DRIVING WHILE INTOXICATED OR IMPAIRED

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History

With the advent of the motor vehicle, a new criminal problem arose: the necessity of dealing with the driver who is unable to properly control his actions owing to the influence of liquor. For some time no direct action was taken in Canada to enable punishment of an intoxicated driver. He might, of course, often be liable to prosecution for dangerous driving under section 285 of the Criminal Code. But more was required to deal with the problem and in 1921 section 285 was amended setting up a summary conviction offence with compulsory jail sentence for driving a motor vehicle while intoxicated.[1]

The next step was taken in 1925 when a broader prohibition was substituted. No longer did the accused need to be actually driving; he was equally liable if he was in care or control of the motor vehicle. In addition the section now covered being "under the influence of narcotics" as well as being intoxicated by alcoholic beverages.[2]

In 1930, provision was made so that a charge could now be laid upon indictment providing for a heavier penalty which was increased by subsequent offences; the penalty on summary conviction was not changed. The prosecution thus was given a discretion to charge the accused under either. The change emphasized the realization of the seriousness of the offence and the increasing danger to the public as more and better motor vehicles were introduced.

In 1947, a further amendment provided that once the Crown had proved that the accused was intoxicated or under the influence of a narcotic and was occupying the driver's seat, the onus was on him to establish "that he did not enter or mount the said vehicle for the purpose of setting it in motion".[4]

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1. (1921) 11 & 12 Geo. V, c. 25, s. 3, s. 285(c).
2. (1925) 15 & 16 Geo. V, s. 38, s 5. The actual wording of the section was not affected by the statutory revision of 1927: R.S.C., 1927, s. 36, s. 285(4).
3. (1930) 20 & 21 Geo. V, c. 11, s. 6; added to (1935) 25 & 26 Geo. V, c. 56, s. 4.
4. (1947) 71 Geo. VI, c. 55, s. 10 (now s. 224(2)).

In 1951, a new section dealing with the driver who is not intoxicated by whose ability to drive is impaired by alcohol or a drug was enacted. The offence was less serious as is indicated by the penalty imposed upon conviction; a fine could be imposed as an alternative to imprisonment if the accused was convicted of driving while his ability to do so was impaired.[5] At the same time, legislation was passed allowing chemical tests of bodily substances to be admitted as evidence notwithstanding that the accused was not warned that he need not give the sample.[6] However, it was made clear that no person has to submit to that test and the fact that he refuses to give such a sample is not admissible.[7]

The Criminal Code sections as they appear in the new revision[8] are as follows:

> 222. Every one who, while intoxicated or under the influence of a narcotic drug, drives a motor vehicle or has the care or control of a motor vehicle, whether it is in motion or not, is guilty of
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> (a) an indictable offence and is liable
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> (i) for a first offence, to imprisonment for not more than three months and not less than thirty days, and
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> (ii) for each subsequent offence, to imprisonment for not more than one year and not less than three months; or
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> (b) an offence punishable on summary conviction and is liable
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> (i) for a first offence, to imprisonment for not more than thirty days and not less than seven days,
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> (ii) for a second offence, to imprisonment for not more than three months and not less than one month, and
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> (iii) for each subsequent offence, to imprisonment for not more than one year and not less than three months.
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> 223. Every one who, while his ability to drive a motor vehicle is impaired by alcohol or a drug, drives a motor vehicle or has the care or control of a motor vehicle, whether it is in motion or not, is guilty of an indictable offence or an offence punishable on summary conviction and is liable,

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5. (1951) 15 Geo. VI, c. 47, s. 14(2).
6. **Ibid.** (now s. 224(3)).
7. **Ibid.** (now s. 224(4)).
8. (1953-4) 2 & 3 Eliz. II, c. 51.

(a) for a first offence, to a fine of not more than five hundred dollars and not less than fifty dollars or to imprisonment for three months or to both,

(b) for a second offence, to imprisonment for not more than three months and not less than fourteen days, and

(c) for each subsequent offence, to imprisonment for not more than one year and not less than three months.

224. (1) Where an accused is charged with an offence under section 222, and the evidence does not establish that he committed an offence under that section, but establishes that he committed an offence under section 223, the accused may be convicted of an offence under section 223 and the conviction bars further proceedings for any such offence under section 222 or 223.

(2) For the purpose of sections 222 and 223, where a person occupies the seat ordinarily occupied by the driver of a motor vehicle he shall be deemed to have the care or control of the vehicle unless he establishes that he did not enter or mount the vehicle for the purpose of setting it in motion.

(3) In any proceedings under section 222 or 223, the result of a chemical analysis of a sample of the blood urine, breath or other bodily substance of a person may be admitted in evidence on the issue whether that person was intoxicated or under the influence of a narcotic drug or whether his ability to drive was impaired by alcohol or a drug, notwithstanding that he was not, before he gave the sample, warned that he need not give the sample or that the results of the analysis of the sample might be used in evidence.

(4) No person is required to give a sample of blood, urine, breath or other bodily substance for chemical analysis for the purposes of this section and evidence that a person refused to give such a sample or that such a sample was not taken is not admissible nor shall such a refusal or the fact that a sample was not taken be the subject of comment by any person in the proceedings.

In 1959, three subsections were added to section 224.[9] These are:

(5) In any proceedings under section 222 or section 223 a certificate purporting to be signed by an analyst stating that he has performed a chemical analysis on the blood, urine, breath or other bodily substance of a person and stating the results of his analysis or examination is prima facie evidence of the facts stated in the certificate without proof of the signature or the official character of the person by whom it purports to be signed.

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9. (1959) 7 & 8 Eliz. II, c. 41, s. 15.

(6) In this section "analyst" means a person designated by the Attorney General as an analyst for the purposes of this section

(7) Subsection (5) does not apply in any proceedings unless at least seven days' notice in writing is given to the accused that it is intended to tender the certificate of the analyst in evidence

Elements

In sections 222 and 223 of the Criminal Code, eight separate offences are created. Each of these offences involved four separate elements:

(a) The condition of the accused; he must be either intoxicated, under the influence of a narcotic drug, impaired by alcohol or impaired by a drug.

(b) The relation of the accused to the motor vehicle; he must be either driving or in care or control of it.

(c) Whether the vehicle is a motor vehicle.

(d) **Mens rea.**

The Crown must take great care in proving the existence and close association of all the essential elements. In the case of **R. v. Brown,**[10] the accused was charged with driving a motor vehicle while intoxicated. The evidence showed that the accused was drunk at the time of the arrest and that he had been driving a car some time before, but the drunkeness and the driving were not brought into juxtaposition and the accused was acquitted.

Each of the elements will now be discussed in greater detail.

Intoxication

The first element to be discussed is "intoxication" as set out in section 222 of the Criminal Code. No definition of the word has been accepted in all cases and many authorities feel the word is less a definition than a test. An explanation that has become widely accepted was given by Boyle, J. in **McRae v. McLaughlin Motor Car.**[11] He stated:

> Intoxication, it must be remembered, is a mental and physical condition, caused by the concumption of alcohol in some form or another. Some people believe that a man who takes any alcohol thereby becomes intoxicated.

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10. (1951) 13 C.R. 53

11. [1926] 1 D.L.R. 372, at p. 378; Followed in: **R. v. Ouellette** (1931) 55 C.C.C. 389; **R. v. Levesque** (1938) 44 Rev. de Jur. 309; **R. v. Leahy** (1939) 73 C.C.C. 99; **Giddings v. R.** (1947) 89 C.C.C. 346; **R. v. Zasadny** (1948) 92 C.C.C. 103.

> In my opinion the degree of intoxication contemplated by Parliament in enacting s. 285(c) (now s. 222) is a state of intoxication during which, if permitted to drive a motor car, it would be a danger to the public.

Another definition is that given in the New Oxford Dictionary which defines intoxication as "the act of stupefying with a drug or alcoholic liquor; the making drunk or intoxicated, the condition of being so stupefied as made drunk". This definition was adopted in **R. v. Constable.**[12] It is clear in any case that intoxication means more than being under the influence of alcohol. Thus it has been held that a charge of having care or control of an automobile "while under the influence of liquor" discloses no offence under the Criminal Code.[13]

The control essential for the proper operation of a motor vehicle has been described as "the state of mind and a physical state that permits driver to operate and drive in a normal, wise and prudent manner and to be able to react immediately to the difficulties, troubles and problems of traffic".[14] The section is aimed at the state of intoxication which deprives the driver of this control and renders him a danger both to himself and the public. It is, however, not necessary for the Crown to prove that the accused was in such a state of intoxication that if permitted to drive he would have been a danger to the public.[15]

Impairment

There is a point, short of intoxication, where a person's faculties are so interfered with by alcohol that his judgment and ability to handle a motor vehicle are impaired.[16] The driver in this condition is a danger to the public.[17] To cope with this situation the Criminal Code was amended in 1951 to punish persons whose ability to drive is impaired by alcohol or a drug.[18]

The mere fact that the accused's driving was apparently normal on the occasion in question is not conclusive of guilt or

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12. (1936) 66 C.C.C. 206.
13. **R. v. Ouellette** (1931) 55 C.C.C. 389; **R. v. Constable** (1936) 66 C.C.C. 206.
14. **R. v. Royer** (1952) 104 C.C.C. 189.
15. **R. v. Pollock** (1947) 90 C.C.C. 171; **R. v. Desbiens** (1951) 103 C.C.C. 36.
16. **R. v. Donald** (1954) 108 C.C.C. 173; **R. v. Denny** (1956) 22 C.R. 387
17. **R. v. Cox** [1949] 1 D.L.R. 524.
18. (1951) 15 Geo. VI, c. 49, s. 14(2).

innocence on a charge under this section. In **R. v. McKenzie,**[19] Sissons, C. J. said:

> . . . . the offence is not that the driving was impaired by alcohol but that the accused drove while his ability to drive was impaired.

If the person who is in care or control of the motor vehicle is found on examination to be impaired in his ability to drive, there is no need to prove that he actually drove erratically or dangerously.[20]

To convict a person of driving or having care or control of a motor vehicle while his ability to drive is impaired there must be more than a slight variation from the way he would normally act. The evidence must be reasonably conclusive that the driver is under the influence of alcohol with consequent impairment of faculties and therefore that his ability to drive is impaired.[21]

Influence of Drugs

Few cases have dealt with the offences of driving or having care or control of a motor vehicle while under the influence of a narcotic drug or impaired by a drug. It should be noted that section 222 of the Code makes it an offence to be driving or in care or control while under the influence of a narcotic drug. Section 223, however, deals with all drugs, not only narcotics.

An English case of interest is **Armstrong v. Clark.**[22] Here the accused was found in his car in a semi-comatose state as a result of the overaction of an injection of insulin. It was held that he must be convicted. As Lord Goddard, C. J. said:

> . . . . this section was designed for the protection of the public, and if a person happens to be in a condition of health that renders him subject to comas or take remedies which may send him into a coma, the answer is that he must not drive, because he is a danger to the rest of Her Majesty's subjects.[23]

In **R. v. Pringle and Flinn,**[24] the accused was impaired by the combined effects of alcohol and drugs. It was submitted by counsel that section 223 creates two offences, namely, driving

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19. (1955) 20 C.R. 412, at p. 412.
20. **Hurley v. Taylor** (1953) 107 C.C.C. 220; **Beals v. R.** (1957) 117 C.C.C. 22.
21. **R. v. McKenzie** (1955) 20 C.R. 412.
22. (1957) 41 C.A.R. 56.
23. **Ibid.,** at p. 60.
24. (1955) 113 C.C.C. 35.

with ability impaired by alcohol, and driving with ability impaired by a drug, and that there should be no conviction if the impairment was the result of both. Clearihue, Co. Ct. J. stated:

> . . . . I am of the opinion that s. 223 of the **Code** as far as alcohol or a drug is concerned provides for one offence only. The offence is that of driving a motor vehicle whilst the ability of the driver to drive a motor vehicle is impaired. It may be impaired by alcohol or a drug. But these are particulars of the offence only.[25]

Evidence of Intoxication or Impairment

In determining if the accused was intoxicated or impaired, evidence describing the accused's actions, appearance, language and general conduct is admissible.[26] In arriving at a decision a judge or jury must apply to the evidence their knowledge as ordinary citizens and their judgment and experience.[27] Great care must be taken not to jump to a conclusion. Thus the fact that a man has been drinking and is driving recklessly is not **prima facie** evidence of driving while intoxicated. Again, the evidence of a reckless or negligent act, when combined with drink, is not conclusive evidence as sober people frequently drive in a reckless or negligent manner.[28]

Before 1951 Canadian courts had been reluctant to receive the results of blood, breathalizer and other chemical tests as evidence.[29] In that year the predecessors of subsections (3) and (4) of section 224 were enacted. These provide in effect that a person need not give a sample of bodily substance but once it is obtained it may be used in evidence.[30] It must be noted that the result of a chemical test is not itself conclusive proof of intoxication or impairment.[31] In **Federal Insurance Co. v. Matthews,**[32] it was held that the result of any mechanical test of alcoholic blood content is merely corroborative of other evidence leading to a conclusion whether a man is sober or not. In order

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25. **Ibid.,** at p. 37; followed in: **R. v. Bennett** (1959) 126 C.C.C. 366.
26. **R. v. Pollock** (1947) 90 C.C.C. 171.
27. **R. v. McCauley** (1949) 96 C.C.C. 355
28. **Giddings v. R.** (1947) 89 C.C.C. 346; **R. v. Constable** (1936) 66 C.C.C. 206
29. Popple, Canadian Criminal Evidence, 2nd. ed. (1954), p. 98; **Earnshaw v. General Insurance Co.** (1943) 80 C.C.C. 35.
30. Section 224 with the relevant subsections are set out at p. .
31. **R. v. Ostrowski** (1958) 122 C.C.C. 196; **R. v. Lord** [1958] O.R. 193.
32. (1956) 18 W.W.R. 193.

to convict there should be tangible physical evidence of driving impairment in the form of one or more of the usual obvious indications of impairment.[33]

Considerable discussion[34] has centered around two problems: the accuracy of chemical tests in measuring blood-alcohol concentration; and the amount of alcohol needed to impair or intoxicate. As to the first problem, facilities available in police stations are often unsatisfactory for administering chemical tests and police officers often lack skill in examination. As regards the second, it takes considerably more alcohol to impair one man's driving ability and judgment than it would to impair another's. The difference arises from many variables including body conditions, food consumed before drinking and the size of the man. Again, there is a wide measure of disagreement among doctors as to the findings on an examination of the driver and the conclusion to be drawn from these findings. In many foreign countries, blood-alcohol concentrations are used as a basis for a conviction. The great variances in the percentages adopted leads one to doubt the wisdom of such measures. For example, in Ireland a 50 mg./100 ml. ratio is necessary for conviction while in Germany 150 mg./100 ml. is sufficient. No consideration is given to variances in human capacity and size.

Motor Vehicle

Under both section 222 and section 223, it is necessary to prove that the vehicle involved in the offence was a motor vehicle. Before the introduction of a definition into the Criminal Code in 1953, different opinions had been expressed in Canadian courts as to what constitutes a motor vehicle within the meaning of the sections. In **R. v. Higgins,**[35] Orde, J. A. stated:

> I think this section must be confined to a motor vehicle which is either being driven or is capable of being driven and cannot apply to a car out of commission and unable to be operated under its own power.

However, in later cases a vehicle, even though inoperative at the time owing to a mechanical failure, lack of gas or some other

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33. **R. v. Marks** (1952) 15 C.R. 47; **R. v. Royer** (1953) 104 C.C.C. 189.

34. See Stuart Ryan, Q.C., "Chemical Tests to Prove Impairment by Alcohol" (1959-60) 2 Crim. L.Q., p. 41; Edson L. Haines, Q.C., "Let's Impose a Limit on Drinking and Driving" (1960-1) 3 Crim. L.Q., p. 60; "The Drinking Driver and the Law" [1960] Crim. L.R., p. 152.

35. (1928) 50 C.C.C. 381; see also**R. v. Young** [1939] 2 D.L.R. 62; **R. v. Conlin** (1948) 92 C.C.C. 58; **R. v. Williamson** (1950) 98 C.C.C. 179; **R. v. Broughton** (1951) 100 C.C.C. 157; **R. v. Cook** (1956) 24 C.R. 313.

reason, was still found to be a motor vehicle for the purpose of the sections. This view was expressed in **R. v. Tait**[36] by McPherson, C.J.M. as follows:

> I am not prepared to adopt the proposition that if anything stops a motor car from operating, such as a disconnected wire, defects in ignition or loss of air from tires, it ceases to be an automobile and the person responsible for its operation is not relieved from all or any responsibility.

The term is now defined by section 2(25) of the Criminal Code which reads as follows:

> "Motor vehicle" means a vehicle that is drawn, propelled or driven by any means other than muscular power, but does not include a vehicle of a railway that operates on rails.

In **R. v. Rye**,[37] it was held that the decisions previous to this enactment can no longer be considered to be authorities respecting the definition of a "motor vehicle", but the view in **R. v. Tait** seems to express the law under the definition. In the **Rye** case the accused's vehicle was stuck in the snow and could not be moved under its own power. MacDonald, J. A. stated:

> It is quite immaterial to the commission of the offence that the car was stuck in the snow.

The fact that a vehicle has run out of gas and is being propelled by a truck to a service station does not make it any the less a motor vehicle.[38] The reason for this is explained in **R. v. Henry**,[39] which was decided before the definition. Prendergast, C.J.M. stated:

> . . . . the steering appliances are integral parts of an auto car as such, which differentiate it both in make-up and sharp action, from ordinary vehicles. I would also say that even if its course were only deflected by a foot or two, injudicious control of it, by causing the car to dart from the right to the left, would be a danger to other cars and foot-passengers . . . .[40]

It had been doubtful before the introduction of section 2(25) whether a tractor was within the definition of a motor vehicle

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36. (1951) 101 C.C.C. 337; followed: **R. v. McGarvie** (1959) 20 C.R. 286.

37. (1958) 27 C.R. 153.

38. **R. v. Walker** (1954) 18 C.R. 285.

39. (1934) 61 C.C.C. 207; followed: **R. v. Boivin** (1950) 96 C.C.C. 234.

40. **Ibid.**, at pp. 209-10.

for the purposes of the section. It is now clear that it comes within the definition.[41]

Driving and Care or Control

In addition to establishing that the vehicle concerned is a motor vehicle and that the accused was impaired or intoxicated, it must also be established that the accused was either "driving" or had "care or control" of the motor vehicle. "Driving" and "care or control" form two separate offences. Therefore, an information that charges in one count that the accused "did drive and have the care or control of a motor vehicle while his ability to drive was impaired" charges two offences and is void for duplicity.[42]

Proof of driving has not given rise to many problems. One interesting situation arose in **R. v. Jacobs.**[43] Here a car owner bringing his vehicle to a stop momentarily on the wrong side of the road with the lights on and the engine running was held to be driving in bringing the automobile to a stop as much as in accelerating or steering it.

The ingredients of "care or control" have provided the courts with much greater difficulties. One problem is whether the words "care or control" create one offence only or whether the words "care" and "control" should be treated as creating two separate offences. It has been held to be one offence. "Care" is broad enough to include "control", and conversely it would seem that "control" involves "care".[44] What is probably meant by care or control is an actual physical control which can be converted into conduct creating actual damage.[45]

In order to lighten the difficulties of the Crown in proving care or control, a section (now section 224(2)) was added to the Criminal Code. By this section, where a person occupies the seat ordinarily occupied by the driver of a motor vehicle he shall be deemed to have the care or control of the vehicle unless he establishes that he did not enter or mount the vehicle for the

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41. **R. v. Swarychewski** (1957) 22 W.W.R. 91; the following earlier cases agreed: **R. v. Gaiewski** (1951) 102 C.C.C. 115; but **R. v. Owens** (1950) 98 C.C.C. 279; **R. v. Urushott** (1951) 99 C.C.C. 320 disagreed

42. **R. v. Phillips** (1958) 122 C.C.C. 181.

43. (1955) 16 W.W.R. 126.

44. **R. v. Coffill** (1950) 100 C.C.C. 82; see also **R. v. Thomson** (1941) 75 C.C.C. 141

45. **R. v. Butler** [1939] 4 D.L.R. 592.

purpose of setting it in motion.[46] Several cases have been decided under the section. In **R. v. MacKay**[47] a person who while intoxicated occupied the driver's seat of a motor vehicle which was off the highway and parked in a private driveway was held guilty of an offence under section 285(4) (now s. 222) because he did not discharge the onus of establishing that he did not enter the vehicle for the purpose of setting it in motion. In **R. v. MacLellan,**[48] the accused was found sleeping behind the wheel of a parked vehicle beside the road and was visibly impaired. Hughes, J. stated:

> The intention of the accused as to putting his motor vehicle in motion is only material at the time of entering or mounting it . . . . The accused failed to rebut the presumption of care or control apparently for the reason that when he entered his vehicle he did set it in motion.[49]

It is immaterial that the accused at the time he stopped the car prior to apprehension did no intend to set the vehicle in motion again.

Two interesting **dicta** appear in civil cases where a person was not sitting in the driver's seat in the motor vehicle. In **McKenzie v. Western Assurance Co.,**[50] the question arose whether the plaintiff could collect on an insurance policy which prohibited him from driving while intoxicated. On the occasion of the accident he became intoxicated and engaged an experienced driver, but during the trip he slipped off the seat, grabbed the steering wheel and caused the collision. Spence, J. stated:

> Surely there is an inference that the person who occupies a seat other than that ordinarily occupied by the person driving should not be deemed to have control of the vehicle for the purpose of the prohibition in the Criminal Code, and surely the inference from the latter words is that it is only the person who enters the vehicle for the purpose of setting it in motion who can be held to have committed the offence.[51]

In **Joubert v. Toronto General Trusts,**[52] the plaintiff was driving with the car driver, whom he knew to be intoxicated, and was drinking with him. Adamson, C.J.M. stated:

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46. See: **R. v. McLean** (1953) 107 C.C.C. 32; **R. v. Gilchrist** (1954) 109 C.C.C. 348; **R. v. Walker** (1954) 110 C.C.C. 207.

47. (1949) 95 C.C.C. 97.

48. **R. v. MacLellan** (1959) 30 C.R. 38; disapproving **R. v. Perigny** (1957) 27 C.R. 1; see also **R. v. McLeod** [1948] 3 D.L.R. 613.

49. **Ibid.,** at p. 42.

50. [1955] 1 D.L.R. 271.

51. **Ibid.,** at p. 279.

52. (1955) 15 W.W.R. 654.

> By driving with him, and especially drinking with him in the car when driving and when he (the driver) was already intoxicated, the plaintiff made himself a party to the crime of driving while intoxicated.[53]

Mens Rea

At one time the question whether **mens rea** was necessary to constitute the offence of driving or having care or control while intoxicated or impaired gave rise to a difference of opinion. The view accepted in some courts was that a person is able to have the control of a motor vehicle notwithstanding that he is incapable by reason of intoxication of forming an intention to drive the car. Thus Chisolm, C.J.N.S. in **R. v. Crowe**[54] made it clear that the purpose of the section being the protection of the public, the legislature intended an absolute prohibition. Similarly, in **R. v. Hyatt,**[55] the accused was found slumped behind the wheel of a car with the ignition turned on. He claimed that he had entered the car with the intention of sleeping, not driving; but **mens rea** was held not to be an ingredient of the offence and the accused was convicted.

Other courts took the opposite view. In **R. v. Thomson,**[56] the defendant entered a motor vehicle and sat in the front seat, but his actions demonstrated that he had no intention of driving. Baxter, C.J.N.B. held that until Parliament says definitely that **mens rea** is to be excluded from the section, the courts should presume it. Again in **R. v. Forbes,**[57] it was held that a person incapable of functioning physically or mentally was incapable of putting the vehicle in motion.

This difference of opinion seems to have been brought to an end by what is now section 224(2) of the Criminal Code. As previously seen, this section shifts the onus onto the accused to show that he did not enter the vehicle with the intention of setting it in motion when he is found in the driver's seat in an impaired or intoxicated condition. In **R. v. Luhtala**[58] it was held that the section reintroduces the factor of intention. The decision was followed in **R. v. Gilchrist;**[59] there the charge against the accused was dismissed because he was able to establish his lack of intention to set the vehicle in motion.

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53. **Ibid.,** at p. 659.
54. (1941) 76 C.C.C. 170.
55. (1945) 84 C.C.C. 253.
56. (1940) 75 C.C.C. 141.
57. (1943) 79 C.C.C. 116.
58. (1956) 23 C.R. 240.
59. (1954) 109 C.C.C. 348.

At first sight **R. v. Wilson**[60] seems to run against this trend. There the accused was found slumped over the steering wheel in an intoxicated condition. He was unable to discharge the onus that he had not entered the motor vehicle for the purpose of setting it in motion. Aylen, J. said:

> It seems to me that the present s. 224(2) of the **Code** means in effect that **mens rea** no longer comes in to a proper decision for an offence under s. 222. . . .[61]

A close examination of the case reveals, however, that Aylen, J. did not mean that **mens rea** was not an essential ingredient of the offence as was widely accepted before the introduction of section 224(2). He seems simply to have meant that the onus of proving guilty intent is not on the Crown; it is for the accused to show lack of intent. As stated in section 224(2) the accused must establish that he did not intend to set the vehicle in motion.[62]

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60. (1957) 117 C.C.C. 105.

61. **Ibid.**, at p. 108.

62. **R. v. Perigny** (1957) 27 C.R. 1; **R. v. MacLellan** (1959) 30 C.R. 38.