

**SUPREME COURT OF CANADA**

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| **Citation:** R. *v.* Roy, 2012 SCC 26, [2012] 2 S.C.R. 60 | **Date:** 20120601  **Docket:** 33699 |

Between:

**Randy Leigh Roy**

Appellant

and

**Her Majesty The Queen**

Respondent

**Coram:** McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein and Cromwell JJ.

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| **Reasons for Judgment:**  (paras. 1 to 56): | Cromwell J. (McLachlin C.J. and LeBel, Deschamps, Fish, Abella and Rothstein JJ. concurring) |

R. *v.* Roy, 2012 SCC 26, [2012] 2 S.C.R. 60

Randy Leigh Roy *Appellant*

v.

Her Majesty The Queen *Respondent*

**Indexed as: R. *v.* Roy**

2012 SCC 26

File No.: 33699.

2011:  November 9; 2012:  June 1.

Present: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein and Cromwell JJ.

on appeal from the court of appeal for british columbia

*Criminal law — Dangerous operation of motor vehicle — Elements of offence — Mens rea — Whether proof of actus reus without more can support inference that required fault element is present — Whether accused’s conduct displayed a marked departure from standard of care — Criminal Code, R.S.C. 1985, c. C‑46, s. 249.*

*Criminal law — Appeals — Whether trial judge applied incorrect legal principles in addressing fault component of offence — If so, whether error was harmless — If appeal allowed, whether Court should order new trial or direct an acquittal — Criminal Code, R.S.C. 1985, c. C‑46, s. 686(1)(b)(iii).*

On an afternoon in late November 2004, R was driving home from work with a passenger. Visibility was limited due to fog and the unpaved back road they were on was relatively steep, snow‑covered, and slippery. The driver of an oncoming tractor‑trailer testified that R stopped before proceeding onto the highway, then drove onto the highway and into the tractor‑trailer’s path. In the resulting collision, R’s passenger was killed. R survived, but the collision left him with no memory of either its circumstances or of the surrounding events. R was convicted of dangerous driving causing death and his appeal to the Court of Appeal was dismissed.

In a decision released shortly before *R. v. Beatty*, 2008 SCC 5, [2008] 1 S.C.R. 49, the trial judge concluded that R’s conduct was objectively dangerous. He then immediately concluded that R’s driving had constituted a marked departure from the standard of care a reasonable person would observe in the circumstances. Since no explanation was provided for R’s conduct — due in great part to his loss of memory — there was no evidence that could raise a reasonable doubt that a reasonable person would not have been aware of the risks in the circumstances. The appellant’s appeal to the Court of Appeal was dismissed. Although the court concluded that the trial judge had made a legal error, it was of the view that the error was harmless as it occasioned no substantial wrong or miscarriage of justice.

*Held*: The appeal should be allowed, the conviction set aside and an acquittal entered.

Dangerous driving causing death, a serious criminal offence punishable by up to 14 years in prison, consists of two components: prohibited conduct — operating a motor vehicle in a dangerous manner resulting in death — and a required degree of fault — a marked departure from the standard of care that a reasonable person would observe in all the circumstances. However, because driving is an inherently dangerous activity, the trier of fact must not infer simply from the fact that the driving was, objectively viewed, dangerous, that the accused’s level of care was a marked departure from that expected of a reasonable person in the same circumstances. The fault component ensures that criminal punishment is only imposed on those deserving the stigma of a criminal conviction. Determining whether the fault component is present may in turn be done by asking two questions. First, in light of all of the relevant evidence, would a reasonable person have foreseen the risk and taken steps to avoid it if possible? Second, was the accused’s failure to foresee the risk and take steps to avoid it, if possible, a marked departure from the standard of care expected of a reasonable person in the accused’s circumstances? The distinction between a *mere* departure, which may support civil liability, and the *marked* departure required for criminal fault, is a matter of degree, but the trier of fact must identify how and in what way the driver went markedly beyond mere carelessness. This will generally be done by drawing inferences from all of the circumstances. Furthermore, in answering these questions, personal attributes will only be relevant if they go to capacity to appreciate or to avoid the risk. Of course, proof of deliberately dangerous driving would support a conviction for dangerous driving, but it is not required.

In this case, the trial judge erred in law by equating fault with the failure to explain the conduct, but also by failing to conduct any meaningful inquiry into whether R had displayed a marked departure from the standard of care to be expected of a reasonable person in the same circumstances. He simply inferred from the fact that R had committed a dangerous act while driving that his conduct displayed a marked departure from the standard of care expected of a reasonable person in the circumstances.

The Court of Appeal erred in finding that this error was not a substantial wrong or a miscarriage of justice. There was no evidence to support the finding that R was aware of the risk he was creating and deliberately chose to run that risk, and fault could not be inferred from the fact that the driving was, objectively viewed, dangerous. The record here discloses a single and momentary error in judgment with tragic consequences. Since the record did not provide evidence on which a properly instructed trier of fact, acting reasonably, could have concluded that R’s standard of care was a marked departure from that expected of a reasonable person in the circumstances, entering an acquittal is the appropriate course.

**Cases Cited**

**Applied:** *R. v. Beatty*, 2008 SCC 5, [2008] 1 S.C.R. 49, rev’g 2006 BCCA 229, 225 B.C.A.C. 154; **referred to:** *R. v. Hundal*, [1993] 1 S.C.R. 867; *American Automobile Insurance Co. v. Dickson*, [1943] S.C.R. 143; *O’Grady v. Sparling*, [1960] S.C.R. 804; *Mann v. The Queen*, [1966] S.C.R. 238; *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823; *R. v. MacNeil*, 2009 NSCA 46, 277 N.S.R. (2d) 22; *R. v. D.C.S.*, 2000 NSCA 61, 184 N.S.R. (2d) 299.

**Statutes and Regulations Cited**

*Canadian Charter of Rights and Freedoms*.

*Criminal Code*, R.S.C. 1985, c. C‑46, ss. 249(1)(*a*), (4), 259(4), 686(1)(*b*)(iii).

APPEAL from a judgment of the British Columbia Court of Appeal (Levine, Neilson and Garson JJ.A.), 2010 BCCA 130, 285 B.C.A.C. 57, 482 W.A.C. 57, 92 M.V.R. (5th) 28, [2010] B.C.J. No. 437 (QL), 2010 CarswellBC 583, affirming the convictions entered by Blair J., 2006 BCSC 2107, [2006] B.C.J. No. 3660 (QL), 2006 CarswellBC 3851. Appeal allowed.

*Christopher J. Nowlin*, for the appellant.

*Michael J. Brundrett*, for the respondent.

The judgment of the Court was delivered by

Cromwell J. —

I. Overview

1. Dangerous driving causing death is a serious criminal offence punishable by up to 14 years in prison. Like all criminal offences, it consists of two components: prohibited conduct — operating a motor vehicle in a dangerous manner resulting in death — and a required degree of fault — a marked departure from the standard of care that a reasonable person would observe in all the circumstances. The fault component is critical, as it ensures that criminal punishment is only imposed on those deserving the stigma of a criminal conviction. While a mere departure from the standard of care justifies imposing civil liability, only a marked departure justifies the fault requirement for this serious criminal offence.
2. Defining and applying this fault element is important, but also challenging, given the inherently dangerous nature of driving. Even simple carelessness may result in tragic consequences which may tempt judges and juries to unduly extend the reach of the criminal law to those responsible. Yet, as the Court put it in *R. v. Beatty*, 2008 SCC 5, [2008] 1 S.C.R. 49, at para. 34, “If every departure from the civil norm is to be criminalized, regardless of the degree, we risk casting the net too widely and branding as criminals persons who are in reality not morally blameworthy”. Giving careful attention to the fault element of the offence is essential if we are to avoid making criminals out of the merely careless.
3. The fault requirement for dangerous driving is at the centre of this appeal, which raises three issues:

1. Did the trial judge apply incorrect legal principles when he addressed the fault component of the offence?

2. If he applied incorrect legal principles, was his error harmless in the circumstances?

3. If the judge erred and the error was not harmless so that the appeal must be allowed, should the Court order a new trial or direct an acquittal?

1. In my view, the trial judge made a serious legal error in relation to the fault element: he simply inferred from the fact that the appellant had committed a dangerous act while driving that his conduct displayed a marked departure from the standard of care expected of a reasonable person in the circumstances. This error is not one that may be dismissed as harmless. I would allow the appeal and set aside the appellant’s conviction for dangerous driving. As in my view the evidence in the record does not support a reasonable inference that the appellant exhibited a marked departure from the standard of care that a reasonable person would have exhibited in the circumstances, I would allow the appeal and enter an acquittal.

II. Facts and Proceedings

A. *Overview of the Facts*

1. The appellant pulled his motor home out from a stop sign onto a highway and into the path of an oncoming tractor-trailer. In the collision that resulted, the appellant’s passenger was killed. The appellant was convicted of dangerous driving causing death and his appeal to the Court of Appeal was dismissed. The facts are as simple as they are tragic.
2. On an afternoon in late November 2004, the appellant and Mark Anthony Harrington decided to return home after work at a sawmill near Vavenby, a town north of Kamloops, British Columbia. They left work together in the appellant’s motor home to head back to a trailer park where they lived. They took a shortcut via the Harmon Road to reach Highway 5, the Southern Yellowhead Highway, and then planned to head south on the highway to the trailer park.[[1]](#footnote-1) The Harmon Road is an unpaved back road which becomes relatively steep as it approaches the intersection with the highway. The appellant knew the Harmon Road well, having driven it to and from Highway 5 about 500 times before.
3. The Harmon Road intersects with Highway 5 in such a way that vehicles intending to turn from the road onto the highway to head south, as the appellant did to return to the trailer park, usually first veer towards the north in order to come squarely to the intersection. This enables them to better see the oncoming northbound traffic and better determine when it is safe to turn left, and cross the northbound lanes to head south. Constable Campbell testified that to turn onto the highway, he has “to turn towards the right so I can come square at the intersection so I can see both ways” (A.R., vol. II, at p. 167). That afternoon, visibility was limited due to fog and the Harmon Road was snow-covered and slippery.
4. On the afternoon of the accident, Michael McGinnis, accompanied by his daughter Darlene, was driving a tractor-trailer northbound on the highway. As he was approaching the Harmon Road intersection at about 3:00 p.m., the fog was thickening and the visibility was poor. The trial judge accepted Mr. McGinnis’s evidence that the weather conditions led him to decrease his speed to between 75 and 80 kilometres per hour. That was the speed he was driving when, from a distance, he noticed the headlights of what we now know to have been the appellant’s vehicle pointing towards him from what Mr. McGinnis assumed was the shoulder of the highway or the top of the side road. Although the trial judge did not make a specific finding on the point, both Mr. McGinnis and his passenger thought that the appellant’s vehicle had stopped before proceeding onto the highway, although his passenger was not sure. Mr. McGinnis also testified that when he first saw the lights of the appellant’s vehicle, he guessed that it was about 300-400 feet away but that it could have been as little as 100 feet.
5. When Mr. McGinnis saw the headlights, he took his foot off the accelerator. When he then realized that the appellant’s vehicle was proceeding onto the highway, he applied his brakes, but it was too late. His truck violently collided with the appellant’s vehicle, killing Mr. Harrington. The appellant survived, but the collision left him with no memory of either its circumstances or of the surrounding events.
6. The appellant was charged with and convicted of dangerous driving causing the death of Mr. Harrington, contrary to s. 249(4) of the *Criminal Code*, R.S.C. 1985, c. C-46. The relevant provisions 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) 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.

1. The appellant was also convicted under s. 259(4) of the *Criminal Code* of operating a motor vehicle while disqualified from doing so by reason of an order issued under the *Criminal Code*. The driving while disqualified charge is not in issue here.

B. *Proceedings*

(1) Supreme Court of British Columbia (Blair J.), 2006 BCSC 2107 (CanLII)

1. As noted, the appellant was convicted at trial of dangerous driving causing death. At the time of trial, the Court had not yet rendered its decision in *Beatty*. The trial judge therefore relied on the law as set out in *R. v. Hundal*, [1993] 1 S.C.R. 867, and in the British Columbia Court of Appeal’s judgment in *R. v. Beatty*, 2006 BCCA 229, 225 B.C.A.C. 154, a decision which this Court subsequently reversed.
2. The trial judge considered that, in order to convict the appellant, he had to be satisfied beyond a reasonable doubt that the appellant was driving in a manner that was dangerous to the public. In making this assessment, he had to satisfy himself that the conduct of the appellant amounted to a marked departure from the standard of care that a reasonable person would observe in the accused’s situation. If the appellant offered an explanation for his conduct, such as a sudden and unexpected onset of illness, then he had to be convinced that a reasonable person in similar circumstances ought to have been aware of the risk and of the danger involved in the conduct he manifested.
3. Turning to the facts of this case, the trial judge noted that vehicles entering Highway 5 from Harmon Road had to comply with a stop sign which gave highway traffic the right of way. He accepted that, at the relevant time, the surface of Harmon Road was slippery and that its steepness would have slowed the progress of a motor home attempting to proceed through the northbound traffic on to the southbound lanes on Highway 5. He was of the view that the fog on Highway 5 would have “obscured [the appellant’s] ability to ascertain the presence of other traffic” on it (para. 25). Finally, the evidence, the trial judge held, entitled him to infer that the appellant was well aware that Highway 5 “is a major traffic conduit between British Columbia and the Prairies and as such it attracts a considerable amount of traffic, including tractor trailer units at all times” (para. 26).
4. The trial judge concluded that the appellant’s conduct in proceeding “from the stop sign onto Highway 5 from [Harmon] Road, with visibility diminished by fog, into the path of oncoming traffic, specifically Mr. [McGinnis’s] tractor trailer unit” was objectively dangerous (para. 27) and then immediately concluded that the appellant’s driving had constituted a marked departure from the standard of care a reasonable person would observe in the circumstances. Further, given that no explanation was provided for the appellant’s conduct — due in great part to his loss of memory — there was no evidence that could raise a reasonable doubt that a reasonable person would not have been aware of the risks related to his behaviour in the present case.
5. The critical part of the judge’s analysis is as follows:

The question is whether Mr. Roy’s conduct in proceeding from the stop sign onto Highway 5 from [Harmon] Road, with visibility diminished by fog, into the path of oncoming traffic, specifically Mr. [McGinnis’s] tractor trailer unit, was objectively dangerous.

I conclude that given the test as expressed in *Hundal* and as further considered by the B.C. Court of Appeal in [*Beatty*], that the question must be answered in the affirmative. I find that Mr. Roy’s driving constitutes a marked departure from the standard of care a reasonable person would observe in the accused’s situation.

The second part of the test in *Hundal* is found in ¶38 and 43 and that is whether, even though the driving is objectively dangerous, there was 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.

There is no explanation for Mr. Roy’s conduct. He recalls nothing of the events surrounding the collision and therefore there is no evidence to consider that might raise a reasonable doubt that a reasonable person would have been aware of the risks in the accused’s conduct. [Emphasis added; paras. 27-30.]

(2) Court of Appeal for British Columbia (Garson J.A., Levine and Neilson JJ.A. concurring), 2010 BCCA 130, 285 B.C.A.C. 57

1. The appellant’s appeal to the Court of Appeal was dismissed. Although the court concluded that the trial judge had made a legal error, it was of the view that the error was harmless as it occasioned no substantial wrong or miscarriage of justice.
2. The appellant argued that the trial judge had erred in law at para. 28 of his reasons by equating the *actus reus* of the offence — that is, driving which viewed objectively was dangerous — with the *mens rea* requirement — that is, that the appellant’s level of care was a marked departure from the standard expected of a reasonable person in the same circumstances. The Court of Appeal noted that the trial judge’s reasons had to be reviewed in light of this Court’s decision in *Beatty*.
3. The Court of Appeal held that the trial judge erred in his legal analysis because he had equated the fault (“*mens rea*”)inquiry “with the question of whether there was an explanation for the accused’s conduct” (para. 21). Had the trial judge applied the test set out in *Beatty*, “his analysis would have reflected two enquiries. First, . . . was his driving objectively dangerous? Second, was it a marked departure from the standardof care that a reasonable person would observe in the accused’s circumstances?” (para. 23). His failure to specifically address both questions opened his verdict to appellate review.
4. Notwithstanding the trial judge’s error, the Court of Appeal dismissed the appeal. It applied the proviso set out in s. 686(1)(*b*)(iii) of the *Criminal Code*,because in its view the error had not occasioned any substantial wrong or miscarriage of justice. Although the trial judge had not specifically addressed the second step of the dangerous driving inquiry as articulated in *Beatty*, it could “easily be inferred from his reasons that the [appellant] had the necessary intent” (para. 31). Indeed, this case was not one where the appellant’s negligence was inadvertent. “Rather, the driving that resulted in the collision entailed a deliberate act of driving onto a busy highway, in fog, in the face of oncoming traffic” (para. 31). Further, “[t]he evidence at trial did not reveal any explanation as to why he left the stop sign without first ascertaining that it was safe to do so” (para. 1). In light of these considerations, the trial judge was correct, in the court’s view, to hold that the appellant’s driving constituted a marked departure from the standard of care expected of a reasonable person in his circumstances. This satisfied the faultrequirement of dangerous driving and therefore no substantial wrong or miscarriage of justice resulted from the trial judge’s failure to inquire separately into the appellant’s state of mind.
5. The appeal was dismissed.

III. Issues

1. As noted, the appeal to this Court raises three issues:

1. Did the trial judge apply incorrect legal principles when he addressed the fault component of the offence?

2. If he applied incorrect legal principles, was his error harmless in the circumstances?

3. If the judge erred and the error was not harmless so that the appeal must be allowed, should the Court order a new trial or direct an acquittal?

1. I will address these issues in turn.

IV. Analysis

A. *First Issue: The Fault Element of Dangerous Driving*

1. The respondent defends the appeal to this Court by submitting that, contrary to the finding of the Court of Appeal, the trial judge did not err in his consideration of the fault component of the offence. I do not agree. In brief, my view is that the trial judge did exactly what the Court unanimously said in *Beatty* must not be done: without further analysis of the fault component of the offence, he inferred simply from the fact of driving that was, objectively viewed, dangerous, that the appellant’s level of care was a marked departure from that expected of a reasonable person in the same circumstances.
2. To explain my conclusion, it will be helpful first to review the main principles established by the Court in *Beatty* and then to set out how in my respectful view the trial judge failed to apply them in substance in this case.

(1) *Beatty* in Overview

1. In *Beatty*, the Court undertook an in-depth analysis of the elements of dangerous driving. Although three opinions were delivered, the Court unanimously upheld the trial judge’s finding that Mr. Beatty’s momentary lapse of attention did not constitute a marked departure from the standard of care of a prudent driver even though it had tragic consequences.
2. *Beatty* addressed concern that the Court’s reasons in *Hundal* did not sufficiently emphasize the importance of giving careful attention to the faultrequirement of dangerous driving. *Hundal* did not expressly differentiate between the two elements of the offence — the prohibited conduct and the required fault. There was concern that judges and juries might infer the existence of the fault element too quickly and without sufficient analysis, simply from the fact that a motor vehicle had been operated in a dangerous manner. (This, I add parenthetically, is, in my view precisely what happened in this case.) The Court in *Beatty* sought to ensure that a meaningful analysis of *both* elements would be performed in every case and it did this by defining and separating the conduct and mental elements of the offence.
3. In *Beatty*, the majority of the Court spoke through the reasons of Charron J. which of course are the authoritative statement of the relevant principles. In brief, the Court decided as follows. The *actus reus* of the offence is driving in a manner dangerous to the public, having regard to all the circumstances, including the nature, condition and use of the place at which the motor vehicle was being operated and the amount of traffic that at the time was or might reasonably have been expected to be at that place (s. 249(1)(*a*) of the *Criminal Code*). The *mens rea* is that the degree of care exercised by the accused was a *marked* departure from the standard of care that a reasonable person would observe in the accused’s circumstances (*Beatty*,at para. 43). The care exhibited by the accused is assessed against the standard of care expected of a reasonably prudent driver in the circumstances. The offence will only be made out if the care exhibited by the accused constitutes a *marked* departure from that norm. While the distinction between a mere departure from the standard of care, which would justify civil liability, and a *marked* departure justifying criminal punishment is a matter of degree, the lack of care must be serious enough to merit punishment (para. 48).
4. It will be helpful to reiterate the main elements of the majority reasons in *Beatty*.

(2) The Importance of the Fault Requirement for Dangerous Driving

1. A fundamental point in *Beatty* is that dangerous driving is a serious criminal offence. It is, therefore, critically important to ensure that the fault requirement for dangerous driving has been established. Failing to do so unduly extends the reach of the criminal law and wrongly brands as criminals those who are not morally blameworthy. The distinction between a *mere* departure, which may support civil liability, and the *marked* departure required for criminal fault is a matter of degree. The trier of fact must identify how and in what way the departure from the standard goes *markedly* beyond mere carelessness.
2. From at least the 1940s, the Court has distinguished between, on the one hand, simple negligence that is required to establish civil liability or guilt of provincial careless driving offences and, on the other hand, the significantly greater fault required for the criminal offence of dangerous driving (*American Automobile Insurance Co. v. Dickson*, [1943] S.C.R. 143). This distinction took on added importance for constitutional purposes. It became the basis for differentiating, for division of powers purposes, between the permissible scope of provincial and federal legislative competence as well as meeting the minimum fault requirements for crimes under the *Canadian Charter of Rights and Freedoms* (*O’Grady v. Sparling*, [1960] S.C.R. 804; *Mann v. The Queen*, [1966] S.C.R. 238; *Hundal*). Thus, the “marked departure” standard underlines the seriousness of the criminal offence of dangerous driving, separates federal criminal law from provincial regulatory law and ensures that there is an appropriate fault requirement for *Charter* purposes.
3. *Beatty* consolidated and clarified this line of jurisprudence. The Court was unanimous with respect to the importance of insisting on a significant fault element in order to distinguish between negligence for the purposes of imposing civil liability and that necessary for the imposition of criminal punishment. As Charron J. put it on behalf of the majority, at paras. 34-35:

If every departure from the civil norm is to be criminalized, 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.

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. [Emphasis added.]

(3) The *Actus Reus*

1. *Beatty* held that the *actus reus* for dangerous driving is as set out in s. 249(1)(*a*) of the *Code*, that is, 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’” (para. 43).
2. In considering whether the *actus reus* has been established, the question is whether the driving, viewed objectively, was dangerous to the public in all of the circumstances. The focus of this inquiry must be on the risks created by the accused’s manner of driving, not the consequences, such as an accident in which he or she was involved. As Charron J. put it, at para. 46 of *Beatty*, “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” (emphasis added). A manner of driving can rightly be qualified as dangerous when it endangers the public. It is the risk of damage or injury created by the manner of driving that is relevant, not the consequences of a subsequent accident. In conducting this inquiry into the manner of driving, it must be borne in mind that driving is an inherently dangerous activity, but one that is both legal and of social value (*Beatty*, at paras. 31 and 34). Accidents caused by these inherent risks materializing should generally not result in criminal convictions.
3. To summarize, the focus of the analysis in relation to the *actus reus* of the offence is the manner of operation of the motor vehicle. The trier of fact must not simply leap from the consequences of the driving to a conclusion about dangerousness. There must be a meaningful inquiry into the manner of driving.

(4) The *Mens Rea*

1. The focus of the *mens rea* analysis is on whether the dangerous manner of driving was the result of a marked departure from the standard of care which a reasonable person would have exercised in the same circumstances (*Beatty*, at para. 48). It is helpful to approach the issue by asking two questions. The first is whether, in light of all the relevant evidence, a reasonable person would have foreseen the risk and taken steps to avoid it if possible. If so, the second question is whether the accused’s failure to foresee the risk and take steps to avoid it, if possible, was a *marked departure* from the standard of care expected of a reasonable person in the accused’s circumstances.
2. Simple carelessness, to which even the most prudent drivers may occasionally succumb, is generally not criminal. As noted earlier, Charron J., for the majority in *Beatty*,put it this way: “If every departure from the civil norm is to be criminalized, regardless of the degree, we risk casting the net too widely and branding as criminals persons who are in reality not morally blameworthy” (para. 34). The Chief Justice expressed a similar view: “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” (para. 71).
3. The marked departure from the standard expected of a reasonable person in the same circumstances — a modified objective standard — is the minimum fault requirement. The modified objective standard means that, while the reasonable person is placed in the accused’s circumstances, evidence of the accused’s personal attributes (such as age, experience and education) is irrelevant unless it goes to the accused’s incapacity to appreciate or to avoid the risk (para. 40). Of course, proof of subjective *mens rea* — that is, deliberately dangerous driving — would support a conviction for dangerous driving, but proof of that is not required (Charron J., at para. 47; see also McLachlin C.J., at paras. 74-75, and Fish J., at para. 86).

(5) Proof of the “Marked Departure” Fault Element

1. Determining whether the required objective fault element has been proved will generally be a matter of drawing inferences from all of the circumstances. As Charron J. put it, the trier of fact must examine all of the evidence, including any evidence about the accused’s actual state of mind (para. 43).
2. Generally, the existence of the required objective *mens rea* may be inferred from the fact that the accused drove in a manner that constituted a *marked departure* from the norm. However, even where the manner of driving is a marked departure from normal driving, the trier of fact must examine all of the circumstances to determine whether it is appropriate to draw the inference of fault from the manner of driving. The evidence may raise a doubt about whether, in the particular case, it is appropriate to draw the inference of a marked departure from the standard of care from the manner of driving. 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: *Beatty*, at para. 37.
3. In other words, the question is whether the manner of driving which is a marked departure from the norm viewed in all of the circumstances, supports the inference that the driving was the result of a marked departure from the standard of care that a reasonable person in the same circumstances would have exhibited.
4. Driving which, objectively viewed, is simply dangerous, will not on its own support the inference that the accused departed markedly from the standard of care of a reasonable person in the circumstances (Charron J., at para. 49; see also McLachlin C.J., at para. 66, and Fish J., at para. 88). In other words, proof of the *actus reus* of the offence, without more, does not support a reasonable inference that the required fault element was present. Only driving that constitutes a marked departure from the norm may reasonably support that inference.
5. I now turn to the question of whether the trial judge committed reversible error in this case.

(6) Did the Trial Judge Err With Respect to the Fault Element?

1. The Court of Appeal found that the trial judge erred by equating the fault component of the offence with the question of whether there was an explanation for the accused’s conduct (para. 21). I agree. But I also agree with the appellant that the trial judge’s error goes beyond that. In my respectful view, the trial judge erred in law by failing to conduct any meaningful inquiry into whether the appellant displayed a marked departure from the standard of care to be expected of a reasonable person in the same circumstances. Specifically, he inferred the marked departure simply from the fact that the driving was, objectively viewed, dangerous: trial judge’s reasons, at paras. 27-28. This is precisely what all of the members of the Court held in *Beatty* must not be done. Of course, the trial judge did not have the Court’s decision in *Beatty*.
2. The respondent argues that the trial judge did not err and that the Court of Appeal was wrong to find that he had. It is submitted that the Court’s decision in *Beatty* only reformulated, not substantively modified, the test in *Hundal*. It follows, the respondent says, that by faithfully following the test established in *Hundal* the trial judge did not make any legal error. The respondent points out that the Court did not suggest in *Beatty* that verdicts rendered under the *Hundal* analysis were automatically subject to appellate intervention. That being the case, the respondent submits, it was not open to the Court of Appeal to intervene simply because the trial judge had used the *Hundal* test to reach his verdict.
3. I agree that, if the trial judge had correctly applied the law in substance, it would not have been an error simply to fail to carry out his analysis using the *Beatty* framework, which of course he could not have known of at the time of his decision. However, my view is that the trial judge erred in substance and not merely in form. As explained above, the trial judge inferred the necessary fault element simply from the fact of dangerous driving. As *Beatty* makes clear, this is an error of law.
4. The next question is therefore whether the trial judge’s error was harmless because it resulted in no substantial wrong or miscarriage of justice.

B. *Second Issue: Was the Error Harmless?*

1. Section 686(1)(*b*)(iii) of the *Criminal Code* permits an appellate court to dismiss an appeal from conviction despite a trial judge’s legal error where the Crown satisfies the court that no “substantial wrong or miscarriage of justice has occurred”. The Crown may do this either by showing (1) that the error was trivial or could have had only a minor effect on the verdict, or (2) that it is clear that the evidence pointing to the guilt of the accused is so overwhelming that conviction was inevitable (*R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823, at paras. 30-31).
2. The appellant argues that the Court of Appeal’s reasoning on this issue is flawed and I respectfully agree. I note that the respondent’s primary position is that there was no error and very little argument was directed to upholding the Court of Appeal’s decision to apply the proviso.
3. I do not understand the Court of Appeal to have applied the proviso on the basis that the Crown’s case was overwhelming. In any event, that is clearly not the case here. Rather, the Court of Appeal held that the trial judge’s reasons show that the legal error had no significant effect. The court relied on two points to reach this conclusion: first, that this was a case of advertent rather than inadvertent negligence and second, that the trial judge’s finding of fact that the driving constituted a marked departure from the standard of care made it clear that he had found the fault element to have been established. I set out the operative part of the Court of Appeal’s judgment:

The trial judge did not . . . specifically address the second step as it is now articulated in *Beatty* [i.e., the fault element], but it may easily be inferred from his reasons that the accused had the necessary intent. This was not a case in which the negligence was inadvertent. Rather, the driving that resulted in the collision entailed a deliberate act of driving onto a busy highway, in fog, in the face of oncoming traffic. The trial judge correctly concluded that the appellant’s driving did constitute a marked departure from the standard of care of a reasonable person in the circumstances of the appellant, thus satisfying the test for mens rea. [para. 31]

1. I respectfully cannot agree with either of these reasons. With respect to the first, there was no evidence to support the Court of Appeal’s conclusion that this was “advertent” negligence. Advertent negligence refers to subjective *mens rea* and applies when an accused actually foresees the risk and decides to take it. While the appellant’s act of driving out from the stop sign was apparently a voluntary act, there was no evidence to support the conclusion that the appellant was in fact aware of the risk he was creating in doing so and deliberately chose to run that risk. In my respectful view, the Court of Appeal erred in finding that subjective *mens rea* had been established on this record. Of course, subjective *mens rea* is not required, but it certainly was not established on this record.
2. As to the judge’s finding of a marked departure, my view is, as noted earlier, that the judge reached this conclusion solely by inferring it from the fact that the appellant’s driving had been, objectively viewed, dangerous. That erroneous inference cannot provide justification for dismissing that error as harmless.

C. *Third Issue: New Trial or Acquittal?*

1. The appellant asks the Court to allow the appeal, set aside his conviction and enter an acquittal. The Crown’s position is that if the appeal is to be allowed, a new trial should be ordered. The decision as to what order to make turns on whether there is any evidence upon which a properly instructed trier of fact could have convicted. If there is not, then generally entering an acquittal is the appropriate course (see *R. v. MacNeil*, 2009 NSCA 46, 277 N.S.R. (2d) 22, at paras. 16-18; *R. v. D.C.S.*, 2000 NSCA 61, 184 N.S.R. (2d) 299, at paras. 46-50). In my view, that is the appropriate course in this case.
2. In my view, the record does not provide evidence on which a properly instructed trier of fact, acting reasonably, could conclude that the appellant’s standard of care was a marked departure from that expected of a reasonable person in the circumstances. I accept that the driving, objectively viewed, was dangerous. But it must be noted that there was no evidence that the driving leading up to pulling into the path of oncoming traffic was other than normal and prudent driving. The focus, therefore, is on the momentary decision to pull onto the highway when it was not safe to do so. I do not think that the manner of driving, on its own, supports a reasonable inference that the appellant’s standard of care was a marked departure from that expected of a reasonable driver in the same circumstances.
3. Taking the Crown’s case at its highest, the appellant pulled out from a stop sign at a difficult intersection and in poor visibility when it was not safe to do so. Although the trial judge did not make a specific finding on the point, Mr. McGinnis (the driver of the tractor-trailer) thought that the appellant’s vehicle had stopped before proceeding onto the highway. Mr. McGinnis also testified that when he first saw the lights of the appellant’s vehicle, he guessed that it was about 300-400 feet away but that it could have been as little as 100 feet. It is, of course, reasonable to assume that the appellant could have seen the McGinnis vehicle at least as soon as Mr. McGinnis was able to see the appellant’s vehicle. Given the lighting on the tractor-trailer, it might be concluded that the tractor-trailer may have been visible somewhat sooner. However, on any realistic scenario consistent with the evidence, the time between visibility and impact would be only a few seconds. In my view, the appellant’s decision to pull onto the highway is consistent with simple misjudgment of speed and distance in difficult conditions and poor visibility. The record here discloses a single and momentary error in judgment with tragic consequences. It does not support a reasonable inference that the appellant displayed a marked departure from the standard of care expected of a reasonable person in the same circumstances so as to justify conviction for the serious criminal offence of dangerous driving causing death.

V. Disposition

1. I would allow the appeal, set aside the appellant’s conviction and enter an acquittal.

*Appeal allowed.*

Solicitor for the appellant:  Christopher J. Nowlin, Vancouver.

Solicitor for the respondent:  Attorney General of British Columbia, Vancouver.

1. Highway 5 runs predominantly north-south, but, in the area of the collision, it runs east-west. As the witnesses most often referred to east and west as north and south, “north” and “south” are used in these reasons. [↑](#footnote-ref-1)