judge found that following an evening of drinking with friends on December 13, 2009, the appellant got up around 10 - 10:30 a.m. on December 14th and was provided with an Irish coffee by Mr. Sanderson. The trial judge found that the appellant took a long drink of the Irish coffee when it was offered, because he thought it was only coffee, and that according to the appellant, he drank only about one-quarter of the cup.

[6] Later the same day, the appellant and Mr. Sanderson met with Ms. Frotten for lunch at a restaurant. The time of the lunch is the subject of some controversy, but it was sometime between 1:30 and 3:30 p.m. During the lunch the appellant consumed a large hamburger and french fries, and two or three ten ounce glasses from a 60 ounce pitcher of beer. The three companions then proceeded to Ms. Frotten's place of employment, a brewery, where the appellant consumed two or perhaps three 2 ounce samples of beer.

[7] The three left the brewery and stopped at a gas station at 3:47 p.m., and then headed for Haines Junction with the appellant driving. The accident took place at sometime between 4:07 and 4:30 p.m.

[8] After the accident, the appellant flagged down a school bus driver, Charlie MacKenzie. Sometime later another driver, the police, and ambulance personnel arrived at the scene of the accident.

Discussion

a) The Charges of Driving an Automobile with a Blood Alcohol Concentration exceeding 80 milligrams in 100 millilitres of blood, thereby causing Bodily Harm

[9] The trial judge dismissed these charges, finding that he had a reasonable doubt about whether the appellant's blood alcohol concentration at the time of the accident exceeded the permitted limit.

b) The Charges of Dangerous Driving

[10] The trial judge referred to the decision of the Supreme Court of Canada in *R. v. Beatty*, 2008 SCC 5, in which the Court found that the objective test for dangerous driving requires "proof of a 'marked departure' from the standard of care that a reasonable person would observe in all the circumstances", and that the objective test must be modified "to give the accused the benefit of any reasonable

doubt about whether the reasonable person would have appreciated the risk or could and would have done something to avoid the danger."

[11] The trial judge recognized that in *Beatty*, the Court emphasized that it is the manner in which the vehicle is operated that must be considered, not the consequence of the driving. Recognizing as well, however, that it is unnecessary for the Crown to prove that the accused intended to create a danger on the highway in order to make out the charge, the trial judge found at para. 48 of his reasons that:

> In the case at bar, there is no evidence that Mr. Schmidt markedly or substantially departed from the conduct expected of a reasonably prudent driver. He had been speeding when the road was slippery, but I am not satisfied that this is a marked departure from the norm.

c) The Charges of Impaired Driving causing Bodily Harm

[12] For a charge of impaired driving causing bodily harm, the consequence of the accident; bodily harm is to be considered. The element of impairment in the charge, however, requires that the manner in which the vehicle is operated be considered, but not the consequence of the driving.

[13] In *R. v. Best*, 2012 ONCA 421, the Ontario Court of Appeal dismissed an appeal based on alleged inconsistent verdicts related to impaired driving offences commenting that:

> “Impaired driving and driving "over 80" are separate criminal offences. Operating a motor vehicle with a BAC over the legal limit is not an essential element of impaired driving. Accordingly, it is logically and legally possible for a jury to acquit on an "over 80" charge and convict on an impaired driving charge: see *R. v. Cunningham* (1999), 43 M.V.R. (3d) 39 (Ont. C.A.).”

[14] I agree with that reasoning, and based upon it, accept that the appellant’s acquittal on the four counts of which he was acquitted is not inconsistent with his conviction of the two counts of which he was convicted.

[15] In *R. v. Stellato*, [1993] O.J. No. 18, aff’d [1994] 2 S.C.R. 478, the Ontario Court of Appeal held that the offence of impaired driving is proved if the trial judge is satisfied that an accused’s ability to operate a motor vehicle was impaired by alcohol

or drugs to any degree ranging from slight to great. In order to make out the offence, it must be proven not simply that the accused has consumed alcohol, but also that such consumption impaired the accused's ability to operate a motor vehicle (*R. v. Andrews*, 1996 ABCA 23).

[16] The essence of the trial judge's reasoning with respect to the charges of impaired driving causing bodily harm in this case is found at para. 41 of his reasons for judgment:

> I have concluded, based on Mr. Schmidt's alcohol consumption, driving speed, and reaction to the icy road, that his ability to operate a motor vehicle was impaired at the time of the accident. He admitted that he was driving too fast and was 30 km in excess of the speed limit when he encountered a bad patch of road at the Drury Farm. Although he slowed down, he admitted his speed was 110-113 km per hour at the time of the accident. While the description of the accident in his statements to the RCMP suggested unseen bumps that suddenly put his vehicle sideways into the ditch, his evidence at trial was different, in that he testified that he had an opportunity to turn into the skid and accelerate as he drifted sideways. I find that Mr. Schmidt had full knowledge that the road was icy and rough in areas, but he continued to drive at an excessive speed and did not see the bumps that he says caused the accident. Cst. Flynn did not observe bumps or frost heaves at the scene of the accident. While Mr. Schmidt's demeanour did not display the usual effects of alcohol consumption in the observation some witnesses, I am satisfied that the circumstances of his drinking and speeding in the road conditions that he encountered, prove beyond a reasonable doubt that his ability to operate a motor vehicle was impaired by alcohol and that he caused bodily harm to Jessica Frotten and Michael Sanderson.

[17] In effect, the trial judge found that the Crown had made out both counts of impaired driving causing bodily harm for three reasons; alcohol consumption, driving speed, and the appellant's reaction to the road conditions.

[18] As I have already pointed out, the trial judge had a reasonable doubt about whether the appellant's blood alcohol level exceeded the legal limit at the time of the accident. As explained in *R. v. Campbell* (1991) 87 Nfld & PEIR 269 at 269-270, "It is not an offence to drive a motor vehicle after having consumed some alcohol as long as it has not impaired the ability to drive."

[19] The trial judge referred to the evidence of Cst. Hack that the appellant displayed some symptoms of impairment; an odor of alcohol on the appellant and the appellant's watery, glassy eyes. The odor of alcohol in and of itself is not an indicium of impairment, and the evidence of the driver who stopped at the scene of the accident was that the appellant was crying after she stopped her vehicle, providing an explanation for his watery, glassy eyes.

[20] The indicia reported by Cst. Hack were equivocal. Ms. Fratten and Mr. Sanderson, as well as the waitress who served them lunch and the employee at the brewery who observed the appellant there agreed that they observed nothing that caused them concern about the appellant's ability to drive. I infer from his comments at para. 41 with respect to these witnesses that the trial judge attributed the absence of what he expected to be the effects of alcohol on the appellant to his tolerance for alcohol. My inference does not explain how an inference of impairment could be drawn by the trial judge simply from the fact that the appellant had consumed alcohol, yet displayed no usual effects of that consumption. Consumption of alcohol in and of itself does not permit the inference that the consumer was impaired. In my opinion, it was unreasonable to infer impairment based upon the appellant's consumption of alcohol, and the trial judge erred in so doing.

[21] As for the appellant's speed prior to the accident, clearly he was driving in excess of the posted speed limit of 90 k.m.h. The question is whether his speeding permits an inference of impairment. Cst. Hack gave evidence that it is common for drivers to speed on Yukon highways, and the ambulance driver who attended the scene of the accident testified that she drove to the scene at speeds of up to 110 k.m.h. without having an accident.

[22] It is apparent that the appellant travelled for a considerable distance at speeds of up to 120 k.m.h. without incident prior to the accident. I am unable to accept that it is reasonable to find that the appellant's speed is indicative of impairment, and conclude that the trial judge erred in so finding.

[23] Insofar as the appellant's reaction to the icy road is concerned, the trial judge accepted that the appellant slowed when he encountered a bad patch of road at the Drury Farm, prior to the accident. In the result, it would appear that the appellant, although speeding reduced his speed when the road conditions changed. The trial judge recited the following portion of the appellant's statement to the police given on the morning after the accident:

> And it was, it was seemed slippery, and the those those bumps on the road I noticed them so I started slowing down, and it was just on a straight stretch. And I didn't see the bump or anything but it just put the car sideways. And we hit the ditch in like one second. And I was upside down in the car we rolled a few times. And, I released myself and then I ran around looking for them cause they weren't in the car. And Jess was there. I put a blanket or my jacket under her cause she was in the snow. And I asked Mike if he was okay, and then I went to flag down a school bus. And the, a few minutes later a truck came and we loaded them on. And Mike was in my lap and Jess was in the front screaming.

[24] The trial judge found that the appellant was a credible witness, who provided a more amplified and detailed of his explanation of the events leading to the accident at trial than he did the morning after the accident. He concluded that the appellant's "statement to the RCMP [was] the most reliable evidence of the accident, as it was made the morning after the accident and he was less defensive than he at times appeared to be in court."

[25] Nonetheless, the trial judge found in part, at para. 24 of his reasons for judgment that:

> Cst. [sic] Flynn, who visited the scene, did not observe any obstructions, potholes or frost heaves. This contrasts with Schmidt's statement at the accident scene and the next day to the RCMP and at trial. I find that there was no bump or frost heave of any significance at the scene of the accident. The photographs also do not reveal the frost heaves, but I rely on Cst. Flynn's evidence on that issue.

[26] The photographs of the scene were of little assistance in determining whether there were frost heaves. The trial judge said that he relied on the evidence of Sgt. Flynn for his conclusion.

[27] Sergeant Flynn was one of the RCMP members who attended the scene of the accident. He undertook the investigation of the scene and measured various landmarks around the scene of the accident. His evidence in chief respecting the presence or absence of bumps or frost heaves was as follows:

> Q What were the road conditions like in the area of kilometre 1466?
>
> A The road conditions appeared - - appeared normal at that time, My Lord. I didn't see any obstructions on the highway or any large potholes or cracks in the highway. It seemed like a normal stretch of the Alaska Highway to me.

[28] In cross-examination, his evidence was:

> Q Sergeant, you've indicated that you didn't notice anything about the road in terms of obstructions, cracks, potholes. Do you recall anything like frost heaves?
>
> A My Lord, I know from personal experience, there is quite a few frost heaves along the Alaska Highway during that stretch. I recall a slight downgrade just prior to the skid, but I don't recall a specific big frost heave.
>
> Q So there was a change in the surface, you way - - I'm sorry, what did you call it?
>
> A There was a slight downgrade from higher to lower elevation, a slight slope in the highway where I first observed the skid mark.
>
> Q Okay. Would that have created a dip? Like did it come up after that or did it - -
>
> A I wouldn't consider it a dip. It was very, very minimal. It wasn't a big drop. It was a slight downgrade.

[29] At its highest, Sgt. Flynn's evidence can only be taken to support that he did not observe bumps or frost heaves in the area of the accident. Uncontradicted, it could support the judge's finding at para. 24, but it was not uncontradicted.

[30] The appellant's evidence of frost heaves or bumps was corroborated and the evidence of Sgt. Flynn contradicted by two of his fellow members of the RCMP; Cst. Desaulniers and Cst. Larsen and by the school bus driver, Mr. MacKenzie.

[31] Constable Desaulniers described the area of the accident in his evidence in chief as follows:

Q Can you describe what the road conditions were like in that area?

A It was - - the road was slippery and there were frost heaves.

Q And did you make note of the condition of the road between the spot where you - - the occupants of the motor vehicle were found, where EMS and everybody was, and to the Takhini River Bridge?

A I recall driving slower because there was - - there were frost heaves, and also because I was - - it was quite slippery and I was looking for where the scene was.

[32] In cross examination, Cst. Desaulniers gave the following evidence:

Q And you've probably never been provided with a transcript [from the preliminary inquiry], but I'll refer you to page 38 of the volume marked Day 2, starting at line 43, cross-examination by Mr. Coffin.

Q Constable, you've indicated on a couple of occasions in your testimony about there being frost heaves. As I understand what you told us, that was either as you were getting to the scene or at the - - where it appeared that the vehicle had started to skid, or whatever happened to it, marks were seen?

You recall that question?

A Yes.

Q And you said:

A Yes.

And then you were asked:

Q Had there been frost heaves on the road prior to that time?

and your answer was:

A Yes, there was frost heaves when I was arriving.

Q Okay. When you were arriving at the area of the crash?

A Yes.

Q Had there been between that area and Whitehorse; do you recall?

And your answer:

A I don't recall.

Q So it may be that those were the first frost heaves on the road from Whitehorse?

And your answer was:

A It was possible.

Do you remember giving those - -

A I do recall.

Q Okay. And so that - - does that help your memory about the frost heaves that you noticed on that road out there?

A Can you clarify for me?

Q Well, you said earlier to my question that you didn't really recall where these frost heaves were, and having gone through the preliminary, does that help you recall?

A As to their exact locations, I would not be able to say. I know that they were interspersed throughout the road. If there was - - if there was some when I was arriving, I would have to go by what I said earlier, that there were some when I was arriving. I can't really recall at this point.

Q Okay. There would be no reason for you not to tell us the truth - -

A No.

[33] Cst. Larson's evidence with respect to frost heaves in the area of the accident was restricted to her impression from photographs that the trial judge found unhelpful, so her evidence is of little help. Her evidence was that she was unfamiliar with frost heaves, but from the photos, she considered that the area was not flat, and there appeared to be one significant dip adjacent to an open area on the photograph.

[34] Mr. MacKenzie gave evidence that he drove the stretch of road where the accident occurred four times a day. He said that the road conditions were good, but in the area where the appellant's car left the highway, there were a couple of long frost heaves, and other frost heaves on the road, just south of Drury's Farm.

[35] After careful consideration, I have reached the conclusion that the trial judge's finding that the appellant's reaction to the icy road showed that he was impaired is an unreasonable inference on the evidence before him, and the type of inference warned against in *Andrews*.

[36] I appreciate that the trial judge considered the three factors that he mentioned collectively. There may well be cases where individual factors alone could not support a finding of impairment, but when taken together, may. I do not consider that this is such a case, as even taken collectively, the factors here are insufficient to support such the finding of impairment.

[37] Had the trial judge resolved the conflict in the evidence before him concerning the presence or absence of frost heaves, to reach his conclusion that there were no frost heaves in the area of the accident, he may have had a basis for inferring that the appellant's reaction to the icy road showed that he was impaired, but as he failed to resolve the conflict it is impossible to determine if he applied the correct legal test for impairment, and for that reason the appellant's convictions for impaired driving causing bodily harm must be set aside, and a new trial ordered.

[38] **GROBERMAN J.A.:** I agree.

[39] **HARRIS J.A.:** I agree.

[40] **GROBERMAN J.A.:** The conviction is set aside and a new trial is ordered.

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The Honourable Mr. Justice Hinkson