2012-20 — Segal's Motor Vehicle and Impaired Driving Newsletter

Date: October 1, 2012

Contents

Case Law Highlights

Case Law Highlights

1. — Impaired care or control; "Over 80"; Whether impaired occupant of motor vehicle who is asleep or passed out in care or control; Passed out in rear of mini-van; Whether a risk of danger, whether from putting car in motion or in some other way; Factors informing risk of danger; Crown appeal allowed; Criminal Code*, ss. 253, 258(1)(a).*

R. v. Smits, 2012 CarswellOnt 9437, 2012 ONCA 524 (Ont. C.A.): The respondent was found passed out in the back of a mini-van in the morning. The van was parked on the side of a county road in a rural area. The roadway was narrow, with no shoulder, and the van was parked with its passenger side wheels on the grass and the left rear corner still on the road. The van was not running. The hood was warm. Neither a passer-by nor the police could wake him up by rapping on the window. The keys were in the ignition. In the vehicle was a partially unsealed bottle of vodka, an open can of beer, an empty can of beer, and a glass of orange juice. His BAC recordings were 147 and 138. He admitted to consuming two Percocet pills. He denied driving the van but admitted to sitting in the driver's seat before he passed out. There was no front middle seat so one could

go directly to the back seat through the inside of the van. He was convicted at trial. The Summary Conviction Appeal Court allowed the appeal holding the trier may have engaged in speculation. The appeal was allowed and the conviction and sentence were restored.

Three risks of danger have been identified:

1. The risk that the vehicle will intentionally be set in motion;
2. The risk that through negligence a stationary or inoperable vehicle may endanger others;
3. The risk that the individual who has decided not to drive will change his or her mind and drive while still impaired.

The case deals with the third risk.

The Court of Appeal adopted the factors in *R. v. Szymanski*, 2009 CarswellOnt 5150, 88 M.V.R. (5th) 182 (Ont. S.C.J.), that a court may look at when engaging in a risk of danger analysis based on circumstantial evidence including:

- level of impairment
- whether keys were in ignition or nearby
- location of vehicle
- where accused in his journey
- disposition, attitude
- whether accused drove to location
- whether drove after drinking and pulled over to sleep it off or started using vehicle for purposes other than driving
- accused's plan to get home
- whether stated intention to resume driving
- where seated
- with seatbelt
- whether failure to take advantage of alternative means of leaving scene
- whether had cell phone to make other arrangements and failed to do so

2. — Highway traffic; Commercial vehicles; Speed-limiting system; Operating a commercial motor vehicle not equipped with a working speed-limiting system; Charging the offence; Elements of the offence; Whether offence as charged made out where speed-limiting system but set too high;* Highway Traffic Act *(Ont.), s. 68.1(1), R.R.O. 1990;* Highway Traffic Act*, Reg. 587; R.R.O. 950;* Provincial Offences Act*, Sched. 43.

Provincial Offences Act *(Ont.); Certificate of Offence; Short form of offence;* Provincial Offences Act *(Ont.), ss. 3(1), (2)(a), (b), 13(1)(a), (b), (2), (3), 25(1)-(7); R.R.O. 1990, Reg. 950,* Provincial Offences Act*, Sched. 43.*

Ontario (Ministry of Transportation) v. Don's Triple F Transport Inc., 2012 ONCA 536, 2012 CarswellOnt 9883 (Ont. C.A.): The defendant was charged with permitting the operation of a commercial motor vehicle not equipped with a working speed-limiting system. The evidence disclosed that there was a system but that the limit had been set too high. It appeared that the Justice of the Peace found that the incorrect offence had been made out, but in any event, there was a doubt about whether the offence had been made out. The court split three ways. The appeal from the Provincial Court Judge was dismissed. Two judges would have dismissed the appeal, but for different reasons — one, because the offence as charged had not been made out; and one because the trier had a reasonable doubt.

3. — Impaired operation; "Over 80";* Charter *procedure;* Charter *procedure in typical drinking and driving offence;* Criminal Code*, s. 253(1)(a), (b);* Charter of Rights*, s. 24(1).

R. v. Brodersen, 2012 ABPC 231, 2012 CarswellAlta 1451 (Alta. Prov. Ct.), Rosborough Prov. J.: The accused was charged with impaired operation and "over 80". The trial judge reviewed what was appropriate under the *Charter* procedure, including notice and evidence, the nature of the hearing, the calling of evidence, examination of witnesses. While the procedure to be followed on a s. 24 application is a matter for the trial judge depending on the circumstances of each case, however, a blueprint is a good thing. It would look like the following in the context of an impaired case:

(i) Each party bearing a burden of proof (whether ultimate or evidentiary) must ensure that sufficient time is scheduled for proper litigation of the application. This estimate of time should be provided either at the time the trial is scheduled or at an alternate time well before the intended application. As the accused will bear the ultimate burden of proof on the application, he may well need to liaise with the prosecution to ensure that sufficient time is secured for the application *over and above the time estimated for trial*.

(ii) The Applicant must give to the Respondent and the court full and fair notice of any impending *Charter* s. 24 application.

(iii) Each party bearing a burden of proof must take whatever steps are necessary to secure evidence to discharge that burden of proof. I am confident that some form of pre-trial consultation will assist in achieving this goal informally and without duplication. The investigating officer will be attending the trial whether subpoenaed by Applicant or the prosecution. Nevertheless, failure to ensure the attendance of that witness or other police witnesses necessary for the purposes of the *Charter* s. 24 application because of assumptions about which witnesses would be called by the prosecution will not, as a general rule, result in an adjournment.

(iv) Where any notice given fails to outline the evidence to be called in support of the application, a *voir dire* may not be permitted. The Applicant must satisfy the court that the available evidence warrants a separate proceeding.

(v) The Applicant will commence the *voir dire*, calling evidence in the form of witnesses or otherwise.

(vi) Where the Applicant elects to call the investigating police officer or other police officers as witnesses, those witnesses will, as a general rule, be examined-in-chief. The Applicant may be able to establish bias or partiality on the part of a given witness (in which case leave to cross-examine may be granted *ab initio*). However, there is no presumption of bias or partiality. In addition, the usual litigation tools may assist in demonstrating inconsistency, adversity or hostility sufficient to justify varying levels of cross-examination.

(vii) The Respondent is at liberty to cross-examine any witness called by the Applicant.

(viii) Once the Applicant has called its witnesses or otherwise submitted its evidence on the application, the Respondent will be called to present its case.

(ix) Once the evidence is complete, the party last calling evidence will make argument with a reply as required.