

IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *R. v. Blanchard*, 2005 YKSC 10

Date: 20050216
Docket No.: S.C. No. 04-01532
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

And

ROBERT RICHARD BLANCHARD

Before: Mr. Justice R.S. Veale

Appearances:
John Phelps
Elaine Cairns

For the Crown
For the Defence

REASONS FOR JUDGMENT

INTRODUCTION

[1] Robert Blanchard is charged with dangerous driving causing bodily harm, impaired driving causing bodily harm and driving with a blood alcohol concentration in excess of the legal limit.

[2] On September 29, 2003, after 12:15 p.m., Mr. Blanchard was driving a ¾-ton crew cab truck southbound on the North Klondike Highway at Pelly Crossing. Jenna Joe was riding her bicycle northbound on the left side of the highway. She had pulled so close to the guardrail that she could no longer pedal. Mr. Blanchard struck Jenna Joe

with his passenger side rear view mirror. She was thrown over the guardrail, but remarkably, the injury to her right shoulder was not serious.

[3] Because of the slight injury to Jenna Joe, the Crown is not proceeding with the “bodily harm” aspect. This judgment will consider the included offences of dangerous driving and impaired driving.

[4] Mr. Blanchard was also charged with driving a motor vehicle while under a five-year driving prohibition dated December 1, 1999. He was further charged with consuming alcohol contrary to a Probation Order dated June 19, 2002. There was no contest on these charges and I convicted him on each. Sentencing has been adjourned pending this decision.

ISSUES

[5] There are three issues raised:

1. Has the Crown proved that Mr. Blanchard’s ability to operate a motor vehicle was impaired by alcohol?
2. Has the Crown proved that Mr. Blanchard’s blood alcohol concentration was over the legal limit?
3. Has the Crown proved that Mr. Blanchard was driving in a manner dangerous to the public?

THE EVIDENCE

[6] Pelly Crossing is a small community that sits on the south side of the Pelly River. It lies on the east side of the North Klondike Highway. It consists of the Selkirk First Nation’s administration building, equipment yards, a gas station and a store right beside the highway as well as a number of residences, the RCMP station and a school. The

Pelly River bridge spans the Pelly River. The John Ross subdivision is on the north side of the Pelly River and also to the east of the highway.

[7] Robert Blanchard is forty-two years old and lives in the John Ross subdivision. He also worked there with a construction crew building a house. On Monday, September 29, 2003, the crew was insulating the house.

[8] The previous Friday was a payday and most of the crew had been drinking all weekend. The exception was Frank Johnson who does not drink. The other crewmembers, Charles Joe, Dale Joe, Thomas Harper and Robert Blanchard were drinking that Monday.

[9] Robert Blanchard admitted drinking half a bottle of vodka on Sunday at his home. He is an alcoholic with ten prior alcohol related offences between 1982 and 2002. Five of those offences, between 1992 and 2002, are for driving while disqualified. One offence of driving while disqualified occurred in Pelly Crossing.

[10] He stated that when he got up Monday morning, he had a drink of vodka. He did not go to the worksite but instead walked into Pelly Crossing which is on the other side of the Pelly River. It took twenty-five minutes. He went to the equipment yard where he claims that Alex Morrison permitted him to take a ½-ton Ford truck in order to pick up the other crewmembers and take them to the worksite. He acknowledged that he knew he was prohibited from driving but he rationalized that it was okay because he was on Band land. He said he was not familiar with driving the truck and it had a touchy clutch. He picked up Frank Johnson and Thomas Harper and drove them to the job site. The rest of the crew was already there.

[11] Mr. Blanchard states that he brought half a bottle of vodka to the worksite and hid it under some insulation and wood scraps on the porch of the house. He says that he had nothing to drink for the rest of the morning. He also received an ounce of alcohol from Charles Joe who brought a bottle of vodka to work. Charles Joe stated that everyone was drinking the vodka mixed with water, except for Frank Johnson. In cross-examination, he said that he did not see Robert Blanchard drinking. When asked if he thought Robert Blanchard was driving that day, he said he was buzzed out and could not recall. Robert Blanchard denied that he was drinking with the crew and claims he added the vodka to a jar and hid it with the rest of his vodka.

[12] Dale Joe said that Mr. Blanchard got the truck stuck on the septic tank pipe at the work site and had to jack the truck off. Mr. Blanchard said it was hard to drive the truck because of the clutch. He said that the truck stalled and spun out in the sand around the septic tank.

[13] Frank Johnson was a somewhat more reliable witness than the rest of the crew, at least as to the comings and goings that morning. He is sixty-one years old and has not been drinking for three and one-half years. He was at the site until it was shut down when the police arrived in the afternoon.

[14] He said he did not see anyone drinking at the worksite. He thought Robert Blanchard looked okay when he drove him to work that morning. Robert Blanchard drove the crew, except for Frank Johnson, back over to Pelly Crossing around noon and returned at 12:30 p.m. with Thomas Harper. Thomas Harper was "pretty drunk" and Robert Blanchard drove him home at 1 p.m. and returned to the work site at 1:20 or 1:30

p.m. Robert Blanchard did not have a watch and has no idea as to the timing of events that day. None of the crew testified about Warren Ellis being present.

[15] Richard Baker is fifty-eight years old and he is the manager of the capital works department for the Selkirk First Nation. He was working in the Band office and left for lunch at 11:55 a.m. He saw Robert Blanchard in the driver's seat of the ½-ton Ford truck in Greg Sim's yard. The truck was stuck on a chain-link fence and Robert Blanchard was trying to back it up without success. Thomas Harper was in the passenger seat.

Mr. Baker said that he was responsible for the truck and Robert Blanchard was not authorized to drive it. He has known Mr. Blanchard in both drunk and sober conditions for fifteen years.

[16] Mr. Baker took the keys from Mr. Blanchard as he judged him to be "half-cut" and in no condition to drive. Mr. Baker had no difficulties putting the truck in forward and pulling away from the fence. He also observed that Mr. Blanchard did not slur his words and that he could not smell alcohol on his breath. He did not observe any alcohol or drinking around the vehicle.

[17] Robert Blanchard's version is that he was backing out and the truck was stuck. He thought there was a log under the truck but he never got out to check. He explained that he could not see the fence. He confirmed that Mr. Baker took the keys from him and told him not to use the truck.

[18] Mr. Blanchard was not easily deterred. He left briefly and returned to the Sim's yard. He entered a ¾-ton truck with a flat deck owned by the Selkirk First Nation and began to back out of the yard. He said that Richard Baker did not tell him that he could

not drive the $\frac{3}{4}$ -ton truck. He had not driven the $\frac{3}{4}$ -ton truck previously except perhaps to back it up to load it.

[19] Nesta Hager is a nineteen-year old young woman. She is employed as the communications officer for Selkirk First Nation.

[20] On September 29, 2003, she was leaving school for lunch and was walking to the store on the highway. She noticed some intoxicated people in the Sim's yard and heard a truck start. It was 12:15 to 12:20 p.m. when she saw the vehicle back out of the Sim's yard onto the wrong side of the road and swerve. The back of the truck came within 2 to 3 feet of her and she rushed to the passenger side and banged on the door. She opened the passenger door and confronted Mr. Blanchard who was driving. She said to him he was drinking and he should park the truck. Mr. Blanchard denied that he was drinking and said he had to go to work. She closed the door and Mr. Blanchard drove off.

[21] Nesta Hager described Mr. Blanchard as shocked when she opened the passenger door. He did not look like he normally did and his eyes looked tired. His speech was not slurred and she could not smell any alcohol. She did not see any bottles.

[22] The next major event is the accident with Jenna Joe. Jenna is nineteen years old. On September 29, 2003, she left school at 11:50 a.m. to go for lunch across the river. She was riding her bicycle northbound across the bridge when she was hit by a Selkirk First Nation truck, which she identified. She said that she saw the truck swerve once or twice on the highway as it came towards her. She was on the left side of the road, which she admitted to be the wrong side. She moved closer to the guardrail, so close that she

could not pedal her bicycle. The passenger side mirror of the truck struck her right shoulder. She was knocked off her bicycle onto the other side of the guardrail.

[23] She testified that Bobby Blanchard and Warren Ellis got out of the truck. Bobby Blanchard said he was sorry. She described him as shocked and that he could have been "intoxicated or something". She also stated he seemed weird or paranoid. She could not describe him any further. Warren Ellis helped her up and she said she was okay. She walked home with her bike. She did not return to school that afternoon and went to the nursing station where she had an x-ray on her shoulder. Her shoulder was not broken and she was given painkillers. Her shoulder was numb for a week, but then had no further problems.

[24] Robert Blanchard explains the accident this way. He says he left the worksite with Warren Ellis and Thomas Harper. Thomas Harper was too drunk to work. He cannot explain why Warren Ellis was in the truck.

[25] He testified that the truck was pretty slow and he had to come onto the highway from the John Ross subdivision. The highway is a corner at this point at the bottom of a long hill. He described it as a blind corner and he was worried about vehicles coming fast down the hill behind him. Because of this concern, he was looking out his rear view mirror. He said he had to adjust his body by leaning forward to see out of the mirror. He also claims he was affected by the sun and a dirty truck window. He claims that he swerved twice while he was looking in his mirror.

[26] He testified that he saw Jenna Joe coming close to the pylons on his right side. He was concentrating on staying to the right of the yellow centre line. He heard the mirror hit something but he did not see it hit Jenna. He denies saying that he was sorry.

He could not explain how the accident happened but he denied swerving from intoxication. His concern was about the possibility of a car coming down the hill behind him. He admitted that he might have gone over the yellow line. He also admitted that he might have moved left to right on the highway but he was not sure what he was doing. There is no evidence that he made any attempt to report the accident.

[27] At approximately 12:45 p.m. when Nesta Hager was sitting in front of the Band office, she saw Robert Blanchard drive by in the truck towards the highway. She said that when Mr. Blanchard drove onto the highway, he swerved onto the wrong side of the road coming close to the guardrail leading to the bridge.

[28] Mr. Blanchard denied that his driving was as described by Nesta Hager. As for swerving onto the wrong side of the highway, he claimed that it was necessary to make a wide turn to avoid some ruts and potholes in the gas station's lot. He said that he wanted to ensure that things on the flat deck were not shaking. He had never checked the flat deck and was unable to say if anything was on it.

[29] After the accident, Robert Blanchard dropped his passenger off and returned to the worksite. He states that he was scared and nervous because of the accident. He testified that he did not have a drink since early that morning but now began to take large drinks from his bottle of vodka which contained ten to twelve ounces. In chief, he said he drank it all in three swigs which occurred at separate times, until Janet Joe, the victim's mother, arrived followed by the police. The police arrived about an hour after he returned to the worksite.

[30] In cross-examination, he said he drank three to four ounces in each sip straight except for the water mixed in from the ounce he had received from Charles Joe in the

morning. He said he was sober until the accident and then could have gone three or four times to drink. He just finished drinking before the police arrived.

[31] Constable David Morin had been stationed in Pelly Crossing for two years. He has eight and one-half years of experience. He was on call on September 29, 2003. He received a phone call at 1:30 p.m. advising that Jenna Joe had been struck on her bicycle by Bobby Blanchard, who was intoxicated. Constable Morin interviewed Jenna Joe's grandmother and went to the nursing station at 2:00 p.m. and spoke to Jenna who described the accident.

[32] Constable Morin knows Mr. Blanchard well in both intoxicated and sober conditions. He went to Mr. Blanchard's house and then to the worksite where he found Mr. Blanchard at 2:20 p.m. talking to Janet Joe. He described Mr. Blanchard's speech as slow and slurred. His eyes were glassy, red and watery. His pupils were dilated. He had a moderate odour of alcohol. His balance was okay.

[33] Constable Morin spoke to Mr. Blanchard in the police vehicle. Mr. Blanchard said that he knew that he was prohibited from driving. He also said that he was hung over and had one shot of alcohol that morning.

[34] Constable Morin observed the missing mirror on the truck and a smashed right window. Constable Morin concluded that Mr. Blanchard's ability to drive was impaired. He read him his Charter rights and gave the police caution. He made the breathalyzer demand and drove him to the police station.

[35] Robert Blanchard did not speak to a lawyer until 3:25 p.m., as it was difficult to contact a Whitehorse lawyer by telephone. Constable Morin kept him under observation.

When they went to the breathalyzer room, Mr. Blanchard said, "I should just shoot myself, all I can do is show people how to do wrong".

[36] His first breath sample at 3:50 p.m. gave a reading of 270 milligrams. His second sample at 4:14 p.m. gave a reading of 270 milligrams.

[37] Constable Morin served Mr. Blanchard with the Summons, certificate of analysis and notice of intention to seek greater punishment. Constable Morin was unable to say how much Mr. Blanchard weighed but he estimated his weight was 155 to 160 pounds.

[38] My findings of fact in this case turn to a large extent on the credibility of several witnesses and Mr. Blanchard.

[39] My assessment of the evidence of the crewmembers is that it is very unreliable as it relates to Robert Blanchard. They were either too intoxicated to remember or they were evasive and protecting their fellow crewmember.

[40] I do not believe the evidence of Mr. Blanchard. His evidence was carefully crafted to respond to each event that day and give a rational explanation. He had no independent memory of the time frames involved but presented his evidence as though he did. His attempts to explain his erratic driving that day were superficial and lacked substance. He had no rational explanation for why he could not extricate the truck when Richard Baker took the keys. There was no evidence of things on the flat deck to explain his swerving observed by Nesta Hager. He had no satisfactory explanation of the accident with Jenna Joe except to say he was watching for a vehicle that never came up behind him. The accident did not occur at the blind curve and hill that he referred to.

[41] Frank Johnson was the only sober person on the worksite and he flatly contradicted Robert Blanchard on the timing of Thomas Harper leaving the work site because Harper was too drunk to work.

[42] I accept the evidence of Richard Baker. He testified in a forthright manner about Mr. Blanchard's inability to extricate the truck in the Sim's yard. He was frank about Mr. Blanchard's demeanour that day despite the fact that it did not conform to the usual signs of impairment. While one can debate the meaning of "half-cut", in my experience in this Court, it means that Robert Blanchard was intoxicated and not fit to drive. I find as a fact that Mr. Blanchard was intoxicated at noon and had difficulty performing simple driving tasks.

[43] I accept the evidence of Nesta Hager. She testified candidly and had good reason to remember the driving of Mr. Blanchard given her angry reaction when he came very close to her on the first occasion. She suspected he was intoxicated but was forthright when she described his physical symptoms which did not suggest intoxication.

[44] I accept the evidence of Jenna Joe. She was somewhat immature as she was still in school. But she described his vehicle swerving on the highway to explain her action with her bicycle without embellishment. She was quite candid in admitting that she did not know whether Warren Ellis or Robert Blanchard was driving.

[45] I accept the evidence of Constable Morin. He was familiar with Robert Blanchard's drinking and his tolerance for alcohol.

[46] I find the following facts:

1. Mr. Blanchard was continuing to drink on Monday morning to the point of intoxication as observed by Richard Baker at noon.

2. Mr. Blanchard's driving was erratic and he was unable to perform simple driving manoeuvres in the Sim's yard and on entering the highway as observed by Richard Baker and Nesta Hager.
3. The accident with Jenna Joe was caused by Robert Blanchard who was swerving and unable to keep the ¾-ton truck in his driving lane as he approached the Pelly River bridge. He apologized to her.
4. The location of Jenna Joe on her bicycle did not contribute to the accident.
5. The highway approaching the guardrail and the Pelly River bridge where the accident occurred is straight and flat.
6. There were no other vehicles on the highway at the bridge. It was a clear day.
7. Mr. Blanchard did not consume vodka after the accident which occurred sometime after 12:15 p.m.
8. The description of the signs of impairment by Constable Morin is accurate and the breathalyzer readings are admissible.

THE EXPERT EVIDENCE

[47] Robert Blanchard testified that he weighs 140 pounds now but was 135 pounds on September 29, 2003, as he was working and was in better shape. The police officer could only estimate his weight so I find that Mr. Blanchard had a body weight of 135 pounds.

[48] Christine Dagenais was qualified as an expert in toxicology on the following subjects:

1. the physiology of alcohol, that is the absorption, distribution and elimination from the human body;

2. the pharmacology of alcohol, that is the effects of alcohol on individuals especially in their ability to safely operate a motor vehicle while under the influence of alcohol; and
3. the theory and operation of the BAC Datamaster and related instruments and the theory of breath testing and the analysis and certification of solutions.

[49] Ms. Dagenais provided a number of alternative scenarios for extrapolating the breathalyzer results of Mr. Blanchard. She stated that the Datamaster underestimates the concentration of alcohol in blood by between ten and fifteen percent compared to a blood test.

[50] She made the following assumptions for her extrapolation:

1. no alcohol was consumed by Mr. Blanchard 30 minutes before the time of driving;
2. no alcohol was consumed between the time of driving until the breath tests;
3. an elimination rate of between ten and twenty milligrams of alcohol in 100 millilitres of blood per hour; and
4. breathalyzer readings of 270 milligrams at 3:50 p.m. and 4:14 p.m.

[51] She further advised that the elimination rate she chose was not dependent on body weight or gender. She also made this comment on the significance of her assessment of no drinking thirty minutes before driving:

It takes approximately 30 minutes to reach a peak blood alcohol concentration once the individual has completed their last drink. In order for me to not overestimate a person's blood alcohol concentration, the assumption is that they have reached their peak blood alcohol concentration. If any alcohol is consumed 30 minutes prior to the time of driving or after, I would have to subtract that from the calculated blood alcohol concentration.

[52] Based upon these assumptions and an accident time of 12:15 p.m., the blood alcohol level of Mr. Blanchard would be a range between 306 and 342 milligrams in 100 millilitres of blood. At 1:20 p.m., Mr. Blanchard's blood alcohol level would be in the range of 295 to 320 milligrams of alcohol in 100 millilitres of blood.

[53] Conversely, if a 125-pound male was at a zero alcohol in his system at 12:15 p.m., he would have to consume 12.8 to 13.9 ounces of 40% liquor in order to have a reading of 270 milligrams at the times of the breath samples. The amount of consumption a 155-pound male would be a range of 15.5 to 16.8 ounces.

[54] Ms. Dagenais also calculated the amount of alcohol that must be consumed if the male was driving at 12:15 p.m. with 80 milligrams of alcohol in 100 millilitres of blood. In order for a 125-pound male to reach 270 milligrams at the time of the breath samples, he would have to consume between 9.6 and 11.2 ounces of 40% liquor.

[55] I have not recited all the ranges given by Ms. Dagenais as her evidence was given before Mr. Blanchard testified as to his body weight.

[56] Ms. Dagenais described the symptoms that would be expected from an average social drinker who had a breathalyzer reading of 295 to 320 milligrams. That individual would be grossly intoxicated with major muscular uncoordination, staggering or inability to walk, slurred speech, impaired memory and incontinent. However, the symptoms of an experienced drinker with higher tolerance would be much reduced although the ability to drive would remain impaired regardless of the person's tolerance.

[57] Ms. Dagenais was not asked and did not give evidence about the number of milligrams of alcohol to be subtracted if some drinking took place just before and just after the time of driving.

Issue 1: Has the Crown proved that Mr. Blanchard's ability to operate a motor vehicle was impaired by alcohol?

[58] The Crown must prove beyond a reasonable doubt that Mr. Blanchard's ability to operate a motor vehicle was impaired by alcohol. In other words, the consumption of alcohol must result in Mr. Blanchard driving with less ability than an ordinary, careful driver in similar circumstances. As stated in *R. v. Andrews* (1996), 104 C.C.C. (3d) 392 (Alta C.A.), the impairment of the ability to drive by alcohol "need not be to a marked degree" but "must indicate behaviour that deviates from normal behaviour".

[59] Defence counsel submits that the lack of a smell of alcohol on his breath, no balance problem and no slurring of his speech indicate that he was not intoxicated. Defence counsel suggests that the lack of signs of impairment noticed by Richard Baker, Nesta Hager and Jenna Joe confirms his sobriety.

[60] Christine Dagenais, the toxicologist stated that experienced drinkers sometimes mask the usual symptoms. Thus, their impairment may be much greater than their outward symptoms. This applies to Mr. Blanchard. He is an experienced drinker. His erratic driving confirmed the impairment by alcohol observed by Richard Baker. In addition, he was drinking vodka which has little odour.

[61] Ms. Dagenais also pointed out that making observations about a person's condition is very subjective and depends on the person's experience and training. I conclude that Constable Morin would be likely to observe more signs of impairment than civilian witnesses because of his training and experience.

[62] I am mindful of the test for reasonable doubt in *R. v. W.(D.)*, [1991] 1 S.C.R. 742. I do not believe Mr. Blanchard's evidence explaining his erratic driving or his pattern of drinking. Taking the evidence as a whole, including the breathalyzer readings of 270

milligrams at 3:50 and 4:14 p.m., I am satisfied that the Crown has proved beyond a reasonable doubt that his ability to operate a motor vehicle was impaired by alcohol.

Issue 2: Has the Crown proved that Mr. Blanchard's blood alcohol concentration was over the legal limit?

[63] The Crown is not entitled to rely upon the presumption that Mr. Blanchard's breathalyzer readings of 270 milligrams at 3:50 and 4:14 p.m. were the same as at the time of the accident because section 258(1)(c) of the *Criminal Code* requires that the breath samples be taken within two hours of the accident. This did not happen, through no fault of the police officer.

[64] I must now turn to the extrapolation calculations made by Ms. Dagenais.

[65] I have found that Mr. Blanchard did not consume the excessive amount of liquor that he claimed after the accident. The purpose of that evidence was to suggest that Mr. Blanchard was relatively sober at the time of the accident so that the breathalyzer readings of 270 milligrams could not be extrapolated back to the time of the accident.

[66] I have found that Mr. Blanchard did not consume any liquor after 12 noon. Thus, I accept the evidence of the toxicologist that his blood alcohol level between 12:15 p.m. and 1:20 p.m. would be between a range of 295 to 342 milligrams. I cannot rule out the possibility that Mr. Blanchard consumed some liquor just prior to noon. However, given the high extrapolated readings, the subtraction of a drink or two would not bring Mr. Blanchard even close to the legal limit.

[67] I am satisfied that the Crown has proven beyond a reasonable doubt that Mr. Blanchard had a breathalyzer reading well in excess of the legal limit of 80 milligrams of alcohol in 100 millilitres of blood. However, I have convicted Mr. Blanchard of impaired driving and the rule precluding multiple convictions for the same incident

requires that a conditional judicial stay be entered on the charge of driving with a blood alcohol concentration in excess of the legal limit.

Issue 3: Has the Crown proved that Mr. Blanchard was driving in a manner dangerous to the public?

[68] The dangerous operation of a motor vehicle involves more than just careless driving. The Crown must prove beyond a reasonable doubt that Mr. Blanchard's driving was a marked departure from what a reasonable driver would do in the same circumstances. See *R. v. Hundal*, [1993] 1 S.C.R. 867, at paragraph 43. It is not a question of whether the accused subjectively intended to drive dangerously but rather whether viewed objectively, Mr. Blanchard exercised the appropriate standard of care. See *R. v. Rajic* (1993), 80 C.C.C. (3d) 533 (Ont. C.A.).

[69] Defence counsel submits that Mr. Blanchard's description of the blind corner as he exited the John Ross subdivision, the hill and his concern about a vehicle catching him, as well as the glare of the sun, were the cause of the accident.

[70] In my view, there is no merit to this evidence from Mr. Blanchard. The road approaching the bridge and guardrail is straight and it is a marked departure to hit a young woman on a bike up against the guardrail approaching the bridge. Mr. Blanchard saw Jenna Joe but could not drive safely because of his alcohol consumption. If he did have anxiety over cars coming up behind him, it was misplaced because his attention should have been focused on the road ahead not behind. The fact that he was swerving and ultimately came too close to the guardrail was a marked departure from the standard of a reasonable driver. There were no other vehicles on the roadway, it was broad day light and the only concern was that children were coming home from school at the lunch hour. Due to Mr. Blanchard's intoxication, he was unable to control his vehicle

and swerved so close to the guardrail that his right rear view mirror struck Jenna Joe's shoulder and knocked her over the guardrail.

[71] I am satisfied beyond a reasonable doubt, considering all the evidence, that Mr. Blanchard was driving in a manner dangerous to the public.

VEALE J.