Evaluating the Operating Mind Principle: A Comment on *R v Lambert*

By Joshua D. Haase

On September 17, 2011, Bradley Lambert was driving a car that was involved in a single-vehicle accident.[1] An officer who attended the scene, Sgt. Thistle, introduced himself to Lambert in the ambulance and asked how he was feeling, to which Lambert responded: "I am drinking and driving. Give me a ticket and let me go, boy."[2] After confirming that he had been driving, Sgt. Thistle returned to the ambulance and informed Lambert that he believed he was operating the vehicle while impaired and proceeded to read him his rights and caution.[3] Lambert indicated that he understood and did not want a lawyer, before making a similar statement to the first: "I was drinking and driving; I told you, give me the ticket."[4] At the hospital, Lambert was told that he could be charged, but declined to speak with a lawyer and when he was read a demand for a blood sample, he stated: "If it's needed; you know I'm impaired."[5] At trial, an expert for the Crown provided evidence suggesting that Lambert's blood-alcohol level at the time of the accident would have been between 119 and 143 milligrams of alcohol in 100 millilitres of blood.[6]

At a *voir dire* to determine the admissibility of the statements, Lambert testified that he could not remember the collision or any interaction with Sgt. Thistle.[7] A neurologist called by the defence, though he had not examined Lambert, suggested that he had suffered a concussion and, consequently, exercised poor judgment in responding to the officer in the ambulance.[8] The trial judge determined that the statements were involuntary, and Lambert was ultimately acquitted.[9] The Court of Appeal, however, reversed the decision and ordered a new trial on the basis that the trial judge applied the wrong test for voluntariness.[10] In their view, all that mattered

was that Lambert "knew what he was saying and that he was saying it to a police officer who could use it to his detriment."[11] They felt that both requirements were satisfied and pointed to specific factors in the reasons, including that Sgt. Thistle was in uniform and that Lambert had made the statements three times, with an interval in between.[12]

As summarized by the Court, statements given to police will only be admissible if they are voluntary.[13] In *R v Whittle*,[14] Sopinka J discussed the principle of an "operating mind" as an element of voluntariness, noting that "it does not imply a higher degree of awareness than knowledge of what the accused is saying and that he is saying it to police officers who can use it to his detriment."[15] This is the extent of the analysis and "no inquiry is necessary as to whether the accused is capable of making a good and wise choice that is in his or her interest."[16] While there is no doubt that the correct test was applied in *Lambert*, the Court's application of the test to the facts of the case raises some concerns. It is troubling, for example, that Lambert did not realize the particular consequences of making a statement to the officer; he clearly believed he would be issued a ticket for causing an accident while impaired. The question then becomes whether it is possible to make a voluntary statement to police if one is not aware of the stakes that are involved. An argument could be made that one's willingness to make a statement is directly related to the particular consequences that could follow. For example, if I were to receive a traffic ticket, there would be much less hesitancy to speak freely to police than if I were being investigated for murder – there is simply not as much to lose. At the same time, even if Lambert was aware of the consequences, this does not necessarily mean that his statements were voluntary. In a study on the acute effects of alcohol on decision making, for instance, the authors found that alcohol "subtly impairs the ability to use emotional signals (probability, gains and losses) when making risky decisions."[17] In other words, participants in the study were impaired

in their ability to consider consequences when making decisions. Thus, even if Lambert were aware that he could be charged with, among other things, impaired driving causing injury, that does not mean it would have affected his responses to the officer (e.g. he may still have proclaimed that he was drinking and driving or that he did not wish to speak to a lawyer). The fact that Lambert was potentially concussed – he was thrown from the vehicle during the accident[18] – adds another layer of complexity. Researchers have found, for example, that those who suffer from a concussion "may make quick decisions without thinking about the consequences, or not use the best judgment."[19]

Taken together, these factors suggest that it would be worthwhile to reformulate the operating mind principle, at least where circumstances are similar to those in *Lambert*. In particular, where an accused makes a statement to police based on an incorrect assessment of the consequences involved, that information should either be corrected, or the statement should be deemed inadmissible in court. Some may argue that this would result in the defence of mistake of law being available, but an important distinction is being made here: Lambert was not confused about whether his actions were *illegal* or not, but rather the *severity* of the consequences. It is only when the accused makes an incorrect statement regarding the sanction attached to the conduct that a police officer should be expected to correct that misapprehension. Where the accused is suffering from some transitory impairment, such as intoxication or a serious head injury, one option could be avoiding any substantive engagement with the accused regarding the impugned conduct until symptoms have subsided. In every case, the goal will be to establish an appropriate balance between the duties of law enforcement and preventing an already-existing power imbalance from being aggravated by the absence of truly operating mind.

[1] *R v Lambert*, 2018 NLCA 39 at para 2, 2018 CarswellNfld 264 [*Lambert*].
[2] *Ibid*.

[3] *Ibid*.
[4] *Ibid*.
[5] *Ibid* at para 3.
[6] *Ibid*. For comparison, 80 milligrams of alcohol per 100 milligrams of blood – or the 0.08% mark – is the legal limit in Newfoundland.
[7] *Ibid* at para 4.
[8] *Ibid*.
[9] *Ibid* at para 5.
[10] *Ibid* at paras 24-25.
[11] *Ibid* at para 14.
[12] *Ibid*.
[13] *Ibid* at para 2.
[14] [1994] 2 SCR 914 [*Whittle*]. See also *R v Oickle*, 2000 SCC 38 [*Oickle*].
[15] *Ibid* at p 936.
[16] *Ibid* at p 939.
[17] S. George *et al*, "The acute effect of alcohol on decision making in social drinkers" (2005) 182 Psychopharmacology 160 at 167.
[18] *Lambert*, *supra* note 1 at para 2.
[19] TBI Model Systems *et al*, "Cognitive Problems After Traumatic Brain Injury" (2009), online: https://msktc.org/tbi/factsheets/Cognitive-Problems-After-Traumatic-Brain-Injury.