

TOP FIVE 2018

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

R. v BINGLEY, 2017 SCC 12

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<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/16417/index.do>

Facts

In 2009, Mr. Bingley was pulled over by police for driving erratically. When he was pulled over, police noticed signs of impairment and conducted a roadside test to screen for alcohol. Mr. Bingley passed this test.

Unlike the test for alcohol in the bloodstream, there is no highly-reliable roadside device that screens for the presence of other potential intoxicants. Instead, when an officer suspects impairment by other means, they can request a less-objective roadside sobriety test be performed by a police drug recognition expert (DRE) certified under the *Criminal Code* and the *Evaluation of Impaired Operation (Drugs and Alcohol) Regulation*. The officer requested this evaluation and Mr. Bingley failed. He was arrested for driving while drug impaired and was taken into custody, where he received further evaluation through a 12-step detailed evaluation and urine

analysis. Again, Mr. Bingley did not pass. During this series of tests, Mr. Bingley shared that he smoked cannabis and took two alprazolam in the past 12 hours. The tests concluded there was a presence of cannabis, cocaine, and alprazolam in his body. Alprazolam is a legal anti-depressant which can cause symptoms including extreme drowsiness.

Procedural History

At the first trial, the Crown called the DRE to explain the results of his evaluation as evidence against Mr. Bingley. This evidence was permitted without a *voir dire* – a type of hearing that assesses the evidence of an expert witness before it is presented in court. At his first trial, Mr. Bingley was acquitted. On appeal, the acquittal was overturned and a new trial was ordered. In the second trial that took place, the judge held that the *Criminal Code* does not automatically allow DRE



evidence as expert evidence, and that a *voir dire* is required at common law under *R v. Mohan* [1994] 2 S.C.R 9. On this basis, Mr. Bingley was again acquitted at his second trial.

The Crown appealed and the Ontario Court of Appeal ordered a new trial, agreeing that the DRE evidence was admissible without the *voir dire*. Mr. Bingley appealed to Supreme Court of Canada (SCC).

Issues

1. Can a drug recognition expert (DRE) testify about their determination under s. 254(3.1) of the *Criminal Code* without a *voir dire* to determine the DRE's expertise?

Decision

The SCC found that a *voir dire* was not required, dismissing the appeal and confirming the order of the Ontario Court of Appeal for a new trial.

Ratio

Special expertise can be a witness who possesses expertise outside the experience and knowledge of the judge. This expertise is of particular importance in cases of novel science.

Reasons

The SCC found that the intent of s. 254(3.1) of the *Criminal Code* was to provide “investigative tools” to enforce laws in relation to drug impaired driving. There is a difference between expert evidence and an expert opinion. The SCC found that the DRE forms an opinion about impairment, but that opinion is not evidence in itself.

However, according to the common law, expert opinion evidence must meet four factors through a *voir dire*. The evidence must be: relevant, necessary, not subject to exclusionary rule, and considered to be special expertise. In addition to this, the judge must weigh risks to benefits of admitting that evidence. The only issue at hand was whether DRE could count as “special expertise,” and the SCC confirmed that it could because their opinion is based on special training, outside the experience and knowledge of the trier of fact, or judge. They found that ordering a trial judge to hold a *voir dire* would be unreasonable, and a waste of resources.

The dissent argued that novel science must be established in a courtroom, even if it is common outside of the courtroom. They argued that common law rules are in place to protect judicial discretion in novel circumstances. This decision could set a dangerous precedent.

Ultimately, the majority found that a *voir dire* was not necessary and that the evidence by a DRE is evidence that is reliable, necessary, not subject to exclusionary rule, and considered to be special expertise. The benefits of admitting this evidence outweigh the costs. The decision of the Court of Appeal for Ontario was upheld and a new trial ordered for Mr. Bingley.

DISCUSSION

1. Do you think the combination of substances confirmed in Mr. Bingley's blood explains his erratic driving?
2. Why are *voir dire* hearings sometimes useful in legal trials?
3. Could holding a *voir dire* hearing for all expert evidence present a problem for the administration of the justice system?
4. Why do you think expert evidence can be helpful in cases of drug impaired driving?
5. In 2018, cannabis was legalized. Do you think the finding of DRE opinion as expert evidence will make it easier to prosecute those convicted of drug impaired driving?