

Law Reports of the Commonwealth/LRC 2008 Volume 5/R v Beatty - [2008] 5 LRC 10

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R v Beatty

2008 SCC 5

Canada

Supreme Court of Canada

McLachlin CJ, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ

19 October 2007, 22 February 2008

Criminal law - Criminal negligence - Causing death by dangerous driving - Mens rea - Actus reus - Road accident resulting in three deaths - Accused's car crossing centre line into path of oncoming vehicle - Evidence that accused driving properly prior to accident - Accused asserting brief loss of consciousness - Whether accused guilty of causing death by dangerous driving - Whether mens rea established - Appropriate test - Relevant considerations - Criminal Code, RSC 1985, c C-46, s 249(4).

The appellant, B, was involved in a motor vehicle accident which occurred when his vehicle, for no apparent reason, suddenly crossed the solid centre line into the path of an oncoming vehicle, killing all three occupants. Witnesses driving behind the victims' car observed B's vehicle being driven in a proper manner prior to the collision and neither mechanical failure nor intoxication were a factor. When interviewed by police and medical officers, B stated that he did not know what had happened and that he had lost consciousness briefly. He was subsequently charged with three counts of dangerous operation of a motor vehicle causing death, pursuant to s 249(4) of the Criminal Code ('(1) Everyone commits an offence who operates (a) 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; ... (4) Every one who commits an offence under subsection (1) and thereby causes the death of any other person is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.'). The main question that arose was whether a momentary act of negligence was sufficient to constitute an offence under s 249(4). The trial judge, acquitting B of all charges, found that B's momentary lapse of attention could not, without more, support a finding of a marked departure from the standard of care of a reasonably prudent driver. The Crown appealed to the Court of Appeal, which set aside the acquittals and ordered a new trial, holding that the trial judge had asked the wrong question and that the correct question was 'whether crossing the centre line into the path of oncoming traffic at 90 kilometres per hour, on a well-travelled highway was objectively dangerous'. The court found that such conduct could be viewed only as objectively dangerous and a 'marked departure' from the requisite standard of care.

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Thus, the court held, the trial judge had to consider whether B's explanation raised a reasonable doubt about whether a reasonable person in similar circumstances would have been aware of the risk created by B's conduct. B appealed against the decision of the Court of Appeal to the Supreme Court of Canada.

HELD: Appeal allowed.

Per Charron J (Bastarache, Deschamps, Abella and Rothstein JJ concurring). Conduct which constituted a departure from the norm expected of a reasonably prudent person formed the basis of both civil and penal negligence. However, the civil standard of negligence should not be conflated with the test for penal negligence. Fundamental principles of criminal justice required that the law on penal negligence concerned itself not only with conduct that deviated from the norm, which established the *actus reus* of the offence, but also with the offender's mental state. The onus lay on the Crown to prove both the *actus reus* and the *mens rea*. The test was two-pronged. Firstly, to establish the *actus reus*, the trier of fact had to be satisfied beyond a reasonable doubt that, viewed objectively, the accused was, in the words of s 249(4) of the Criminal Code, driving in a manner that was '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'. It was not the case that the test for the *actus reus* was defined in terms of a marked departure from the normal manner of driving. The *actus reus* had to be defined, rather, by the words of the enactment. Conduct that was found to depart markedly from the norm remained necessary to make out the offence because nothing less would support the conclusion that the accused acted with sufficient blameworthiness, in other words with the requisite *mens rea*, to warrant conviction. The second part of the test required the trier of fact to be satisfied beyond a reasonable doubt that the accused's objectively dangerous conduct was accompanied by the required *mens rea*. In making the objective assessment, the trier of fact should be satisfied on the basis of all the evidence, including any evidence about the accused's actual state of mind, that the conduct amounted to a 'marked departure' from the standard of care that a reasonable person would observe in the accused's circumstances. A mere departure from the standard expected of a reasonably prudent person would meet the threshold for civil negligence, but would not suffice to ground liability for penal negligence. The distinction between a mere departure and a marked departure from the norm was a question of degree. Moreover, if an explanation was offered by the accused, then, in order to convict, the trier of fact had to be satisfied that a reasonable person in similar circumstances should have been aware of the risk and of the danger involved in the conduct manifested by the accused. In the instant matter the Court of Appeal's analysis stopped short at determining that the *actus reus* of the offence had been made out and then erroneously placed the burden of disproving *mens rea* squarely on B. By contrast, the trial judge's approach revealed no error in principle. There was no reason to interfere with the verdicts reached at trial; the appeal should be allowed and the acquittals

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restored (see paras [6]-[9], [43], [46]-[48], [50]-[53], [84], below). *R v Hundal* [1993] 1 SCR 867 applied. *R v Tutton* [1989] LRC (Crim) 553 and *R v Willock* (2006) 210 CCC (3d) 60 considered.

Per McLachlin CJ (Binnie and LeBel JJ concurring). The correct statement of the law for the offence of dangerous operation of a motor vehicle should be expressed as follows. 1. The *actus reus* required a marked departure from the normal manner of driving. 2. The *mens rea* was generally inferred from the marked departure in the nature of driving. Based on the finding of a marked departure, it was inferred that the accused lacked the requisite mental state of care of a reasonable person. 3. While generally the *mens rea* was inferred from the act constituting a marked departure committed by the accused, the evidence in a particular case could negate or cast a reasonable doubt on that inference. The issue in the instant matter was whether an act of momentary lapse of attention was capable of establishing the *actus reus* and *mens rea* of the offence of dangerous driving. In terms of the test for that offence, a momentary lapse of attention did not establish the marked departure from the standard of care of a reasonably prudent driver required for the *actus reus* of the offence. One had to consider the entire manner of driving of the accused, in all the circumstances. A momentary lapse of attention, in the context of totally normal driving, was insufficient to establish the marked departure required for the offence of dangerous driving. However, additional evidence could establish that the momentary lapse was part of a larger driving pattern that, considered as a whole, constituted a marked departure from the standard of care of a reasonably prudent driver. In the instant matter, all that had been established was a momentary lapse of attention. The marked departure required for the offence of dangerous operation of a motor vehicle was not made out and it followed that the Crown could not prove the *actus reus* of the offence (see paras [55], [57], [67]-[72], [75], [77], [81], below).

Dicta of McLachlin J in *R v Creighton* [1993] 3 SCR 3, *R v Mann* [1966] SCR 238 and *R v Hundal* [1993] 1 SCR 867 applied. *R v Willock* (2006) 210 CCC (3d) 60 explained.

Per Fish J. The mens rea element could be established in two ways. In rare cases, the prosecution could establish that the accused drove in a deliberately dangerous manner. Where that could be shown, it would be unnecessary to establish, in addition, that the nature or degree of the accused's conduct represented a marked departure from the conduct of a reasonable person in similar circumstances. The mens rea element of dangerous driving could also be established on an objective basis by demonstrating that the accused failed to meet the objective standard of a reasonable person in the circumstances. Although characterising the conduct that represented a marked departure from the norm as the mens rea of the offence should be avoided, it did not follow that a marked departure from the norm had to be instead characterised as the actus reus of the offence. Proof of the actus reus, coupled with subjective mens rea, would suffice for conviction. Otherwise, conduct that was found to depart markedly from the norm was nonetheless necessary for conviction because nothing less would support a reasonable inference that the accused acted with the objective mens rea that was an essential element of the offence (see paras [85]-[89], below).

[Editors' note: Section 249 of the Criminal Code, RSC 1985, c C-46, so far as material, is set out at para [19], below.]

Cases referred to in judgments

BC Motor Vehicle Act, Re [1985] 2 SCR 486, Can SC

R v Anderson [1990] 1 SCR 265, Can SC

R v City of Sault Ste Marie [1978] 2 SCR 1299, Can SC

R v Creighton [1993] 3 SCR 3, Can SC

R v Finlay [1993] 3 SCR 103, Can SC

R v Hundal [1993] 1 SCR 867, Can SC

R v Mann [1966] SCR 238, (1966) 56 DLR (2d) 1, Can SC

R v Pappajohn [1980] 2 SCR 120, (1980) 111 DLR (3d) 1, Can SC

R v Tutton [1989] LRC (Crim) 553, [1989] 1 SCR 1392, (1989) 48 CCC (3d) 129, Can SC

R v Vaillancourt [1987] 2 SCR 636, (1988) 47 DLR (4th) 3, Can SC

R v Waite [1989] 1 SCR 1436, (1989) 48 CCC (3d) 1, Can SC

R v Willock (2006) 210 CCC (3d) 60, Ont CA

Legislation referred to in judgments

Canadian Charter of Rights and Freedoms 1982, s 7

Constitution Act 1867, s 91(27)

Criminal Code, RSC 1985, c C-46, ss 219, 249

Motor Vehicle Act, RSBC 1979, c 288, s 94(2)

Other sources referred to in judgments

Blackstone *Commentaries on the Laws of England* Bk IV, p 21

Law Reform Commission of Canada Working Paper 53: *Workplace Pollution* (1986), pp 2-73

Appeal

The appellant, Justin Ronald Beatty, appealed from the decision of the British Columbia Court of Appeal (Finch CJBC, Ryan and Smith JJA) (2006 BCCA 229) setting aside the decision of the British Columbia Supreme Court (Smith J) (2005 BCSC 751) acquitting the appellant of three counts of dangerous operation of a motor vehicle causing death. The facts are set out in the judgment of Charron J.

Alexander P Watt and *Jaime D Ashby* for the appellant.

Alexander Budlovsky for the respondent.

22 February 2008. The following judgments were delivered.

CHARRON J (BASTARACHE, DESCHAMPS, ABELLA and ROTHSTEIN JJ concurring).

1. Overview

[1] The appellant, Justin Ronald Beatty, was charged with three counts of dangerous operation of a motor vehicle causing death. The tragic accident

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that gave rise to these charges occurred when Mr Beatty's pick-up truck, for no apparent reason, suddenly crossed the solid centre line into the path of an oncoming motor vehicle, killing all three occupants. The question that divided the courts below was whether this momentary act of negligence was sufficient to constitute dangerous operation of a motor vehicle causing death within the meaning of s 249(4) of the Criminal Code, RSC 1985, c C-46.

[2] Instructing herself in accordance with the test set out in *R v Hundal* [1993] 1 SCR 867, the trial judge found that Mr Beatty's momentary lapse of attention could not, without more, support a finding of a marked departure from the

standard of care of a reasonably prudent driver. She held, rather, that his 'few seconds of negligent driving' fell within the continuum of negligence that would attract civil liability ([2005] BCJ No 3071 (QL), 2005 BCSC 751 at [37]). In light of this conclusion, the trial judge found it unnecessary to consider the limited evidence regarding Mr Beatty's explanation for the accident. The trial judge added, however, that if she had concluded that Mr Beatty's manner of driving was objectively dangerous, she would have found this evidence insufficient to raise a reasonable doubt about his guilt. Mr Beatty was acquitted on all three counts.

[3] The British Columbia Court of Appeal was of the view that the trial judge had asked the wrong question. As the court put it, '[t]he right question was whether crossing the centre line into the path of oncoming traffic at 90 kilometres per hour, on a well-travelled highway was objectively dangerous' ((2006) 225 BCAC 154, 2006 BCCA 229 at [26]). In the court's view, such conduct could only be viewed as objectively dangerous and a 'marked departure' from the requisite standard of care. It therefore became incumbent upon the trial judge to consider whether Mr Beatty's explanation raised a reasonable doubt about whether a reasonable person in similar circumstances would have been aware of the risk created by this conduct. Accordingly, the court set aside the acquittals and ordered a new trial.

[4] Mr Beatty appeals from this order. He submits that the Court of Appeal effectively created a legal presumption to the effect that any driver who causes a car accident by reason of his or her negligence, regardless of the degree of negligence, will inevitably be convicted for dangerous driving unless the driver can offer a satisfactory explanation for the accident. This approach, he submits, not only ignores the higher standard of a 'marked departure' from prudent conduct that distinguishes penal negligence from civil negligence, it effectively relieves the Crown of its burden to prove the offence and places the onus squarely on the shoulders of the accused to provide an exculpatory explanation. He submits that the trial judge's approach, by contrast, was consistent with this court's jurisprudence and correct. He therefore asks that his acquittals be restored.

[5] The Crown takes issue with the trial judge's approach, submitting that a 'momentary lack of attention' cannot be the determining criterion. The Crown argues that conduct resulting from momentary inattention may or may not amount to a marked departure from the norm depending on the circumstances. Where, as here, such conduct poses a high risk of danger, a reasonable person would have adverted to the potential risk associated with failing to be attentive and the objective test for proving the offence is met. The

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evidentiary burden then shifts to the accused to raise a reasonable doubt about whether a reasonable person, in the accused's position, would appreciate the risk he has created. '[D]angerous conduct', the Crown argues, 'is no less dangerous when it results from momentary inattentiveness than when it results from continuing inattentiveness or recklessness, wilful blindness, or even from [an] intentional decision to engage in the dangerous conduct'. The degree of an accused's moral blameworthiness, it is suggested, is a relevant consideration in sentencing *but not in the determination of guilt*.

[6] In my respectful view, the approach advocated by the Crown does not accord with fundamental principles of criminal justice. Unquestionably, conduct which constitutes a departure from the norm expected of a reasonably prudent person forms the basis of both civil and penal negligence. However, it is important not to conflate the civil standard of negligence with the test for penal negligence. Unlike civil negligence, which is concerned with the apportionment of loss, penal negligence is aimed at punishing *blameworthy* conduct. Fundamental principles of criminal justice require that the law on penal negligence concern itself not only with conduct that deviates from the norm, which establishes the actus reus of the offence, but with the offender's mental state. The onus lies on the Crown to prove both the actus reus and the mens rea. Moreover, where liability for penal negligence includes potential imprisonment, as is the case under s 249 of the Criminal Code, the distinction between civil and penal negligence acquires a constitutional dimension.

[7] The *modified* objective test established by this court's jurisprudence remains the appropriate test to determine the requisite mens rea for negligence-based criminal offences. As the label suggests, this test for penal negligence 'modifies' the purely objective norm for determining civil negligence. It does so in two important respects. First, there must be 'a

marked departure' from the civil norm in the circumstances of the case. A mere departure from the standard expected of a reasonably prudent person will meet the threshold for civil negligence, but will not suffice to ground liability for penal negligence. The distinction between a mere departure and a marked departure from the norm is a question of degree. It is only when the conduct meets the higher threshold that the court may find, on the basis of that conduct alone, a blameworthy state of mind.

[8] Second, unlike the test for civil negligence, which does not concern itself with the mental state of the driver, the modified objective test for penal negligence cannot ignore the actual mental state of the accused. Objective mens rea is based on the premise that a reasonable person in the accused's position would have been aware of the risks arising from the conduct. The fault lies in the absence of the requisite mental state of care. Hence, the accused cannot avoid a conviction by simply stating that he or she *was not thinking* about the manner of driving. However, where the accused raises a reasonable doubt whether a reasonable person in his or her position would have been aware of the risks arising from the conduct, the premise for finding objective fault is no longer sound and there must be an acquittal. The analysis is thus contextualised, and allowances are made for defences such as incapacity and mistake of fact. This is necessary to ensure compliance with

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the fundamental principle of criminal justice that the innocent not be punished.

[9] As I will explain, it is my respectful view that the Court of Appeal's analysis in effect stopped short at determining that the actus reus of the offence had been made out and then erroneously placed the burden of disproving mens rea squarely on Mr Beatty. By contrast, the trial judge's approach reveals no error in principle. I therefore see no reason to interfere with the verdicts reached at trial. I would allow the appeal and restore the acquittals.

2. Background

[10] The tragic accident giving rise to the criminal charges against Mr Beatty happened on 23 July 2003 at approximately 2 pm on Highway 1, about 14 km west of Chase, British Columbia. The weather was clear, sunny and very hot; the asphalt surface of the road well travelled, in good repair, bare and dry. The collision occurred when upon reaching a curve on the highway the pick-up truck driven by Mr Beatty suddenly, and for no apparent reason, crossed the double solid centre line into the path of an oncoming vehicle, killing all three occupants.

[11] Witnesses driving behind the victims' car observed Mr Beatty's vehicle being driven in a proper manner prior to the accident. They testified that the accident happened very quickly or 'instantaneously'. The point of impact was established at about half a metre into the opposite lane of traffic. Both vehicles had been travelling at the posted 90 km/h speed limit and there was no evidence that either vehicle took evasive measures. It was estimated at trial that it would have taken Mr Beatty's vehicle .00268 seconds to cross the double line and make contact with the oncoming car. An expert inspection concluded that Mr Beatty's vehicle had not suffered from mechanical failure. Intoxicants were not a factor.

[12] After the accident, Mr Beatty exited his vehicle and appeared stunned. When asked what happened by the attending police officer, he indicated that he was driving the pick-up and then 'went unconscious'. He said he had been working in the sun all day. A few minutes later, the police officer overheard Mr Beatty tell an ambulance attendant 'I just lost consciousness. I think it was heat stroke'. The ambulance attendant testified that Mr Beatty appeared dazed and uncomprehending when asked what had happened. After several attempts at giving an explanation, Mr Beatty stated that he was not sure what happened but that he must have fallen asleep and collided with the other vehicle.

[13] After reviewing the evidence, the trial judge instructed herself according to the test laid out in *R v Hundal* [1993] 1 SCR 867. I will review the analysis in *Hundal* in more detail later in these reasons. The trial judge noted (at [28]) that '[t]he application of this objective test has been challenging for trial courts', as 'reflected in a number of decisions that at first blush would appear to be irreconcilable'. After reviewing some of the appellate jurisprudence, including cases

where the accused's driving had been held to constitute a 'marked departure' from the applicable standard, she concluded as follows (at [36]):

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'The circumstances in this case are different. Here there is no evidence of any improper driving by Mr Beatty before his truck veered into the westbound lane and into the oncoming vehicle. While that act of driving was clearly negligent it occurred within a matter of seconds. Moreover, there was no evidence of any evasive measures or evidence of any obstruction in the eastbound lane that might have caused him to veer into the westbound lane. In my view, the only reasonable inference to be drawn in these circumstances, of Mr Beatty's manner of driving, was that he experienced a loss of awareness, whether that was caused by him nodding off or for some other reason. That loss of awareness resulted in him continuing to drive straight instead of following the curve in the road and thereby cross the double solid line. These few seconds of clearly negligent driving, which had devastating consequences, are the only evidence of Mr Beatty's manner of driving. In my view, *Hundal* requires something more than a few seconds of lapsed attention to establish objectively dangerous driving. Criminal culpability cannot be found, beyond a reasonable doubt, on such a paucity of evidence.'

[14] The trial judge then expounded on the distinction between criminal and civil negligence as follows (at [37]):

'This tragic accident occurred from a momentary lapse of attention and snuffed out the lives of three individuals. There is nothing a court can do or say that will adequately redress the loss suffered by the victims' families in such circumstances. However, in assessing criminal culpability it is not the consequences of a negligent act of driving that determines whether an accused's manner of driving is objectively dangerous. It is the driving itself that must be examined. In my view, Mr Beatty's few seconds of negligent driving, in the absence of something more, is insufficient evidence to support a finding of a *marked* departure from the standard of care of a prudent driver. As contemplated by *Hundal* Mr Beatty's negligent driving undoubtedly falls within the continuum of negligence that is certain to attract considerable civil liability. It is in that forum that redress for his actions will be found.' (Trial judge's emphasis.)

[15] In light of this conclusion, the trial judge found it unnecessary to consider the limited evidence regarding Mr Beatty's explanation for the accident. However, she added the following comment (at [38]):

'If I had concluded that Mr Beatty's manner of driving was objectively dangerous, I would have found this evidence of a possible explanation for his dangerous driving insufficient to raise a reasonable doubt that his manner of driving was objectively dangerous.'

[16] The trial judge therefore acquitted Mr Beatty on all three counts. On appeal by the Crown, the Court of Appeal found error in the approach adopted by the trial judge. The court's reasoning is aptly captured in [22]-[27] of the reasons for judgment where Finch CJBC, writing for the court, stated as follows:

'In this case, there is no evidence that the respondent was speeding, no evidence that he had consumed alcohol or drugs, and no evidence that he

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was driving erratically or improperly at any time before his vehicle crossed into the oncoming lane of traffic. However, the evidence showed that there was only one lane for travel in each direction, the traffic was proceeding at or near the posted speed limit of 90 kilometres per hour, the highway was well-travelled, there was limited visibility approaching the curve, and the collision occurred within a split second of the respondent's crossing onto the oncoming lane of traffic. Viewed objectively, the respondent's failure to confine his vehicle to its own lane of travel was in "all the circumstances" highly dangerous to other persons lawfully using the highway, and in particular those approaching in a westerly direction on their own side of the road. The trial judge addressed her attention to the respondent's "momentary lack of attention" and his "few seconds of lapsed attention". She held that such a momentary lapse should not be characterized as dangerous driving. In my respectful opinion the learned trial judge asked the wrong question. The right question was whether crossing the centre line into the path of oncoming traffic at 90 kilometres per hour, on a well-travelled highway was objectively dangerous. I think that question could only be answered in the affirmative. Driving in that way is clearly a "marked departure" from the standard of care a reasonable person would observe in the accused's situation. The second part of the *Hundal* test is whether, even though the driving is objectively dangerous, there is an explanation for the accused's conduct that would "raise a reasonable doubt that a reasonable person would have been aware of the risks in the accused's conduct".'

[17] The Court of Appeal held that the trial judge's added comments regarding Mr Beatty's explanation were 'hypothetical' and that they did 'not adequately engage the analysis required under the second step in *Hundal*' (at [28]). The court therefore set aside the acquittals and ordered a new trial.

3. Analysis

[18] In the context of this proceeding, no one disputes that, in crossing the centre lane into the path of an oncoming motor vehicle, Mr Beatty's manner of driving fell below the standard of care of a reasonably prudent driver. We recognise here the well-established standard for the tort of negligence. As noted by the trial judge, Mr Beatty's negligent driving would therefore undoubtedly attract civil liability. I will refer to the standard for the tort of negligence simply as 'civil negligence'. The more difficult question is whether Mr Beatty's act of negligent driving also attracts criminal liability for the offence of dangerous operation of a motor vehicle causing death under s 249(4) of the Criminal Code.

[19] The relevant parts of s 249 read as follows:

'249. (1) Every one commits an offence who operates (a) 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 ... (4)

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Every one who commits an offence under subsection (1) and thereby causes the death of any other person is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.'

[20] It is well established that dangerous driving is based on a form of negligent conduct. As is readily apparent from a reading of s 249, an act of dangerous operation of a motor vehicle necessarily falls below the standard of care expected of a reasonably prudent driver; among other things, it is expected that a reasonably prudent driver will *not* drive 'in a manner that is dangerous to the public' as proscribed by this provision. The converse, however, does not hold true. An act of negligent driving will not necessarily constitute the offence of dangerous driving. The question raised on this appeal requires the court to reiterate the important distinction between civil negligence and negligence in a criminal setting. The latter has often been referred to as 'penal negligence' so as not to confuse the *category* of negligence-based offences in a criminal setting with the particular offence of criminal negligence under s 219 of the Criminal Code which, of course, also forms part of this category. This court in *R v Hundal* [1993] 1 SCR 867 adopted what it called a *modified* objective test for determining the requisite mens rea for negligence-based driving offences.

[21] As evidenced by the decisions in the courts below in this case, the application of this modified objective test has often proved to be challenging. I therefore propose to review the test in *Hundal* and its underlying rationale in some detail. I will then restate the test in reference to both constituent elements of the offence, the actus reus and the mens rea. Before reviewing the test in *Hundal*, it may be useful to recall the common law and constitutional principles upon which the decision was based and to briefly review some of the jurisprudence that preceded the decision.

3.1 The pre-Charter landscape

[22] Prior to the enactment of the Canadian Charter of Rights and Freedoms, Parliament could prohibit any act and impose any penal sanction for infringing that prohibition, provided of course that it acted within the scope of its power with respect to the 'Criminal Law' under s 91(27) of the Constitution Act 1867. In addition, Parliament and provincial legislatures could create any number of statutory offences within their respective spheres of legislative power. As long as legislation met this constitutional test, the role of the court in reviewing the substance of a prohibition was limited to interpreting its meaning in the light of certain presumptive principles of criminal justice. A classic and often-quoted statement of one such governing principle is the following by Dickson J (as he then was) in *R v City of Sault Ste Marie* [1978] 2 SCR 1299 at 1309-1310:

'The distinction between the *true criminal offence* and the public welfare offence is one of prime importance. *Where the offence is*

criminal, the Crown must establish a mental element, namely, that the accused who committed the prohibited act did so intentionally or recklessly, with knowledge of the facts constituting the offence, or with wilful blindness toward them. *Mere negligence is excluded from the concept of the mental*

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element required for conviction. Within the context of a criminal prosecution a person who fails to make such enquiries as a reasonable and prudent person would make, or who fails to know facts he should have known, is innocent in the eyes of the law.' (Our emphasis.)

[23] Of course, Dickson J was identifying here the presumptive common law principles that apply in the absence of a contrary legislative intention. He made this context clear in his subsequent judgment (dissenting, but not on this point) in *R v Pappajohn* [1980] 2 SCR 120 at 138-139, where he aptly summed up the pre-*Charter* legal landscape as follows:

'There rests now, at the foundation of our system of criminal justice, the precept that a man cannot be adjudged guilty and subjected to punishment, unless the commission of the crime was voluntarily directed by a willing mind. Blackstone spoke of a "vicious act" consequent upon a 'vicious will' (*Commentaries*, Book IV, at p. 21). Proof of the mental element is an essential and constituent step in establishing criminal responsibility. Parliament can, of course, by express words, create criminal offences for which a guilty intention is not an essential ingredient. Equally, *mens rea* is not requisite in a wide category of statutory offences which are concerned with public welfare, health and safety. Subject to these exceptions, *mens rea*, consisting of some positive states of mind, such as evil intention, or knowledge of the wrongfulness of the act, or reckless disregard of consequences, must be proved by the prosecution. The mental element may be established by inference from the nature of the act committed, or by additional evidence.'

3.2 Fundamental principles of criminal justice under the Charter

[24] With the advent of the Charter, the parameters of valid federal and provincial legislation became defined, not only along division of powers lines but by minimal constitutional requirements. Therefore, with the Charter came a renewed interest in the mental elements of crimes and regulatory offences. To what extent had the fundamental principles of criminal justice that gave rise to the common law presumptions on *mens rea* become constitutionally entrenched? The question came to the fore shortly after the Charter came into force in *Re BC Motor Vehicle Act* [1985] 2 SCR 486.

[25] The British Columbia Motor Vehicle Act, RSBC 1979, c 288, provided for minimum periods of imprisonment for the offence of driving on a highway or industrial road without a valid driver's licence or with a licence under suspension. Moreover, s 94(2) of the Act provided that this offence was one of absolute liability in which guilt was established by the proof of driving, whether or not the driver knew of the prohibition or suspension. On a reference brought by the provincial government, the British Columbia Court of Appeal found s 94(2) inconsistent with s 7 of the Charter and of no force or effect. The decision was upheld by this court. Lamer J (as he then was) made it clear that in the post-Charter era, absolute liability and imprisonment cannot be combined. This holds true regardless of whether imprisonment is mandatory or not. Though absolute liability provisions are not in and of themselves unconstitutional, they will be offensive to principles

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of fundamental justice entrenched under s 7 of the Charter to the extent that they have the potential of depriving of life, liberty, or security of the person. The fundamental principle at play was stated as follows ([1985] 2 SCR 486 at 513):

'It has from time immemorial been part of our system of laws that the innocent not be punished. This principle has long been recognized as an essential element of a system for the administration of justice which is founded upon a belief in the dignity and worth of the human person and on the rule of law. It is so old that its first enunciation was in Latin *actus non facit reum nisi mens sit rea*.'

[26] It therefore became clear that *mens rea*, as a presumed element in *R v City of Sault Ste Marie* [1978] 2 SCR 1299, had acquired a constitutional dimension. As noted subsequently in *R v Vaillancourt* [1987] 2 SCR 636 at 652 (where the

court held that subjective mens rea was constitutionally required in respect of the offence of murder):

'Re B.C. Motor Vehicle Act did not decide what level of mens rea was constitutionally required for each type of offence, but inferentially decided that even for a mere provincial regulatory offence at least negligence was required, in that at least a defence of due diligence must always be open to an accused who risks imprisonment upon conviction.' (Our emphasis.)

3.3 Mens rea and negligence-based offences

[27] Not surprisingly, in the years that followed, the requisite mens rea for certain negligence-based criminal offences attracted much judicial scrutiny. Even in cases where the constitutional validity of the legislation was not impugned, the constituent elements of the offence were now interpreted in the light of minimal constitutional requirements. In particular, the question whether the test for determining the requisite mens rea for negligence-based offences was subjective or objective was much debated. In *R v Tutton* [1989] LRC (Crim) 553 and in *R v Waite* [1989] 1 SCR 1436, released concurrently, the court was equally divided (three of the nine judges did not participate in the decisions) on the question whether the offence of criminal negligence under s 202 (now s 219) of the Criminal Code called for a subjective or objective test. *Tutton* concerned parents who caused the death of their son by denying him the necessities of life. *Waite* concerned an impaired driver who caused the death of four young persons and injured a fifth person when he played chicken with a hayride. Three judges were of the view that, in order to sit comfortably with principles of penal liability and fundamental justice, the mens rea for the offence of criminal negligence must be assessed subjectively, requiring proof of a positive state of mind such as intent, recklessness or wilful blindness. Three other judges held that an objective test must be used in determining criminal negligence, with different opinions on how this objective test should applied.

[28] A few years later, the question whether the constitutional requirement of mens rea called for a subjective or objective test in respect of the negligence-based offence of dangerous driving was again the precise issue

[2008] 5 LRC 10 at 22

before the court in *R v Hundal* [1993] 1 SCR 867. A unanimous court (Stevenson J taking no part in the judgment) resolved the impasse created in *Tutton* and *Waite*, at least in the context of driving offences, by adopting a 'modified' objective test.

3.3.1 Objective mens rea appropriate for driving offences

[29] The court accepted objective fault as an appropriate basis for imposing criminal liability because of 'the nature of driving offences', having particular regard to: the 'licensing requirement' for driving; 'the automatic and reflexive nature of driving'; the wording of the legislative provision; and the 'obvious and urgent' need to control the conduct of drivers ([1993] 1 SCR 867 at 883-886). The fact that driving is a regulated and voluntary activity plays a key role in the adoption of a modified objective test for the mens rea of dangerous driving. The court explained how the licensing requirement impacted on the question of mens rea in two principal ways.

[30] First, because driving can only be undertaken by those who have a licence, as a general rule, the law can take it as a given that those who drive are mentally and physically capable of doing so and that they are familiar with the requisite standard of care. As Cory J put it: 'As a result, it is unnecessary for a court to establish that the particular accused intended or was aware of the consequences of his or her driving' ([1993] 1 SCR 867 at 884). In other words, the driver's capacity and awareness can simply be inferred from the licensing requirements.

[31] Second, there is no injustice in inferring the requisite mens rea from the voluntary act of driving because, as Cory J explained, '[l]icensed drivers choose to engage in the regulated activity of driving' and, by doing so, 'place themselves in a position of responsibility to other members of the public who use the roads' ([1993] 1 SCR 867 at 884). Hence, those who choose to engage in this inherently dangerous activity and fail to meet the requisite standard of care cannot be said

to be morally innocent. The court shed further light on how objective fault can thus be reconciled with principles of fundamental justice in *R v Finlay* [1993] 3 SCR 103, released later that same year. In *Finlay*, the court confirmed that the modified objective test adopted in *R v Hundal* [1993] 1 SCR 867 also satisfied minimum fault requirements under s 7 of the Charter in respect of the offence of storing firearms and ammunition in a careless manner. Lamé CJ explained as follows ([1993] 3 SCR 103 at 115):

'It is a basic tenet of the principles of fundamental justice that the state not be permitted to punish and deprive of liberty the morally innocent. Those who have the capacity to live up to a standard of care and fail to do so, in circumstances involving inherently dangerous activities, however, cannot be said to have done nothing wrong. The Law Reform Commission of Canada emphasized this point in the following passage from *Workplace Pollution*, Working Paper 53 (1986), at pp. 2-73: "Certain kinds of activities involve the control of technology (cars, explosives, firearms) with the inherent potential to do such serious damage to life and limb that the law is justified in paying special attention to the individuals in control. Failing to act in a way which indicates respect for

[2008] 5 LRC 10 at 23

the inherent potential for harm of those technologies, after having voluntarily assumed control of them (no one *has* to drive, use explosives, or keep guns) is legitimately regarded as criminal." ' (Law Reform Commission's emphasis.)

[32] As we can see from this discussion, the adoption of an objective test for negligence-based offences such as dangerous operation of a motor vehicle does not obviate the mens rea requirement. Fault is still very much a necessary part of the equation. However, because of the licensing requirement, which 'assures ... a reasonable standard of physical health and capability, mental health and a knowledge of the reasonable standard required of all licensed drivers' (*R v Hundal* [1993] 1 SCR 867 at 888), from a logical standpoint, criminal fault can be based on the voluntary undertaking of the activity, the presumed capacity to properly do so, and the failure to meet the requisite standard of care.

3.3.2 First modification to the objective test: the marked departure

[33] The court in *Hundal*, however, made it clear that the requisite mens rea may only be found when there is a 'marked departure' from the standard of care expected of a reasonable person in the circumstances of the accused. This modification to the usual civil test for negligence is mandated by the criminal setting. It is only when there is a 'marked departure' that the conduct demonstrates sufficient blameworthiness to support a finding of penal liability. One aspect of driving, 'the automatic and reflexive nature of driving', particularly highlights the need for the 'marked departure' requirement in a criminal setting. Cory J described this aspect as follows ([1993] 1 SCR 867 at 884-885):

'Second, the nature of driving itself is often so routine, so automatic that it is almost impossible to determine a particular state of mind of a driver at any given moment. Driving motor vehicles is something that is familiar to most adult Canadians. It cannot be denied that a great deal of driving is done with little conscious thought. It is an activity that is primarily reactive and not contemplative. It is every bit as routine and familiar as taking a shower or going to work. Often it is impossible for a driver to say what his or her specific intent was at any moment during a drive other than the desire to go from A to B.'

[34] Therefore, as noted by Cory J, the difficulty of requiring positive proof of a particular subjective state of mind lends further support to the notion that mens rea should be assessed by objectively measuring the driver's conduct against the standard of a reasonably prudent driver. In addition, I would note that the automatic and reflexive nature of driving gives rise to the following consideration. Because driving, in large part, is automatic and reflexive, some departures from the standard expected of a reasonably prudent person will inevitably be the product, as Cory J states, of 'little conscious thought'. Even the most able and prudent driver will from time to time suffer from momentary lapses of attention. These lapses may well result in conduct that, when viewed objectively, falls below the standard expected of

[2008] 5 LRC 10 at 24

a reasonably prudent driver. Such automatic and reflexive conduct may even pose a danger to other users of the highway. Indeed, the facts in this case provide a graphic example. The fact that the danger may be the product of little conscious thought becomes of concern because, as McLachlin J (as she then was) aptly put it in *R v Creighton* [1993] 3 SCR 3 at 59: 'The law does not lightly brand a person as a criminal.' In addition to the largely automatic and reflexive

nature of driving, we must also consider the fact that driving, although inherently risky, is a legal activity that has social value. If every departure from the civil norm is to be criminalised, regardless of the degree, we risk casting the net too widely and branding as criminals persons who are in reality not morally blameworthy. Such an approach risks violating the principle of fundamental justice that the morally innocent not be deprived of liberty.

[35] In a civil setting, it does not matter how far the driver fell short of the standard of reasonable care required by law. The extent of the driver's liability depends not on the degree of negligence, but on the amount of damage done. Also, the mental state (or lack thereof) of the tortfeasor is immaterial, except in respect of punitive damages. In a criminal setting, the driver's mental state does matter because the punishment of an innocent person is contrary to fundamental principles of criminal justice. The degree of negligence is the determinative question because criminal fault must be based on conduct that merits punishment.

[36] For that reason, the objective test, as modified to suit the criminal setting, requires proof of a *marked departure* from the standard of care that a reasonable person would observe in all the circumstances. As stated earlier, it is only when there is a marked departure from the norm that objectively dangerous conduct demonstrates sufficient blameworthiness to support a finding of penal liability. With the marked departure, the act of dangerous driving is accompanied with the presence of sufficient mens rea and the offence is made out. The court, however, added a second important qualification to the objective test--the allowance for exculpatory defences.

3.3.3 Second modification to the objective test: the allowance for exculpatory defences

[37] The underlying premise for finding fault based on objectively dangerous conduct that constitutes a marked departure from the norm is that a reasonable person in the position of the accused would have been aware of the risk posed by the manner of driving and would not have undertaken the activity. However, there will be circumstances where this underlying premise cannot be sustained because a reasonable person in the position of the accused would not have been aware of the risk or, alternatively, would not have been able to avoid creating the danger. Of course, it is not open to the driver to simply say that he or she gave no thought to the manner of driving because the fault lies in the failure to bring to the dangerous activity the expected degree of thought and attention that it required. As Cory J explained (*R v Hundal* [1993] 1 SCR 867 at 885):

[2008] 5 LRC 10 at 25

'It would be a denial of common sense for a driver, whose conduct was objectively dangerous, to be acquitted on the ground that he was not thinking of his manner of driving at the time of the accident.'

However, because the accused's mental state is relevant in a criminal setting, 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 creating the danger. On these occasions, even when the manner of driving viewed objectively will clearly be dangerous, the accused cannot be convicted. Cory J, in *Hundal*, gave some useful examples ([1993] 1 SCR 867 at 887):

'Take for example a driver who, without prior warning, suffers a totally unexpected heart attack, epileptic seizure or detached retina. As a result of the sudden onset of a disease or physical disability the manner of driving would be dangerous yet those circumstances could provide a complete defence despite the objective demonstration of dangerous driving. Similarly, a driver who, in the absence of any warning or knowledge of its possible effects, takes a prescribed medication which suddenly and unexpectedly affects the driver in such a way that the manner of driving was dangerous to the public, could still establish a good defence to the charge although it had been objectively established.'

[38] We can readily appreciate the injustice of branding the driver in each of these examples as a criminal. In the same vein, a reasonably held mistake of fact may provide a complete defence if, based on the accused's reasonable perception of the facts, the conduct measured up to the requisite standard of care. It is therefore important to apply the modified objective test in the context of the events surrounding the incident. In *R v Tutton* [1989] LRC (Crim) 553 at 577-578 McIntyre J provided the following useful example in the context of a criminal negligence charge (repeated in *R v*

Hundal [1993] 1 SCR 867 at 887-888):

'If an accused under s 202 has an honest and reasonably held belief in the existence of certain facts, it may be a relevant consideration in assessing the reasonableness of his conduct. For example, a welder, who is engaged to work in a confined space believing on the assurance of the owner of the premises that no combustible or explosive material is stored nearby, should be entitled to have his perception, as to the presence or absence of dangerous materials, before the jury on a charge of manslaughter when his welding torch causes an explosion and a consequent death.'

[39] It is important, however, not to confuse the personal characteristics of the accused with the context of the events surrounding the incident. In the course of the earlier debate on whether to adopt a subjective or objective test, Lamer J favoured an objective approach but, in an attempt to alleviate its potential harshness, he would have made generous allowances for factors particular to the accused, such as youth, mental development and education: see, for example, *R v Tutton* [1989] LRC (Crim) 553 at 578. Under this

[2008] 5 LRC 10 at 26

approach, the young and inexperienced driver's conduct would be measured against the standard expected of a reasonably prudent but young and inexperienced driver. This approach, however, was not favoured by other members of the court. As Wilson J stated in *Tutton*, this individualised approach 'sets out a fluctuating standard which in my view undermines the principles of equality and individual responsibility which should pervade the criminal law' (*R v Tutton* [1989] LRC (Crim) 553 at 569).

[40] Some of the language used in *Hundal* nonetheless left uncertainty about the degree to which personal characteristics could form part of the circumstances which must be taken into account in applying the modified objective test. (See, for example, the references to 'certain personal factors' and to 'human frailties' at *R v Hundal* [1993] 1 SCR 867 at 883, 887.) This remaining uncertainty was later resolved in *R v Creighton* [1993] 3 SCR 3. Short of incapacity to appreciate the risk or incapacity to avoid creating it, personal attributes such as age, experience and education are not relevant. The standard against which the conduct must be measured is always the same—it is the conduct expected of the reasonably prudent person in the circumstances. The reasonable person, however, must be put in the *circumstances* the accused found himself in when the events occurred in order to assess the reasonableness of the conduct. To reiterate the example used above, the reasonable person becomes the one who 'without prior warning, suffers a totally unexpected heart attack, epileptic seizure or detached retina' or becomes the one who 'in the absence of any warning or knowledge of its possible effects, takes a prescribed medication which suddenly and unexpectedly' causes him to drive in a manner that is dangerous to the public. By so placing the reasonable person, the test is not personalised and the standard remains that of a reasonably prudent driver, but it is appropriately contextualised.

3.4 Restatement of the test in *Hundal*

[41] In *R v Hundal* [1993] 1 SCR 867 at 888-889 Cory J summarised the analytical framework for applying the modified objective test in the following oft-quoted passage:

'It follows then that a trier of fact may convict if satisfied beyond a reasonable doubt that, viewed objectively, the accused was, in the words of the section, driving in a manner that was "dangerous to the public, having regard to all the circumstances, including the nature, condition and use of such place and the amount of traffic that at the time is or might reasonably be expected to be on such place". In making the assessment, the trier of fact should be satisfied that the conduct amounted to a marked departure from the standard of care that a reasonable person would observe in the accused's situation. Next, if an explanation is offered by the accused, such as a sudden and unexpected onset of illness, then in order to convict, the trier of fact must be satisfied that a reasonable person in similar circumstances ought to have been aware of the risk and of the danger involved in the conduct manifested by the accused.'

[2008] 5 LRC 10 at 27

[42] In reviewing a number of cases that have applied this test, I have observed two common difficulties. First, there appears to be some confusion on the distinction, if any, between 'objectively dangerous driving' on one hand, and 'a

marked departure from the standard of care' on the other. This difficulty is quite understandable because some departures from the reasonable standard of care may not be 'marked' or 'significant' but are nonetheless undeniably dangerous. As we shall see, this case is one example. Second, there appears to be much uncertainty in the case law on how to deal with evidence about the accused's mental state. In particular, when is evidence about the accused's actual mental state relevant? Is it relevant in determining whether the conduct constitutes a 'marked departure' from the norm or, as the courts below in this case have done, should it be considered only as part of a distinct analysis on potential exculpatory defences?

[43] As we have seen, the requisite mens rea for the offence of dangerous driving was the sole issue before the court in *R v Hundal* [1993] 1 SCR 867 and the test was expressed accordingly. In order to clarify the uncertainties I have mentioned, it may assist to restate the summary of the test in terms of both the actus reus and the mens rea of the offence. I respectfully disagree with the Chief Justice that the test for the actus reus is defined in terms of a marked departure from the normal manner of driving (at para [67], below). The actus reus must be defined, rather, by the words of the enactment. Of course, conduct that is found to depart markedly from the norm remains necessary to make out the offence because nothing less will support the conclusion that the accused acted with sufficient blameworthiness, in other words with the requisite mens rea, to warrant conviction. In addition, it may be useful to keep in mind that while the modified objective test calls for an objective assessment of the accused's manner of driving, evidence about the accused's actual state of mind, if any, may also be relevant in determining the presence of *sufficient* mens rea. I would therefore restate the test reproduced above as follows:

(a) The actus reus. The trier of fact must be satisfied beyond a reasonable doubt that, viewed objectively, the accused was, in the words of the section, driving in a manner that was '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'.

(b) The mens rea. The trier of fact must also be satisfied beyond a reasonable doubt that the accused's objectively dangerous conduct was accompanied by the required mens rea. In making the objective assessment, the trier of fact should be satisfied on the basis of all the evidence, including evidence about the accused's actual state of mind, if any, that the conduct amounted to a marked departure from the standard of care that a reasonable person would observe in the accused's circumstances. Moreover, if an explanation is offered by the accused then, in order to convict, the trier of fact must be satisfied that a reasonable person in similar circumstances ought to have been aware of the risk and of the danger involved in the conduct manifested by the accused.

[2008] 5 LRC 10 at 28

[44] I wish to elaborate on certain aspects of this test before applying it to the facts of this case.

3.4.1 Determining the actus reus

[45] I deal firstly with the actus reus. The offence is defined by the words of the legislative provision, not by the common law standard for civil negligence. In order to determine the actus reus, the conduct must therefore be measured as against the wording of s 249. Although the offence is negligence-based, this is an important distinction. As we have seen, conduct that constitutes dangerous operation of a motor vehicle as defined under s 249 will necessarily fall below the standard expected of a reasonably prudent driver. The converse, however, is not necessarily true--not all negligent driving will constitute dangerous operation of a motor vehicle. If the court is satisfied beyond a reasonable doubt that the manner of driving was dangerous to the public within the meaning of s 249, the actus reus of the offence has been made out. Nothing is gained by adding to the words of s 249 at this stage of the analysis.

[46] As the words of the provision make plain, it is the *manner* in which the motor vehicle was operated that is at issue, not the consequence of the driving. The consequence, as here where death was caused, may make the offence a more serious one under s 249(4), but it has no bearing on the question whether the offence of dangerous operation of a motor vehicle has been made out or not. Again, this is also an important distinction. If the focus is improperly placed on the

consequence, it almost begs the question to then ask whether an act that killed someone was dangerous. The court must not leap to its conclusion about the manner of driving based on the consequence. There must be a meaningful inquiry into the manner of driving. The consequence, of course, may assist in assessing the risk involved, but it does not answer the question whether or not the vehicle was operated in a manner dangerous to the public. This court explained this distinction in *R v Anderson* [1990] 1 SCR 265 at 273 as follows:

'In the circumstances of this case, the unfortunate fact that a person was killed added nothing to the conduct of the appellant. The degree of negligence proved against the appellant by means of the evidence that he drove after drinking and went through a red light was not increased by the fact that a collision occurred and death resulted. *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.* In some circumstances, perhaps, the actions of the accused and the consequences flowing from them may be so interwoven that the consequences may be relevant in characterizing the conduct of the accused. That is not the case here.' (Our emphasis.)

3.4.2 Determining the mens rea

[47] In determining the question of mens rea, the court should consider the totality of the evidence, including evidence, if any, about the accused's actual state of mind. As discussed at length above, the mens rea requirement for the offence of dangerous driving will be satisfied by applying a modified objective

[2008] 5 LRC 10 at 29

test. This means that, unlike offences that can only be committed if the accused possesses a subjective form of mens rea, it is not necessary for the Crown to prove that the accused had a positive state of mind, such as intent, recklessness or wilful blindness. Of course, this does not mean that the actual state of mind of the accused is irrelevant. For example, if proof is made that a driver purposely drove into the path of an oncoming vehicle in an intentionally dangerous manner for the purpose of scaring the passengers of that vehicle or impressing someone in his own vehicle with his bravado, the requirement of mens rea will easily be met. One way of looking at it is to say that the subjective mens rea of intentionally creating a danger for other users of the highway within the meaning of s 249 of the Criminal Code constitutes a 'marked departure' from the standard expected of a reasonably prudent driver. Doherty JA similarly equates such deliberate action with a 'marked and substantial' departure from the norm in the context of a criminal negligence charge in *R v Willock* (2006) 210 CCC (3d) 60 at [32], where he states:

'I think the appellant's conduct during the two or three seconds in issue could only reasonably be said to constitute a marked and substantial departure from the conduct expected of a reasonable driver if the appellant deliberately jerked the steering wheel to cause the vehicle to swerve, presumably to either show off or frighten his young passengers. If that finding was reasonably open on the evidence, then the appellant could properly have been convicted of criminal negligence, as he was unable to retain control of the vehicle before it crossed the median and collided with the westbound vehicle. As indicated, I read the trial judge as making that finding. With respect, I do not think that finding was reasonably available on the totality of the evidence.'

I agree with the Chief Justice (at para [75], below) that the analysis in *Willock* does not have the effect of imposing on the Crown the burden of proving the subjective intention of the accused in order to make out the offence. Doherty JA specifically held (at [31]) that 'conduct occurring in a two to three second interval can amount to a marked departure from the standard of a reasonable person and demonstrate a wanton or reckless disregard for the life or safety of others'. Doherty JA simply recognises, as I do, that evidence about the actual intention of an accused is relevant to a court's objective assessment of whether or not conduct constitutes a marked departure from the norm.

[48] However, subjective mens rea of the kind I have just described need not be proven to make out the offence because the mischief Parliament sought to address in enacting s 249 encompasses a wider range of behaviour. Therefore, while proof of subjective mens rea will clearly suffice, it is not essential. In the case of negligence-based offences such as this one, doing the proscribed act with the absence of the appropriate mental state of care may instead suffice to constitute the requisite fault. The presence of objective mens rea is determined by assessing the dangerous conduct as against the standard expected of a reasonably prudent driver. If the dangerous conduct constitutes a 'marked departure' from that

norm, the offence will be made out. As stated earlier, what constitutes a 'marked departure' from the standard expected of a

[2008] 5 LRC 10 at 30

reasonably prudent driver is a matter of degree. The lack of care must be serious enough to merit punishment. There is no doubt that conduct occurring in a few seconds can constitute a marked departure from the standard of a reasonable person. Nonetheless, as Doherty JA aptly remarked in *Willock* (2006) 210 CCC (3d) 60 at [31], 'conduct that occurs in such a brief time frame in the course of driving, which is otherwise proper in all respects, is more suggestive of the civil rather than the criminal end of the negligence continuum'. Although *Willock* concerned the offence of criminal negligence, an offence which is higher on the continuum of negligent driving, this observation is equally apt with respect to the offence of dangerous operation of a motor vehicle.

[49] If the conduct does not constitute a marked departure from the standard expected of a reasonably prudent driver, there is no need to pursue the analysis. The offence will not have been made out. If, on the other hand, the trier of fact is convinced beyond a reasonable doubt that the objectively dangerous conduct constitutes a marked departure from the norm, the trier of fact must consider evidence about the actual state of mind of the accused, if any, to determine whether it raises a reasonable doubt about whether a reasonable person in the accused's position would have been aware of the risk created by this conduct. If there is no such evidence, the court may convict the accused.

4. Application to this case

[50] First, did Mr Beatty commit the actus reus of the offence? Did he operate his 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'? I repeat here the Court of Appeal's analysis of the circumstances for convenience (at [23]-[24]):

'However, the evidence showed that there was only one lane for travel in each direction, the traffic was proceeding at or near the posted speed limit of 90 kilometres per hour, the highway was well-travelled, there was limited visibility approaching the curve, and the collision occurred within a split second of the respondent's crossing onto the oncoming lane of traffic. Viewed objectively, the respondent's failure to confine his vehicle to its own lane of travel was in "all the circumstances" highly dangerous to other persons lawfully using the highway, and in particular those approaching in a westerly direction on their own side of the road.'

[51] Up to this point in the analysis, I would agree with the Court of Appeal. In all the circumstances, Mr Beatty's failure to confine his vehicle to his own lane of traffic was dangerous to other users of the highway. Further, no suggestion was made at trial that Mr Beatty was in a state of non-insane automatism at the time. However, this conclusion only answers the actus reus part of the offence. The more difficult question is whether Mr Beatty had the necessary mens rea. There is no evidence here of any deliberate intention to create a danger for other users of the highway that could provide an easy

[2008] 5 LRC 10 at 31

answer to that question. Indeed, the limited evidence that was adduced about the actual state of mind of the driver suggested rather that the dangerous conduct was due to a momentary lapse of attention. Hence, the trial judge was correct in finding that the question of mens rea in this case turns on whether Mr Beatty's manner of driving, viewed on an objective basis, constitutes a marked departure from the norm.

[52] In my respectful view, the Court of Appeal erred in faulting the trial judge for addressing her attention to Mr Beatty's 'momentary lack of attention' and his 'few seconds of lapsed attention'. The trial judge appropriately focussed her analysis on Mr Beatty's manner of driving in all the circumstances. She noted that there was no evidence of improper driving before the truck momentarily crossed the centre line and that the 'few seconds of clearly negligent driving' was the only evidence about his manner of driving (at [36]). She appropriately considered the totality of the evidence in finding that 'the only reasonable inference' was that 'he experienced a loss of awareness' that caused him to drive straight instead of following the curve in the road (at [36]). In her view, this momentary lapse of attention was

insufficient to found criminal culpability. She concluded that there was 'insufficient evidence to support a finding of a *marked* departure from the standard of care of a prudent driver' (at [37]).

[53] Based on the totality of the evidence, I see no reason to interfere with the trial judge's assessment of Mr Beatty's conduct in this case and her conclusion on Mr Beatty's criminal liability. By contrast, it is my respectful view that the Court of Appeal leaped too quickly to the conclusion that the requisite *mens rea* could be made out from the simple fact of the accident occurring, leaving no room for any assessment of Mr Beatty's conduct along the continuum of negligence.

[54] For these reasons, I would allow the appeal and restore the acquittals.

McLACHLIN CJ (BINNIE and LeBEL JJ concurring).

[55] I agree with much of Charron J's analysis as well as with her disposition of the appeal. However, I take a different view on how the test for the offence of dangerous operation of a motor vehicle should be stated and how this impacts on cases of momentary lapse of attention, such as this case.

The test for the offence of dangerous driving

[56] At para [43], above, my colleague describes the *actus reus* in terms of dangerous operation of a motor vehicle and the *mens rea* in terms of a marked departure from the standard of care that a reasonable person would observe in the accused's circumstances. In discussing the *actus reus*, my colleague observes that '[n]othing is gained by adding to the words of s 249 at this stage of the analysis' (at para [45], above).

[57] With respect, I take a different view. A clear understanding of what is required to fulfil both the *actus reus* and *mens rea* of dangerous operation of a motor vehicle is important, and I see no impediment to judicial clarification of either element. Determining what constitutes dangerous driving without regard to the consequences--as the test requires--is a difficult task, and one

[2008] 5 LRC 10 at 32

that has given rise to confusion. In my opinion the language of s 249 of the Criminal Code, RSC 1985, c C-46, is consistent with requiring a marked departure as part of the *actus reus* of the offence.

[58] The jurisprudence of this court offers assistance on what constitutes the *actus reus* and *mens rea* of dangerous driving and how the two elements of the offence should be described. *R v Hundal* [1993] 1 SCR 867, confirmed in *R v Creighton* [1993] 3 SCR 3, indicates that the characterisation of 'marked departure' from the norm applies to the *actus reus* of the offence, and that the *mens rea* of the offence flows by inference from that finding, absent an excuse casting a reasonable doubt on the accused's capacity.

[59] In *R v Hundal* [1993] 1 SCR 867 at 888, Cory J, writing for the majority, was concerned mainly with *mens rea*. However, after settling this matter, he stated the overall requirements of dangerous driving in terms of marked departure, without limiting them to *mens rea*:

'... a trier of fact may convict if satisfied beyond a reasonable doubt that, viewed objectively, the accused was, in the words of the section, driving in a manner that was "dangerous to the public, having regard to all the circumstances, including the nature, condition and use of such place and the amount of traffic that at the time is or might reasonably be expected to be on such place". In making the assessment, the trier of fact should be satisfied that the conduct amounted to a marked departure from the standard of care that a reasonable person would observe in the accused's situation.' (My emphasis.)

[60] Cory J then went on to state that even where this is established, the accused may offer an excuse such as a sudden and unexpected onset of illness, thereby raising a reasonable doubt as to mens rea.

[61] In the absence of language in this passage confining the requirement of marked departure to the mens rea of the offence, it is reasonable to conclude that it was intended to apply to both the actus reus and the mens rea of the offence.

[62] Any doubt on the matter was removed by the majority decision of this court in *R v Creighton*, in which Cory J joined. I wrote ([1993] 3 SCR 3 at 73-74):

'The foregoing analysis suggests the following line of inquiry in cases of penal negligence. *The first question is whether actus reus is established. This requires that the negligence constitute a marked departure from the standards of the reasonable person in all the circumstances of the case ...* The next question is whether the mens rea is established. As is the case with crimes of subjective mens rea, the mens rea for objective foresight of risking harm is normally inferred from the facts. The standard is that of the reasonable person in the circumstances of the accused. If a person has committed a manifestly dangerous act, it is reasonable, absent indications to the contrary, to infer that he or she failed to direct his or her mind to the risk and the need to take care. However, the normal inference may be negated by evidence raising a reasonable doubt as to lack of capacity to appreciate the risk. Thus, if a prima facie case for actus reus and mens rea is made out,

[2008] 5 LRC 10 at 33

it is necessary to ask a further question: did the accused possess the requisite capacity to appreciate the risk flowing from his conduct? If this further question is answered in the affirmative, the necessary moral fault is established and the accused is properly convicted. If not, the accused must be acquitted.' (Our emphasis.)

[63] This analysis, which defines the actus reus in terms of a 'marked departure' and the mens rea as the normal inference from that conduct, absent excuse, was penned only a short time after *R v Hundal* [1993] 1 SCR 867, and concurred in by the majority of the court, including Cory J. Cory J's decision in *Hundal* was cited and relied on in *R v Creighton* [1993] 3 SCR 3 as a basis for this formulation. It follows that *Hundal* and *Creighton* should be seen as adopting the same test, and that any ambiguity in the discussion of dangerous driving in *Hundal* should be resolved in the manner suggested in *Creighton*.

[64] Requiring that the conduct alleged to constitute the actus reus of the offence constitute a marked departure from the standard of a reasonable person is consistent with the language of s 249 of the Criminal Code. Section 249(1)(a) defines the actus reus in terms of operating a motor vehicle 'in a manner that is dangerous to the public, having regard to all the circumstances', and goes on to provide a non-exhaustive list of circumstances to be taken into consideration. In this context, dangerousness is properly understood as requiring a marked departure from the conduct of a reasonable person, in the circumstances.

[65] If conduct not representing a marked departure is allowed to satisfy the actus reus requirement for dangerous driving, then it becomes unclear how Criminal Code dangerous driving is to be distinguished from a wide variety of provincial motor vehicle offences, at the level of the actus reus. Provincial motor vehicle legislation exists in part to manage and minimise the risks associated with the widespread use of motor vehicles. Thus in many cases, conduct representing a violation of provincial motor vehicle legislation will be 'objectively dangerous' in comparison with strict compliance with the provisions of the legislation. Yet it would stretch the meaning of s 249(1)(a) to suggest that such conduct would be sufficient to establish the actus reus of dangerous driving. The 'marked departure' requirement provides a standard for determining what is objectively dangerous in the context of s 249(1)(a), allowing relatively minor violations of provincial motor vehicle Acts to fall clearly outside the scope of conduct that Parliament intended to criminalise.

[66] I add that this formulation mirrors the theory on which the criminal law is founded--that the actus reus and mens rea of an offence represent two aspects of the criminal conduct. The actus reus is the act and the mens rea, or guilty mind, the intention to commit that act. If the mens rea of the offence requires a failure to take reasonable care which is inferred from the conduct of driving in a manner that represents a marked departure from the norm, then the actus reus

must be the act of driving in a manner that represents a marked departure from the norm.

[67] I therefore conclude that the correct statement of the law is as follows:

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1. The actus reus requires a marked departure from the normal manner of driving.
2. The mens rea is generally inferred from the marked departure in the nature of driving. Based on the finding of a marked departure, it is inferred that the accused lacked the requisite mental state of care of a reasonable person.
3. While generally the mens rea is inferred from the act constituting a marked departure committed by the accused, the evidence in a particular case may negate or cast a reasonable doubt on this inference.

The problem of momentary lapse of attention

[68] The problem at the heart of this case is whether acts of momentary lapse of attention can constitute the offence of dangerous driving. The accused was driving in an entirely normal manner until his vehicle suddenly swerved over the centre line of the road, for reasons that remain unclear. Clearly there was momentary lapse of attention. The issue is whether this is capable of establishing the actus reus and mens rea of the offence.

[69] In my view, momentary lapse of attention without more cannot establish the actus reus or mens rea of the offence of dangerous driving. This flows from this court's decision in *R v Mann* [1966] SCR 238, upholding the constitutionality of the provincial offence of careless driving. The constitutionality of the provincial offence was attacked on the ground that the field was occupied by the federal offence of dangerous driving. In order to resolve this issue, the court was obliged to define the ambit of dangerous driving and careless driving, respectively. The court concluded that the two offences were aimed at different conduct. In *Mann*, the distinction between the levels of negligence required for careless driving and dangerous driving was essential to upholding the constitutionality of the provincial offence of careless driving. Although some of the judges in *R v Mann* [1966] SCR 238 cast their reasoning in terms of inadvertent versus advertent negligence, concepts which are no longer the focus of the analysis in cases of dangerous driving (*R v Hundal* [1993] 1 SCR 867 at 889), what is clear is that the offence of dangerous driving requires a higher degree of negligence than careless driving. This court affirmed the differing levels of negligence for careless driving and dangerous driving in *Hundal*.

[70] It follows that if the only evidence against the accused is evidence of momentary lapse of attention, the offence of dangerous driving is not established. This, in my view, is as it should be. The heavy sanctions and stigma that follow from a criminal offence should not be visited upon a person for a momentary lapse of attention. Provincial regulatory offences appropriately and adequately deal with this sort of conduct.

[71] In terms of the test for the offence outlined above, momentary lapse of attention does not establish the marked departure from the standard of care of a reasonably prudent driver required for the actus reus of the offence. As the case law teaches, one must consider the entire manner of driving of the accused, in all the circumstances. A moment of lapse of attention, in the context of totally normal driving, is insufficient to establish the marked departure required for the offence of dangerous driving. In order to avoid

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criminal liability, an accused's driving is not required to meet a standard of perfection. Even good drivers are occasionally subject to momentary lapses of attention. These may, depending on the circumstances, give rise to civil liability or to a conviction for careless driving. But they generally will not rise to the level of a marked departure required for a conviction for dangerous driving.

[72] A momentary lapse of attention *without more* cannot establish the actus reus and mens rea of the offence of dangerous driving. However, additional evidence may show that the momentary lapse is part of a larger pattern that,

considered as a whole, establishes the marked departure from the norm required for the offence of dangerous driving. For example, a momentary lapse might be caused by the consumption of alcohol or by carrying on an activity incompatible with maintaining proper control of the automobile. The trier of fact might conclude in such a case that considering the total driving pattern in all the circumstances, a marked departure from the norm is established.

[73] This brings us to *R v Willock* (2006) 210 CCC (3d) 60 and the relevance of the subjective intention of the accused. In *Willock*, the accused, who had been driving normally, suddenly steered erratically. His vehicle began to fishtail and ultimately went out of control, crossing the median into opposing traffic. The accused offered no explanation for his steering, such as sudden illness. At trial, the accused was convicted of criminal negligence causing death. The Court of Appeal overturned the conviction on the grounds that in the circumstances, where the accused's driving had otherwise been wholly proper, the Crown had the burden of proving that the accused deliberately caused his vehicle to swerve.

[74] The holding in *Willock* that the Crown be required to prove that the accused deliberately caused his vehicle to swerve should not be read as putting a burden on the Crown to show a subjective intention by the accused to drive dangerously. In *Willock*, Doherty JA did not require the Crown to establish that the accused appreciated that causing his vehicle to swerve created a risk that he would lose control of his vehicle or that this in turn created a risk of death or bodily injury. It was not necessary that the accused subjectively appreciated the risks associated with his conduct or that he appreciated that his conduct represented a marked departure from the reasonable person standard. Doherty JA simply held that in the circumstances, evidence of the appellant's intentions was necessary for assessing his conduct on the objective standard, because on the facts in that case, if the accused had not intentionally caused the car to swerve, the remaining evidence was not sufficient to show a marked departure.

[75] *Willock* should thus not be read as suggesting that in cases of momentary lapse of attention, the Crown must prove that the accused subjectively intended to drive in a manner that constituted a marked departure from the norm and endanger lives, in order to establish the offence of dangerous driving. Additional evidence capable of establishing that a momentary lapse is part of a larger pattern of dangerous driving may indeed be adduced. But as suggested in *R v Hundal* [1993] 1 SCR 867, this will generally be objective evidence of the accused's entire driving pattern. The

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accused's conduct and words may be part of this pattern. But since this is a negligence offence, the concern is with objective mens rea. The ultimate issue is not what was in the accused's mind at the time of the aberration, but the manner of his driving in all the circumstances.

[76] In *R v Hundal* [1993] 1 SCR 867, the majority noted that the objective standard is justified in part by the difficulty of establishing a driver's particular state of mind at a given time, due in part to the automatic and reflexive nature of driving. Cory J held that generally, it is unnecessary to inquire into the accused's subjective state of mind. Evidence relating to such matters as road conditions and the condition and behaviour of the accused's vehicle will usually be sufficient to determine whether the accused's manner of driving constituted a marked departure.

[77] On the test that I have suggested, the appropriate analysis in cases such as *Willock*, where momentary lapse of attention is all the Crown can prove, is the following. The starting point is that momentary lapse of attention cannot satisfy the requirements of the offence of dangerous driving and, more particularly, the requirement of a marked departure from the standard of care of a reasonably prudent driver required to establish the actus reus. A momentary lapse, without more, is therefore insufficient to establish the offence. However, additional elements in the proof may establish that the momentary lapse is part of a larger driving pattern that, considered as a whole, constitutes a marked departure from the standard of care of a reasonably prudent driver. It is for the trier of fact to consider all of the evidence objectively and determine if the actus reus of driving in a manner that constitutes a marked departure from the norm is established. If this is established, the mens rea will be inferred from the driving pattern, absent excuses presented by the accused such as a sudden and unexpected illness which raise a reasonable doubt as to criminal intent.

[78] Additional inquiry into the accused's actual state of mind is unnecessary. If the only evidence is of momentary

lapse of attention, the actus reus is not established and the Crown's case fails, making further inquiry unnecessary. On the other hand, if the accused is driving in a manner that constitutes a marked departure from the norm, the inference will be that he lacked the requisite mental state of care of a reasonable person, absent an excuse, such as a sudden and unexpected onset of illness.

[79] The appellant in this case was charged with dangerous driving causing death. There has been some debate in lower courts, and among academic commentators, regarding the approach to actus reus and mens rea in driving cases where the offence charged is criminal negligence, rather than dangerous driving. In this case, the court does not have to rule on the elements of the offence for a driving offence charged as criminal negligence, and these reasons should not be read as deciding that issue.

Application to this case

[80] The only evidence adduced by the Crown in the case at bar was evidence of a momentary lapse of attention that caused the accused's vehicle to cross the centre line of the highway. In all other respects, the accused's driving was, on the evidence, entirely normal.

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[81] It follows that all that has been established is momentary lapse of attention. The marked departure required for the offence of dangerous operation of a motor vehicle has not been made out. The Crown did not succeed in proving that the accused's manner of driving, viewed as a whole, constituted a marked departure from the standard of care of a reasonably prudent driver. It follows that it did not prove the actus reus of the offence and its case must fail.

Conclusion

[82] I would allow the appeal and restore the acquittals.

FISH J.

I

[83] Justin Ronald Beatty, the appellant, was acquitted at trial on three counts of operating a motor vehicle in a manner that is dangerous to the public (or 'dangerous driving') and thereby causing the death of another person ([2005] BCJ No 3071 (QL), 2005 BSCS 751). On an appeal by the Crown, the British Columbia Court of Appeal set aside his acquittals and ordered a new trial ((2006) 225 BCAC 154, 2006 BCCA 229). Like my colleagues, but for somewhat different reasons, I would allow Mr Beatty's appeal and restore the acquittals entered by the trial judge.

II

[84] I agree with Charron J that the actus reus of dangerous driving consists in the elements of that offence set out in s 249(1) of the Criminal Code, RSC 1985, c C-46. Accordingly, in my view, anyone who commits that actus reus with the requisite mens rea is guilty of dangerous driving.

[85] The mens rea, or fault element, signifies a blameworthy state of mind. That fault element can be established in two ways: the first rare, the second more common.

[86] In rare cases, the prosecution will be able to establish that the accused drove in a deliberately dangerous manner, within the meaning of s 249(1)(a) of the Code. Where this can be shown, it will be unnecessary to establish, in addition, that the nature or degree of the appellant's conduct represents a marked departure from the conduct of a reasonable person in similar circumstances. The decision of the accused to drive in a dangerous manner, like his awareness that he

is doing so, amounts to subjective mens rea and not the volitional element of the actus reus. It follows, in my respectful view, that a 'marked departure' from the norm is not an invariable or essential characteristic of the actus reus of dangerous driving.

[87] It is well established, however, that the fault element of dangerous driving can be established as well--and generally is--on an objective basis, by inference and attribution. In that case, the blameworthiness of the prohibited conduct does not lie in what the accused knew or intended but in the justification for *imputing* to the accused a culpable mental state *for reasons of social policy*. In this regard, I agree with my colleagues that the requisite mens

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rea can be established by demonstrating that the accused failed to meet the objective standard of a reasonable person in the circumstances.

[88] The fault element, however, is not the marked departure from the norm of a reasonably prudent driver but the fact that a reasonably prudent driver in the accused's circumstances would have been aware of the risk of that conduct, and if able to do so, would have acted to avert it. This requisite mental element may only be inferred where the impugned conduct represents a marked departure from the norm; it cannot be inferred from the mere fact that he or she operated the motor vehicle in a dangerous manner.

[89] In the result, I agree that we should avoid characterising the *conduct* that represents a marked departure from the norm as the *mental element* or mens rea of the offence. It does not follow, in my respectful view, that a marked departure from the norm must instead be characterised as the actus reus of the offence. As I have already explained, proof of the actus reus, coupled with subjective mens rea, will suffice for conviction. Otherwise, conduct that is found to depart markedly from the norm is nonetheless necessary for conviction because nothing less will support a *reasonable inference* that the accused acted with the objective mens rea that is an essential element of the offence.

III

[90] The Chief Justice and Charron J, essentially for the same reasons, have concluded, correctly in my view, that the impugned conduct of the accused in this case did not amount to a marked departure from the norm. There may well be circumstances in which inattention, even transitory, will suffice to establish the fault element of dangerous driving. That was not the case here.

[91] I would for this reason, like my colleagues, allow the appeal and restore the acquittals entered by the trial judge.

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