

TOP FIVE 2013

Each year at OJEN's Toronto Summer Law Institute, a judge from the Court of Appeal for Ontario identifies five cases that are of significance in the educational setting. This summary, based on these comments and observations, is appropriate for discussion and debate in the classroom setting.

R v BOUDREAU, 2012 SCC 56, [2012] 3 SCR 157.

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<http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/12636/index.do>

Facts

On a cold night in February 2009, Donald Boudreau drove to a bar and drank alcohol until he was very intoxicated. His sober friend drove him in his car to her house, where he continued to drink alcohol. When Boudreau decided to go home the next morning, he was still unfit to drive. His friend called a taxi company that would send two drivers to drive both him and his car home.

When no taxi arrived after about 20 minutes, the taxi service was called again and Boudreau's friend asked him to wait outside so she could go to sleep. It was minus 15 degrees Celsius outside. While waiting for the taxis, he got into his own truck and started the engine so that he could turn on the heat. The automatic transmission was set to "park".

Boudreau fell asleep in the truck, and when the taxi arrived, the driver called the police. The police found him sleeping in the driver's seat of his vehicle with the engine on. The police arrested Boudreau for having care and control of a vehicle while impaired by alcohol. The quantity of alcohol in his blood was over three times the legal limit.

Criminal Code, RSC 1985, c C-46

253. (1) Every one commits an offence who operates a motor vehicle or vessel or operates or assists in the operation of an aircraft or of railway equipment or has the care or control of a motor vehicle, vessel, aircraft or railway equipment, whether it is in motion or not,

- (a) while the person's ability to operate the vehicle, vessel, aircraft or railway equipment is impaired by alcohol or a drug; or
- (b) having consumed alcohol in such a quantity that the concentration in the person's blood exceeds eighty milligrams of alcohol in one hundred millilitres of blood.

Procedural History

At trial, the judge held that in order for someone to have care and control of a vehicle, she or he must pose a risk of putting the vehicle in motion. Since Mr. Boudreau did not attempt to drive the vehicle, had a safe plan to get home, and understood the gravity of driving while impaired, the judge concluded that his actions did not pose a risk of putting the vehicle in motion. Thus, the judge acquitted him of the charges.



On appeal, the Quebec Court of Appeal reversed the trial judge's decision and convicted Boudreault. The Court held that intention to drive was not part of the test under s. 253 of the *Criminal Code*. The Court held that, in fact, he posed a risk to drive the vehicle because he was so intoxicated that his judgment would have been impaired when he woke up.

Issues

1. Is risk of danger – risk of putting the vehicle in motion – an essential element of the offence of “care and control” under s. 253 of the *Criminal Code*?
2. If so, was the trial judge mistaken in this case for finding that there was no risk in these circumstances?

Decision

The Supreme Court of Canada (SCC) allowed the appeal and restored the acquittals.

Ratio

Writing for the majority of the Court, Justice Fish held that the actual risk of danger is an element of the offence of “care and control” of a vehicle under s. 253 of the *Criminal Code*.

Further, the SCC set out guidelines for similar cases heard in the future. The essential elements of the offence are:

1. An intentional course of conduct associated with a motor vehicle;

2. By a person whose ability to drive is impaired, or whose blood alcohol exceeds the legal limit; and
3. In circumstances that create a realistic risk of danger to persons or property.

A realistic risk does not have to be substantial or likely. As it is used here, the term “realistic” is intended to mean even a low chance of such danger. A danger of realistic risk might arise in at least three ways:

- a. An inebriated person who does not intend to drive changes his or her mind and proceeds to do so;
- b. An inebriated person may unintentionally set a vehicle in motion; or
- c. A stationary vehicle may endanger persons or property through the negligence or bad judgment of an intoxicated person.

The Crown can demonstrate realistic risk of danger by establishing impairment and a present ability to set the vehicle in motion. To avoid conviction, an accused will be required to present reliable evidence to show that no realistic risk of danger existed in the circumstances. In future cases, it will be for the trial judge to determine whether a risk of danger exists after examining all of the evidence. An alternative plan to get home without driving shall be considered, and it will be up to the trial judge to determine whether this plan minimizes the risk of danger posed by the intoxicated driver.



Majority

Justice Fish, writing on behalf of six of the seven Supreme Court justices hearing the case, held that when someone intends to set a vehicle in motion while intoxicated, it will usually mean that a danger of risk exists. However, intention to put the car in motion is not an essential element of the offence. Even without this intention, a danger of risk could be created if an individual's level of intoxication impaired his or her judgment. Thus, intention only helps establish whether a risk exists.

The Court held, however, that the purpose of s. 253 of the *Criminal Code* is to protect public safety. Therefore, if someone poses no realistic risk of harm, then they are outside the intended scope of the offence. In this case, the trial judge applied the correct test for this offence while weighing the evidence presented by the parties. Since the trial judge determined that Boudreau posed no risk of setting the vehicle in motion, he posed no realistic risk of danger to the public. Therefore, the SCC restored his acquittals.

Dissenting Minority

Justice Cromwell disagreed with the majority of the Court. He held that an accused can be convicted of the offence of "care and control" of a vehicle while intoxicated as expressed in s. 253 of the *Criminal Code*, even if **no** risk of harm exists.

Unlike Justice Fish, Justice Cromwell held that the purpose of this provision is preventive: the law intends to prevent harm that may arise from the inherent danger caused by an intoxicated driver. He wrote at para. 86: "[T]he net of criminality has been cast widely in order to avoid the inherent risk of the interaction of alcohol and automobiles." In his view, danger is present when an intoxicated person takes care and control of a vehicle. He interpreted the meaning of "care and control" to mean that a person has assumed the ability to operate a vehicle. Thus, risk of danger is not to be assessed as part of the offence. Rather, the court must look to the facts of the case and only assess the degree to which the intoxicated individual has control of the car.

In this case, the accused sat behind the wheel while drunk and engaged the engine. Section 253 of the *Criminal Code* was enacted precisely to prevent this kind of behaviour. Justice Cromwell stated that by adding in an additional element of the "realistic risk" that this conduct poses, the majority had distorted the preventative nature and wide ranging scope of the provision.



DISCUSSION

1. What is your immediate reaction to this judgment: was the right decision made? Explain your answer.

2. The SCC accepted that Boudreault did not intend to drive the vehicle. Could his intentions have changed while waiting for the taxis?

3. Do you think that the fact that Boudreault was waiting for a taxi mattered in the majority's decision? Why? If he had not done this, do you think the Court would have reached the same conclusion?

4. In your opinion, what would have happened had Boudreault not started the engine? Does this change the degree to which he was in "care and control" of the vehicle?

5. What is more important: preventing harm that could arise from drunk driving or ensuring that individuals who pose no risk to society are not unjustly convicted? Which of these were most important to the majority reasons? Which of these were more important to the dissenting reasons?