

SUPREME COURT OF YUKON

Citation: *R. v. Schmidt*, 2011 YKSC 82

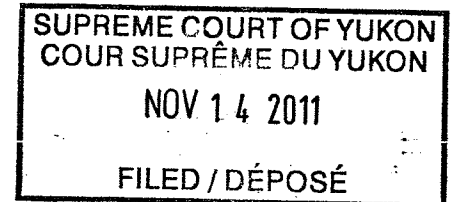
Date: 20111114
S.C. No. 10-01520
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

And

MICHAEL PETER SCHMIDT



Before: Mr. Justice R.S. Veale

Appearances:

Bonnie Macdonald
Gordon R. Coffin

Counsel for the Crown
Counsel for the accused

REASONS FOR JUDGMENT

INTRODUCTION

[1] This case is about a motor vehicle accident that permanently paralyzed Jessica Frotten. This case cannot change that catastrophic injury and its impact on a young woman's life.

[2] On December 14, 2009, Michael Schmidt was the driver in a single motor vehicle accident on the Alaska Highway near kilometre post 1466 north of Whitehorse. Jessica Frotten and Michael Sanderson were passengers. Michael Sanderson was also injured in the accident.

[3] Michael Schmidt is charged with impaired driving causing bodily harm and driving an automobile with a blood alcohol concentration exceeding 80 milligrams in 100 millilitres of blood, thereby causing bodily harm. There is no dispute that the accident resulted in bodily harm. The issues are whether Schmidt was impaired or over 80 mg/100 mL blood alcohol concentration and whether he is guilty of dangerous driving. The relevant *Criminal Code* sections are 249, 253 and 255.

[4] In the event that Mr. Schmidt is acquitted of driving while impaired or "over 80", the only charge remaining is dangerous driving. There are no included offences.

[5] There is a presumption in s. 258 of the *Criminal Code* that the result of a breathalyzer analysis taken within two hours of the alleged offence represents the blood alcohol concentration of the accused at the time of the offence.

[6] Since the two breath samples in this case were taken outside the two hours following the accident, the presumption does not apply and expert evidence has been heard to determine what Mr. Schmidt's blood alcohol content would have been at the time of the accident. The results of each of the two analyses indicated a blood alcohol concentration of 70 mg/100 mL.

THE FACTS

[7] Michael Schmidt is 30 years old, and was 28 at the time of the accident. On the evening of December 13, 2009, he was drinking with some friends, including Michael Sanderson. The group was at Schmidt's cabin on the Hot Springs Road outside of Whitehorse. Schmidt started drinking around 11 p.m. and had six beers before he went to bed around 3 a.m.

[8] Shortly after Schmidt got up around 10 – 10:30 a.m., Michael Sanderson brought him an Irish coffee. Schmidt took a long drink when it was offered because he thought it was only coffee. According to him, he drank about one-quarter of the cup.

[9] Sometime later that morning, Mr. Schmidt called Jessica Frotten, his girlfriend, and drove to her house with Sanderson. They discussed taking a road trip to Haines Junction. Schmidt did not drink any alcohol at Jessica's house, but Jessica made a drink for Sanderson. Schmidt and Sanderson left, driving to the Greyhound bus station to say goodbye to a friend, while Jessica drove in her own car to do errands.

[10] Schmidt, Sanderson and Frotten met up again at the Airport Chalet for lunch. The time of this lunch is not entirely clear. According to the waitress who was serving them, the party arrived at 1:30 p.m. and left between 2 and 3 p.m. Schmidt said they arrived around 3 p.m. and left at 3:30 p.m. Schmidt had a glass of water and a large burger and fries. Sanderson ordered a pitcher of beer, pouring two, or possibly three, glasses for Schmidt. The waitress indicated that a pitcher has 60 oz of beer, and would fill six 10 oz glasses. The waitress, who has a lot of bartending experience, said that Schmidt looked sober when he left.

[11] Schmidt, with Sanderson, drove his car to Yukon Brewing. Jessica Frotten followed in her own car. Schmidt consumed two, or possibly three, 2 oz samples of beer. Jessica, who was employed at Yukon Brewing, picked up two flats of rejected beer cans and Sanderson bought a 15-pack of beer. Schmidt testified that he did not drink any beer after the stop at the brewery, although there was evidence Sanderson and Jessica were drinking in the car.

[12] Jessica Frotten said that a tour was held at the brewery at 2 p.m. each day, ending at 2:30 p.m. She stated that the tour had started when they arrived and they were there 10 to 15 minutes. A Yukon Brewing employee put the time at 3 to 3:30 p.m, which was after the 2 p.m. tour.

[13] According to Schmidt, he, Jessica and Sanderson left Yukon Brewing at 3:30 p.m., and drove in Schmidt's vehicle to buy gas at the Super A. They then proceeded north on the Alaska Highway towards Haines Junction. The till receipt from purchases Schmidt made at Super A recorded a time of 3:47 p.m. This assumes some importance, as I find that this is the only indication of time that can be relied on for accuracy. I also note that Jessica Frotten had a different version of this part of the day, and said that she left the brewery in her own car and was picked up at her house by Schmidt and Sanderson.

[14] The Crown introduced evidence from an RCMP constable about the driving distance and travel time between the Super A and the scene of the accident. Cst. Hack, who drove the route a few weeks before this trial, indicated that it took him 25 minutes to get from the Super A to the scene when he drove at the speed limit. This would place the time of the accident between approximately 4:15 to 4:30 p.m. The exact time of the accident cannot be determined since the travel time of Schmidt is not known, although I find that it was something less than 25 minutes, as he indicated he was speeding. There is no evidence of the driving time from Yukon Brewing to the Super A.

[15] After the accident, Schmidt flagged down a bus driver. The driver could not make an emergency call immediately because there was no signal on his cell phone, however he was able contact his dispatcher shortly afterwards. The bus dispatcher

received this emergency call at 4:15 p.m. Some time also elapsed between the accident and the flagging down of the driver, as Schmidt had to release himself from his seatbelt and then ran around trying to find Jessica and Michael, both of whom had been thrown from the car. I find the accident could have occurred as early as 4:07 p.m., but I am unable to make any definitive finding of fact about the time.

[16] In his statement to the RCMP on the morning after the accident, Schmidt described it as follows:

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.

[17] In his testimony at trial, Schmidt described the Alaska Highway as bare and clear of ice. He said there were frost heaves in the pavement. He has driven the road before. He testified that he was driving at 120 km per hour, but he slowed down after a bad patch of highway near the Drury farm. He increased his speed again but was trying to keep it under 120 km per hour. In cross-examination, he said he was driving at a speed of 110 to 113 km per hour at the time of the accident.

[18] Schmidt testified that he hit a double set of rough frost humps that caused his car to drift sideways to the left. He said he tried to turn into the skid and touched the gas pedal for traction. The vehicle slid into the ditch, rolled and ended up on its roof. He was hanging by his seatbelt and Jessica Frotten and Michael Sanderson were not in the car.

[19] Jessica Frotten's evidence was somewhat different. She testified that they each had a cold beer on the Alaska Highway, although she could not recall exactly how much they drank. She said Schmidt was travelling at 140 km per hour and she could see the speedometer.

[20] She testified they hit their heads on the roof of the car as they went over frost heaves. She said she asked Schmidt to slow down. She has no memory of the accident itself due to the injuries she sustained. The evidence of Sanderson was not helpful as he was heavily intoxicated and had very little memory of the events.

[21] I find that Schmidt was a credible witness, although he had a more amplified and detailed explanation at trial than he did the morning after the event. This may be explained by the number and detail of the questions he was asked at trial as opposed to during his RCMP statement. I accept his evidence generally, as it did not vary significantly from that of independent witnesses or with his statement to the RCMP. However, I find his statement to the RCMP to be 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.

[22] Jessica Frotten's evidence was credible as well but was not accurate as to times. This may be understandable given the serious nature of her injuries, which included a concussion. However, where there is a difference between the evidence of Mr. Schmidt and Ms. Frotten, I generally prefer the evidence of Schmidt.

[23] There was a great deal of evidence led about the accident scene and the interaction of Schmidt with the RCMP after the accident. Some of this has been set out in *R. v. Schmidt*, 2011 YKSC 78, my decision to admit the Certificate of Analysis of

Schmidt's breath samples. There, I found that Cst. Hack had reasonable and probable grounds to make the breathalyzer demand. The Certificate indicated that at 6:54 p.m. Schmidt received a breath sample reading of 70 mg percent and at 7:14 p.m. a second reading of 70 mg percent. Cst. Hack's reasonable and probable grounds were based on the following:

1. Schmidt's admission that he had split a pitcher of beer;
2. He had glassy and watery eyes which could also have been caused by the wind or crying;
3. In the police car, Cst. Hack smelled a powerful odour of alcohol coming from Schmidt's breath or clothing;
4. Schmidt said he was driving too fast, hit a bump, started to skid, and the vehicle left the road.

[24] The RCMP took measurements at the scene of the accident. The distance from the start of the skid mark on the highway to the resting place of Schmidt's vehicle was approximately 180 metres. The vehicle was airborne for a portion of this distance. Cst. 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.

[25] In contrast to Cst. Hack's belief that Schmidt was driving while impaired by alcohol, the waitress who served the pitcher of beer, the staff person who observed Schmidt at Yukon Brewing, and Jessica Frotten herself each concluded that, based on

their observations of Schmidt, he was fit to drive. Further, Eleanor Emke, who assisted Schmidt in helping the injured into her vehicle after the accident and before the arrival of the ambulance and the RCMP, stated that she would have allowed Schmidt to drive her vehicle. Ms. Frotten said that Schmidt was a regular at Yukon Brewing, meaning he came three to four times a week. The other employee who testified was familiar with Schmidt from his appearances at Yukon Brewing.

Blood Alcohol Content

[26] Both the Crown and defence called expert evidence about Mr. Schmidt's blood alcohol concentration at the time of the accident. The RCMP expert was Brian Image. He has been a Forensic Alcohol Specialist with the RCMP since 1984. He stated that some individuals are impaired in their ability to safely operate a motor vehicle at a blood alcohol concentration of 50 mg per 100 mL. As blood alcohol content rises, an increasingly greater proportion of individuals experience impairment, so that at 100 mg percent all individuals, regardless of tolerance, are impaired in the ability to safely operate a motor vehicle. Mr. Image stated that alcohol is a central nervous system depressant, which means it slows down brain activity. It may decrease inhibition and increase self-confidence while making the performance of physical tasks poorer than normal.

[27] The symptoms of impairment that an individual displays can be affected by the alcohol tolerance of the individual. A person accustomed to the effects of alcohol may require a high blood alcohol concentration to display erratic driving, bloodshot or watery eyes, flushed face, odour of liquor and slurred speech.

[28] Mr. Image performed a calculation to determine that, using the breath sample of 70 mg percent at 6:53 p.m., the blood alcohol concentration of that person at 4:15 p.m. would have been 96 to 123 mg percent (96-123 mg/100mL of blood). This is equivalent to having consumed 0.6 to 1.7 bottles of 5% beer or 7.2 to 20.4 oz. Mr. Image's calculation would, if accepted, result in a finding of guilt for driving with a blood alcohol concentration greater than 80 mg in 100 mL of blood.

[29] This back extrapolation of blood alcohol concentration is independent of gender and body weight. However, it is based on several assumptions:

1. that Schmidt consumed no alcohol in the 30 minutes prior to the accident and no alcohol after the accident and before the samples were taken.
2. that if alcohol were consumed during either time, it would affect the calculated blood alcohol concentration by no more than 5%.
3. the calculation is performed by adding the elimination rates of 10 to 20 mg percent per hour to the measured blood alcohol concentration.

[30] Mr. Image described the calculation as a theoretical minimum and as noted, there would be no change in the calculation based on an individual's weight. He also states that if the time of the accident were 15 minutes earlier or later than 4:15 p.m., this would affect the calculated blood alcohol content at the time of the incident by no more than 5 mg percent. Mr. Image referred to a 1985 study in support of this last assumption, however, as will be described below, this assumption is challenged by the defence expert, Dr. Mariah Wallener, who testified that if alcohol is consumed in the 30 minutes before the accident, the back extrapolation analysis has no validity.

[31] Mr. Image was called again in rebuttal after Dr. Wallener's evidence was given. He was specifically asked what his calculation would be if Mr. Schmidt consumed 2, 4, or 6 ounces of beer within 30 minutes before the accident. Mr. Image testified he would subtract 5 mg percent for each 2 oz of beer so that the lower number of the range would be 81 mg percent, 76 mg percent or 71 mg percent respectively.

[32] Mariah L. Wallener, Ph.D., was called by the defence. She is an adjunct professor in the Faculty of Medicine at the University of British Columbia specializing in pharmacology. She stated that there are five variables that can affect the toxicological conclusions reached by back extrapolation. They are: the time of the last drink; the time of the accident; the time to peak blood alcohol concentration; the individual's elimination rate, and; the error inherent in the breath sample measurement.

[33] According to Dr. Wallener, the key variable is the time between the last drink and the accident, which Mr. Image here assumed was 30 minutes. Dr. Wallener stated that the reason this variable assumes such importance is that the back extrapolation is premised upon the individual being in the elimination phase and not the absorption phase of alcohol consumption. In her opinion, if the blood alcohol concentration is measured less than 30 minutes after the last drink, the individual would still be in the absorption phase, rendering the back extrapolation invalid. Dr. Wallener says the time between the last drink and the accident must be at least 30 to 35 minutes for the analysis to have validity.

[34] The conclusion of Dr. Wallener is that this case is quite unique because the time between the last drink and the accident is close, and the calculation of blood alcohol concentration could be invalid if the accident occurred during the absorption phase. If

this is the case, the back extrapolation would lead to a result that is inflated, and it is possible, here, that Mr. Schmidt's blood alcohol concentration was below the 96 mg percent calculated by the RCMP, and, indeed, possibly below 80 mg percent. In this case, she says that there is sufficient cause to doubt that the pharmacokinetic assumptions of the RCMP analysis are valid.

[35] The law requires the Crown to prove beyond a reasonable doubt that the blood alcohol content of Mr. Schmidt was over 80 mg in 100 mL of blood. As the time of the last drink and the time of the accident are close and uncertain, I accept Ms. Wallener's evidence that the back extrapolation may not be accurate. I therefore have a reasonable doubt about Mr. Schmidt's blood alcohol concentration and must acquit Mr. Schmidt on counts 5 and 6.

Impaired Driving

[36] The impaired driving charge is that Mr. Schmidt drove on December 14, 2009 "while his ability to operate a motor vehicle was impaired by alcohol" and caused bodily harm to Jessica Frotten and Michael Sanderson.

[37] In the case of *R. v. Stellato*, [1993] 12 O.R. (3rd) 90, aff'd [1998] 2 S.C.R. 478, the Ontario Court of Appeal dealt with the question of the appropriate test for impairment and whether there is a requirement for a "marked departure" from normal behaviour. The Ontario court cited with approval Mitchell J.A. in *R. v. Campbell* (1991), 87 Nfld. & P.E.I.R. 269 (C.A.), who rejected the requirement of "marked departure" and stated at p. 269-70:

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. However, a person who drives while his or her ability to do so is impaired by alcohol is guilty of an

offence regardless of whether his ability to drive is greatly or only slightly impaired. Courts must therefore take care when determining the issue not to apply tests which assume or imply a tolerance that does not exist in law. Trial judges constantly have to keep in mind that it is an offence to operate a motor vehicle while the ability to do so is impaired by alcohol. If there is sufficient evidence before the court to prove that the accused's ability to drive was even slightly impaired by alcohol, the judge must find him guilty. ...

[38] In *Stellato*, the Ontario Court of Appeal ultimately accepted this view, and, after reviewing a number of precedents, the court concluded at para. 13:

In all criminal cases the trial judge must be satisfied as to the accused's guilt beyond a reasonable doubt before a conviction can be registered. Accordingly, before convicting an accused of impaired driving, the trial judge must be satisfied that the accused's ability to operate a motor vehicle was impaired by alcohol or a drug. If the evidence of impairment is so frail as to leave the trial judge with a reasonable doubt as to impairment, the accused must be acquitted. If the evidence of impairment establishes any degree of impairment ranging from slight to great, the offence has been made out.

[39] The typical symptoms of impairment, as described by Mr. Image, may include bloodshot or watery eyes, flushed face, odour of liquor, poor balance, difficulty walking and slurred speech. However, the Crown is not required to prove that the accused displayed any particular symptom, or any number of symptoms, or any particular severity of symptoms. The evidence here must satisfy me beyond a reasonable doubt that Schmidt's ability to operate his motor vehicle was impaired by alcohol.

[40] In Schmidt's case, he had clearly been drinking beer that day. By his own admission, he drank between a minimum of two 10 oz glasses at the Airport Chalet and two 2 oz samples of beer at Yukon Brewery and a maximum of three glasses of beer and three 2 oz samples. I am satisfied on the evidence that he was a regular beer

drinker and developed a tolerance which masked some of the usual symptoms of impairment. Nevertheless, some of those symptoms were apparent to Cst. Hack after the accident.

[41] 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.

Dangerous Driving

[42] Pursuant to s. 249(1)(a) of the *Criminal Code*, a person commits the offence of dangerous driving when they operate:

a motor vehicle in a manner that is dangerous to the public, having regard to all the circumstances, including the nature, condition and use of the place at which the motor vehicle is being operated and the amount of traffic that at the time is or might reasonably be expected to be at that place;

[43] It is settled law that an act of negligent driving does not necessarily constitute the offence of dangerous driving. There are many circumstances where drivers cause serious accidents as a result of negligent driving. But not all such circumstances will be dangerous in criminal law.

[44] In reviewing dangerous driving jurisprudence in *R. v. Beatty*, 2008 SCC 5, the Supreme Court of Canada confirmed 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” (para. 36).

[45] The Court in *Beatty* also confirmed 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.” One example given is where a driver suffers a totally unexpected heart attack (see para. 37).

[46] The Court further emphasizes that it is the manner in which the motor vehicle is operated that must be considered, not the consequence of the driving (para. 46). Thus, where a driver had been drinking and drove through a red light causing a collision and a death, the collision and death did not increase the degree of negligence. As stated in *R. v. Anderson*, [1990] 1 S.C.R. 265, at para. 21:

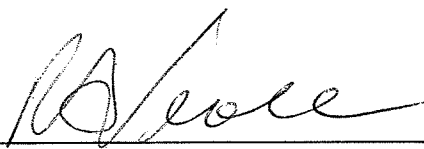
... If driving and drinking and running a red light was not a marked departure from the standard, it did not become so because a collision occurred. ...

[47] On the other hand, it is not necessary for the Crown to prove that the accused intended to create a danger on the highway. Rather, the lack of care must be a "marked departure" from the standard expected of a reasonably prudent driver. Generally, conduct that occurs in a matter of seconds, in the course of driving that is otherwise proper, suggests civil rather than criminal negligence.

[48] 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.

CONCLUSION

[49] In conclusion, I find Mr. Schmidt guilty of counts 1 and 2 of impaired driving causing bodily harm to Jessica Frotten and Michael Sanderson. I find Mr. Schmidt not guilty of counts 3, 4, 5, and 6 of dangerous driving and driving while his blood alcohol concentration exceeded 80 milligrams in 100 millilitres of blood.



VEALE J.