
CANADA / JUDGMENT

Burbank v. R.T.B.

2007 BCCA 215

COURT

British Columbia Court of Appeal

DECIDED

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2007 BCCA 215 Burbank v. R.T.B.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Burbank v. R.T.B.,

2007 BCCA 215

Date: 20070417

Dockets: CA033496; CA033495

Docket: CA033496

Between:

Christine Burbank and Erik Leonard Burbank

by his Guardian ad Litem Christine Burbank

Respondents

(Plaintiffs)

And

R.T.B., an infant

Respondent

(Defendant)

And

Constable Sharan Badyal and

The Attorney General of British Columbia

Appellants

(Defendants)

- and -

Docket: CA033495

Between:

Alfred Leonard Corrado and Josephine Corrado

Respondents

(Plaintiffs)

And

R.T.B., an infant

Respondent

(Defendant)

And

Constable Sharan Badyal and

The Attorney General of British Columbia

Appellants

(Defendants)

Before:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Lowry

The Honourable Mr. Justice Chiasson

J.A. Bowers, Q.C. and B. Bharaj

Counsel for the Appellants

G.P. Brown and M.K. Kinch

Counsel for the Respondent, R.T.B.

B.R. Brooke

Counsel for the Respondents,

Christine Burbank and Erik Leonard Burbank, Alfred Leonard Corrado and Josephine Corrado

Place and Date of Hearing:

Vancouver, British Columbia

January 30, 2007

Place and Date of Judgment:

Vancouver, British Columbia

April 17, 2007

Dissenting Reasons by:

The Honourable Madam Justice Newbury

(Schedule - P. 39)

Written Reasons by:

The Honourable Mr. Justice Lowry (P. 40, para. 48)

Concurring Reasons by:

The Honourable Mr. Justice Chiasson (P. 61, para. 89)

Reasons for Judgment of the Honourable Madam Justice Newbury:

- [1] Constable Badyal, an R.C.M.P. officer, and the Attorney General of British Columbia appeal the finding of the court below that the constable was contributorily negligent in connection with a tragic car accident that occurred on the evening of July 16, 2000 in Newton, British Columbia. A car driven by the defendant R.T.B. had been pursued by Constable Badyal after committing two driving infractions in plain view of her marked R.C.M.P. vehicle. The pursuit took the constable down some residential lanes at a speed as high as 35 km/h, and then onto a street where R.T.B.'s vehicle sped in excess of 80 km/h. Constable Badyal abandoned the pursuit and pulled over. But before she could disengage her siren, R.T.B.'s car went through a stop sign a block to a block and one-half ahead of her and collided with the Burbank vehicle. Eleven-year-old Tina Burbank was killed and the four other occupants of the car were injured. As it turned out, R.T.B., then age 15 and unlicensed, was driving a stolen car, and was impaired by methadone. He already had a long history of vehicle thefts and has since been convicted of dangerous driving causing death in connection with the accident.
- [2] For reasons reported at 50 B.C.L.R. (4th) 115, 2005 BCSC 1506, Mr. Justice Maczko found that Constable Badyal had been negligent in giving chase to R.T.B.'s vehicle. In his words, "This chase should never have begun." He continued:

The officer had no specific information that any serious offence had been committed. She had good reason to believe that the driver of the vehicle might be impaired. In my view, there is no justification for commencing a high-speed chase of a suspected impaired driver through a residential area where it is expected that there would be a high volume of pedestrian and vehicular traffic. The danger to the citizens is far too great. [At para. 26.]

He also found that Constable Badyal's discontinuing the pursuit was "far too little and far too late. By that time, there was little hope of preventing an accident." (Para. 36.) Although he stated that this was sufficient to find liability, he also found the constable had breached the provincial regulations regarding high-speed pursuits. In the result, he found Constable Badyal to be 15% responsible for the accident. On the other hand, he found she had not been grossly negligent and was therefore exempted from personal liability by s. 21 of the Police Act, R.S.B.C. 1996, c. 367.

Factual Background

- [3] Newton is a residential area in the Municipality of Surrey, British Columbia. The evening of July 16, 2000 was the close of a warm summer day and conditions were clear and dry. Constable Badyal had started her shift at 7:00 p.m. and was driving alone in a marked car. At about 8:40 p.m. she was stopped at a stop sign facing eastbound on 70B Avenue at the intersection with 134th Street. (Reference may be made to the map of the area attached as a schedule to these reasons.) Photographs of the area show that it is not metropolitan or even suburban: the streets have wide grassy shoulders and there are both houses and other buildings, such as warehouses, in the area. A townhouse development is located between 134th and 135th Streets.
- [4] Constable Badyal's attention was drawn to a car that came out of an alley east of 134th Street very quickly without stopping. It turned the corner westbound onto 70B Avenue and failed to stop at the stop sign across from the police car. Constable Badyal thought the driver's behaviour was unusual, given that he was in full view of a marked R.C.M.P. car. She decided to run a check of his licence plate on the computerized Canadian Police Information Centre (CPIC) system. As the check was running, she followed the car north on 134th Street and noticed that the driver kept looking at her in his rear view mirror. He was wearing a cap and she was unable to describe or recognize him - although R.T.B. testified he recognized her from a previous occasion.
- [5] In response to the CPIC check, Constable Badyal received what was (rather strangely) called a "no-hit" response. This indicated a "hit" but provided no further information. It told her only that the licence plate had been run through the system earlier that day and that a Surrey R.C.M.P. detachment file had been opened in relation to the subject car. Since a stolen car normally generates a "hit", she did not suspect it was stolen, but was curious as to what further information regarding the file might be available. She acknowledged at trial that the file could have been opened for an innocuous reason - for example, that the car had been noticed parked near a crime scene - or that it might mean something more serious. However, given that she had seen the two traffic infractions, she suspected the driver might

be impaired. She decided to pull the car over at Hall Road and 72nd Avenue, and activated her emergency lights.

- [6] Apparently seeing Constable Badyal's lights, R.T.B. turned right (southbound) onto Hall Road and pulled over at the location marked 'C' on the map. He testified that he hoped to do what he "usually" did - wait until she walked to his car, pull away in his car, "go a couple of blocks and get out and run." Constable Badyal pulled up behind him, advised her dispatcher that she had stopped the car, and keyed in the file number to obtain more information regarding the CPIC "no-hit". She then opened her door to get out of her car but noted R.T.B.'s backup lights had not gone on, indicating that his car had not been put into "park". (R.T.B. testified he had recognized the constable and "figured she had made me for who I was. ... The car wasn't mine. So I stepped on the gas and took off.") The constable got back into her car "in order to find out what the hit was for before I approached the vehicle". Before she received any information from her computer, R.T.B.'s car took off. Constable Badyal so advised her dispatcher. She followed the car and saw it proceed west through an alleyway south of 72nd Avenue. She did not observe any other cars or pedestrians on the road.
- [7] R.T.B.'s car proceeded down the lane, then turned left (southbound) through a covered work area, through which Constable Badyal followed. She testified that as she came out of the covered area, she could see the tail end of the car and debris kicked up by it, as it proceeded southbound down another alley on the south side of 71A Avenue. She testified she was travelling just over 30 km/h, which she thought was the speed limit in the alleys. She slowed to look for traffic, saw none, and then proceeded to follow the car down the second alley. At the end of it, she testified that she slowed again to look for traffic, again saw none, and followed down a further alley to 70B Avenue. Again, as she reached the end of the lane at 70B Avenue, she did not observe any pedestrians or other traffic on the street. (By this time, her siren was on.) She did observe R.T.B.'s car very close to the intersection of 70B and 135th Street, where there was a stop sign for eastbound traffic.
- [8] Constable Badyal also testified that she was going less than the speed limit and that she slowed down to observe "what was happening at the intersection", as she noticed R.T.B.'s car slow down and its doors open. This suggested to her that the occupants were intending to flee on foot. However, none of the occupants got out, the doors closed again, and the car continued on towards 135th Street. (It has one lane going each way.) The constable said she had "slowed considerably because I was unsure of what the white car was going to do", and that she had told her dispatcher when the doors were opening. She again radioed when the car resumed travel, and told her dispatcher that she was continuing to follow. R.T.B. made what the constable described as a "wide circular turn" to the right onto 135th Street. Her siren remained on and again she noticed no other moving vehicles or pedestrians on the street. This was confirmed by Mrs. Patterson, a witness watching from a nearby house. She also testified that the police car was about 12 car-lengths behind the R.T.B. car, travelling more slowly, as it approached the intersection. She saw R.T.B. turn quickly, without stopping at the stop sign at 135th Street and saw the police car turn "in a proper manner ... like a

controlled turning".

- [9] The constable proceeded southbound, accelerating as the R.T.B. vehicle sped ahead down the straight stretch of 135th Street. When she saw that the R.T.B. car was travelling over 80 km/hr, she decided that "given the residential area and the fact that the white car was travelling at such a speed, I would terminate the pursuit." There is evidence suggesting her decision to terminate was made when she was at the spot marked 'D' on the map. R.T.B. was a block to a block and a half ahead of her. Constable Badyal slowed at the opening of a driveway to a warehouse complex and pulled over to the left-hand side of the road, facing south, about to turn off her siren and advise her dispatcher that she had ended the pursuit. (The letter 'X' on the map marks the location of the pullout.) It was at that moment that she observed R.T.B.'s car collide with the Burbank car (proceeding west) in the intersection of 68th Avenue and 135th Street. The elapsed time between her advising her dispatcher that she was pulling over the suspect car for the first time, to her request for an ambulance, was 71 seconds. The trial judge found that the pursuit itself, which covered approximately five blocks, lasted less than 61 seconds.

The Emergency Regulations and Expert Opinions

- [10] The regulations and R.C.M.P. policy governing police pursuits of cars form an important part of the factual background. Section 122 of the Motor Vehicle Act R.S.B.C. 1996, c. 318, permits police officers to disobey traffic laws in carrying out their duties, subject to the regulations promulgated pursuant to the statute, and with due regard for safety. At the time of the accident, these were the Emergency Vehicle Driving Regulations, B.C. Reg. 133/98. Section 3(1) of the Regulation requires that to engage in or continue a pursuit, a peace officer must:
- (a) have emergency equipment activated, and
 - (b) have reasonable grounds to believe that
 - (i) the driver or a passenger in the vehicle being or to be pursued has committed, is committing or is about to commit an offence, and
 - (ii) the seriousness of the offence and the need for immediate apprehension outweigh the risk to the safety of members of the public that may be created by the pursuit.

The Regulation then goes on to require that peace officers consider a number of factors relevant to public safety and the pursuit. It does not prohibit police chases in any particular situation. (Counsel for R.T.B. seemed to assume in her questioning that "... the policy is to not pursue a stolen vehicle", but that is incorrect.) The factors referred to in the regulation are as follows:

- (2) ...
 - (a) the nature and circumstances of the suspected offence or incident;

- (b) the risk of harm posed by the manner in which the emergency vehicle is being or is likely to be operated;
 - (c) the risk of harm posed by the distance, speed or length of time required or likely to be required to exercise the privileges;
 - (d) the nature, condition and use of the highway;
 - (e) the volume and nature of pedestrian or vehicular traffic that is, or might reasonably be expected to be, in the area.
- (3) For the purposes of subsection (1)(b),
- (a) the need for immediate apprehension will be low if
 - (i) the driver or a passenger in the vehicle pursued has not committed an indictable offence, or
 - (ii) identification or apprehension of the suspected offender may be achieved by other means at that or [at] a later time,
 - (b) the greater the distance, speed or length of time required or likely to be required for the pursuit, the greater the risk to the safety of members of the public, and
 - (c) an attempt to evade apprehension is not a factor to be considered in determining the seriousness of the offence or the need for immediate apprehension.
- [11] The constable was also subject to an R.C.M.P. divisional policy regarding "Hazardous Pursuits - Emergency Vehicle Operation". The relevant portion of this policy begins with the general observation that:
1. Pursuant to the Emergency Vehicle Driving Regulations (EVDR) by Order of Lieutenant Governor in Council No. 0522, signed 1998-04-21, the Police Services Division Guidelines were endorsed by the Attorney General.
 2. "Attempting to close the distance" means the act of "catching-up" to an offender, but does not include a pursuit.
 1. Although the wording of this definition is slightly different than the EVDR, the intent is the same.
 3. "Pursuit" means the driving of an emergency vehicle by a peace officer while exercising the privileges granted by Section 122(1) MVA for the purpose of apprehending another person who:
 1. refuses to stop as directed by a peace officer; and
 2. attempts to evade apprehension.

The policy then sets out various "factors to consider" when a police officer is assessing whether to engage in or continue a pursuit. Sections E. 44. c. and d. provide:

E. 44. c. Factors to Consider

1. When making an assessment as to the reasonable grounds to engage in or continue a pursuit, a member must consider the following factors:
 1. nature and circumstances of the suspected offence or incident;
 2. the risk of harm posed by the manner in which the police vehicle is being operated;
 3. the risk of harm posed by the distance, speed or length of time required or likely to be required to exercise the privileges under Sec. 122 MVA;
 4. the nature, condition and use of the highway;
 5. the volume and nature of pedestrian and/or vehicle traffic that is or might reasonably be expected to be in the area;
2. The need for immediate apprehension will be low if:
 1. the driver or passenger in the vehicle has not committed an indictable offence; or
 2. identification or apprehension of the suspected offender may be done by other means at that or a later time.
3. The greater the distance, speed or time required to apprehend an offender, the greater the risk to public safety.
4. A suspect's attempt to evade apprehension is not a factor in determining the seriousness of the offence, or the need for immediate apprehension.

E. 44. d. Member

1. Familiarize yourself with HQ, "E" Division, and Unit directives as they relate to hazardous pursuits.
2. Do not pursue a vehicle unless you are operating a marked police motor vehicle equipped with a roof light bar, siren and revolving lamps.
 1. Unmarked, clean roof police vehicles may only be used in pursuits where there is an absolute necessity to protect life.
3. While engaged in, or supervising a pursuit, you are accountable for its continuation.
 1. Police actions often become the focus of subsequent reviews or legal proceedings.

Further, s. E. 44. f., headed "Termination/Discontinuance of a Pursuit" states:

1. A pursuit may be terminated at any time.
2. A Primary Member or Supervisor shall terminate a pursuit when:
 1. the risk to the safety of the public can no longer justify its continuation, or

2. when visual contact with the suspect vehicle is lost and cannot be re-established within a reasonably short time frame.
3. Termination of the pursuit shall immediately be broadcasted to all involved members.
4. The decision to terminate a pursuit is final and no criticism is to be levied against a member who discontinued or ordered the discontinuance of the pursuit.

The policy goes on to provide guidance to officers who are "secondarily" involved in a pursuit, dispatch centre personnel and supervisors, and detachment/unit commanders, but it is not alleged in this case that any of those persons were negligent. In particular, there is no allegation in this case that the constable's dispatcher should have ordered her to discontinue the pursuit sooner than she did.

[12] Counsel for R.T.B. adduced into evidence at trial a written report and opinion of Mr. D'Aoust, a retired R.C.M.P. officer with experience in traffic law enforcement. He instructs non-police agencies on the operation of emergency vehicles. The trial judge concluded, after extensive argument, that Mr. D'Aoust was qualified to give expert evidence on the issues of "emergency vehicle driving, police pursuit policies, and on the regulations and the training of emergency vehicle driving." However, the written opinion he provided to the Court was much more specific. It assumed a set of facts set out in Appendix "B" to his letter, which concluded with the following four paragraphs:

20. Cst. Badyal travelled through alleys southbound past 71st Avenue and emerged onto 70B Avenue. At this time she regained visual contact with the Toyota for the first time since it entered the open bay garage. She noticed the Toyota to the east, approaching the intersection between 70B Avenue and 135th Street. Cst. Badyal noticed that the driver's side door was open and it appeared as though the occupants might be preparing to "bail" from the vehicle. She proceeded towards the vehicle with her sirens and lights activated.
21. The Toyota's driver's side door then closed and the vehicle turned the corner onto 135th Street and accelerated rapidly southbound. Cst. Badyal pursued the vehicle southbound on 135th Street. Both the police cruiser and the Toyota travelled southbound on 135th Street with speeds in excess of 80 km/hour.
22. The Toyota failed to stop at the intersection between 135th Street and 68th Avenue at which time the fatal collision with the Ford Expedition occurred.
23. The route taken by Cst. Badyal while following the Toyota was near downtown Newton and typically contained significant vehicular and pedestrian traffic.

This appendix did not mention that Constable Badyal had terminated her pursuit a block to a block and one-half before R.T.B.'s vehicle went through the intersection at 68th Avenue, and did not attempt to determine for what length of time Constable Badyal had exceeded 80 km/h. Nor did the opinion mention that Constable Badyal did not see, and there was no evidence of, "significant vehicular and pedestrian traffic" on the evening in question. Instead, the body of Mr.

D'Aoust's opinion stated that when Constable Badyal was proceeding down the alleyways behind the R.T.B. vehicle, "she should have slowed down to look for it and to properly check for vehicular and pedestrian traffic." Her evidence, which was confirmed by Mrs. Patterson and apparently accepted by the trial judge, was that she had checked and that there was none.

[13] The burden of Mr. D'Aoust's opinion related to two items: the constable's commencement of the pursuit of R.T.B.'s car and the continuation of the pursuit through the covered work area down the alleyways to 70B Avenue. On the topic of commencing the pursuit, his written opinion was that:

... Cst. Badyal's decision to commence the pursuit when the Toyota fled was questionable. The RCMP's pursuit guidelines suggest that Cst. Badyal should not have commenced the pursuit at all in this area, based on what she then knew about the suspect vehicle. However, in the field, a member must respond with near instantaneous decision-making and a member's training and instinct is to take steps to apprehend a fleeing suspect. In this case, putting myself in Cst. Badyal's position, I cannot say I would have initially responded differently when the Toyota fled after initially stopping on Hall Road.

While I understand and sympathize with Cst. Badyal's decision to commence the pursuit, I am of the opinion that the risk to the public in commencing this pursuit outweighed the need to immediately apprehend this suspect in this manner and in this residential area.

[Emphasis added.]

On the topic of pursuing the vehicle down the alleyways, Mr. D'Aoust said Constable Badyal should have abandoned the pursuit the moment she lost sight of the vehicle and that continuing to pursue "was not appropriate or reasonable and did not meet the standard of care of a police officer in 2000." In his opinion, the alleyways "were an extremely dangerous area in which to continue a hazardous pursuit." He concluded that:

When Cst. Badyal lost visual contact with the vehicle she should have immediately turned off her emergency equipment and reduced her speed to within safe driving parameters. In this case, rather than shutting down the pursuit, Cst. Badyal appears to have belatedly activated her siren at some point down the alleyways between 71A Avenue and 70B Avenue, indicating that she remained in full pursuit.

[14] Mr. D'Aoust's testimony at trial was considerably different from his written report. When asked about his statement that he could not say he would have initially responded differently than Constable Badyal did when the Toyota driven by R.T.B. fled after its initial stop on Hall Road, he said he "probably would have commenced [the pursuit] a little earlier than she did. She apparently waited for the vehicle to get a ways down the alley before she left." (Emphasis mine.) He acknowledged that in addition to considering what traffic or persons "might be expected" to be present, an R.C.M.P. officer should also consider what is present; that in "proper conditions" it is "appropriate to pursue"; that (contrary to his suggestion in examination-in-chief) the fact that a police officer loses sight of a vehicle does not mean that

he or she should terminate the pursuit as long as the officer knows where the vehicle is; and that he had "no knowledge" of the speed of the two vehicles between points 'B' and 'C' on the map - i.e., while going down the alleys. Finally, he agreed with counsel that when Constable Badyal decided to terminate the pursuit upon observing that the R.T.B. vehicle was going 80-85 km/h, her decision had been "appropriate" and that a reasonably competent police officer would have done so. In re-examination, he was asked whether there were "other speeds at which it would have been appropriate for the officer to have discontinued the pursuit". His answer again focussed on the early part of the pursuit: he stated that in the alleyways, "even driving at the speed limit [which he assumed was 30 km/h] is ... approaching a hazardous point...." He did not suggest that on the straight stretch of 135th Street, a reasonable police officer would have discontinued earlier than Constable Badyal did.

- [15] The second expert whose opinion was canvassed at trial was Corporal P. A. Holmes, also an R.C.M.P. officer. He provides training to R.C.M.P. emergency vehicle operators and to various municipal police departments and other groups required to operate emergency vehicles in the province. Corporal Holmes's written opinion also set forth his assumed facts as a "synopsis". He commented at length on each of the factors that had to be considered by Constable Badyal under the R.C.M.P. pursuit policy. With respect to the "risk of harm" in pursuing R.T.B. down the alleyways, he stated that a speed of more than 30 km/h (which he also assumed was the speed limit) was not excessive; and with respect to alternate means of apprehension, that the short duration of the constable's pursuit "precluded apprehending the suspected offender by other means, such as a tire deflation device." He concluded his report as follows:

It is my opinion that Cst. Badyal had reasonable and probable grounds to pull this Toyota over. She felt that she was dealing with a possible intoxicated driver, did not know who the occupants were and was not sure what the "hit" was for on C.P.I.C.

When she initially pulled the vehicle over she clearly demonstrated that she was thinking about risk assessment and showed sound judgement in not approaching the suspect vehicle until she conducted further investigation into the C.P.I.C. "hit".

When the Toyota took off on her, she followed it and entered into a pursuit. Cst. Badyal notified dispatch of the situation and conducted an ongoing risk assessment. When she felt that the risk of harm to the public was possible, she terminated the pursuit. The Advanced Driver Training she received during her basic training in Regina, taught her to do this.

It is my opinion that Cst. Badyal's conduct in relation to training and policy was appropriate during this incident. [Emphasis added.]

- [16] Corporal Holmes was cross-examined at length by counsel for the plaintiffs, who asked him to make various assumptions about the facts, many of which were not supported by the evidence - the assumption, for example, that Constable Badyal knew that the R.T.B. car was stolen, that she knew the driver was a juvenile, and that she knew he was impaired. Since

none of these assumptions was correct, much of his evidence in response was not helpful. Corporal Holmes did assume specific speeds - that Constable Badyal had exceeded 30 km/h in the alleyways (where, according to counsel, the speed limit was 20 km/h) - a speed that Corporal Holmes had done himself down the alley and found to be "comfortable". He also testified that there were no significant "view obstructions" in the alleys. He was asked to calculate the stopping distance of a car travelling at 30 km/h, and advised the court that assuming a coefficient of friction of .6, the stopping distance was 14.24 metres. Assuming a speed of 85 km/h and a coefficient friction of .7 and driver reaction time of 1.5 seconds, he calculated the stopping distance as 76.07 metres. He said the time to cover the 486 metres on 135th Street (the distance from the point at which R.T.B. had turned onto the street, to the crash) would be 21.85 seconds, assuming a constant velocity of 80 km/h.

[17] In response to questioning by the trial judge, Corporal Holmes agreed that in a residential area where there are "lots of people and cars" and "you have an impaired driver and a high-speed chase on an impaired driver", it "would be dangerous". The following questions were then asked by the Court and answered by the witness:

Q Yes. Well, is there anything more dangerous than that?

A Not -- not behind the wheel of a vehicle, My Lord, no.

Q If the reason for not chasing a stolen car is the likelihood that it's a juvenile, and juveniles have no experience, isn't an impaired driver even that much worse?

A You're right, My Lord.

Q Then how do you conclude that this was a safe chase?

A From the statement of facts I got, My Lord, and you just reiterated them: she saw two minor traffic offences, and then she saw the vehicle veer, so she was just starting into her investigation of an impaired driver. She never actually dealt with the driver to find out what his physical -- how he was physically, whether or not he actually was impaired. So to me, she had enough to pull the vehicle over, but she -- it was only the start of her investigation for an actual impaired.

Q So that she suspected it was --

A Suspected.

Q And if you suspect someone is impaired because you have some evidence of it, it would justify the chase until you know for sure? I am trying to translate what you just told me.

A Yeah. No, it wouldn't. But I think she - she has to form -- she formed some sort of opinion in relation to driving so that --

Q She said she formed the opinion that this was probably an impaired driver and -- or could be an impaired driver, and she was going to stop the vehicle to investigate that?

A Yes, and that's the way I took it from the statement of facts.

Q Well, if she suspected an impaired driver, and the driver takes off under the circumstances I describe, does that justify the chase?

A I would say no, not given that.

[18] In re-examination, however, Corporal Holmes stated that, assuming "good" conditions - i.e., good weather, no other vehicles on the road, no pedestrians, and nothing apparently wrong with the police car or the suspect vehicle - the possibility that the driver of the subject vehicle was impaired would not necessarily indicate that the pursuit should be terminated. At p. 477 of the transcript, the following questions and answers were given:

Q But if the impaired driver is actually driving well and all those other things are not present, could it be appropriate to continue pursuing?

A Yes, I believe so.

Q One of the questions you were asked is how could it possibly be appropriate to pursue impaired drivers, given that their driving is impaired? I am going to ask you the reverse question: is it appropriate for a police officer to observe an impaired driver and not try to take steps to investigate or arrest them?

A We have to pull them over. If you see the driving, if some evidence is there, then you have to investigate further.

Q Because leaving impaired drivers on the road is dangerous to the public?

A Yes.

The Trial Judgment

[19] The trial judge briefly described the circumstances of the accident, and seemed to accept Constable Badyal's evidence regarding speeds and distances. At para. 10, he stated that while R.T.B. was "clearly primarily responsible" for the accident, the issue before the court was whether Constable Badyal should bear any responsibility. He elaborated at para. 12:

The difficult dilemma in these cases is to decide whether to allocate some responsibility for the accident to a police officer who was doing her job, which is to protect the public by apprehending suspected criminals, and by doing so inhibit the apprehension of suspected criminals, or to protect innocent citizens who may be injured or killed, as happened here, by putting some limits on high-speed chases. The police feel they are "damned if they do and damned if they don't". The injured citizens feel that it would be better to let suspected criminals escape or that some other means be used to apprehend them than to put innocent lives at risk.

[20] The trial judge discounted the constable's evidence that she thought the "no-hit" might indicate that the R.T.B. car had been involved in a serious crime. He commented:

I conclude that the officer had no idea what infraction the "hit" - or "no hit" - referred to. She simply assumed it might have involved a serious crime when in fact it could have been quite innocuous.

However, it turned out that the car was stolen. ... [At paras. 22-23.]

[21] At paras. 23-25 of his reasons, the trial judge reviewed the experts' evidence. He summarized Mr. D'Aoust's evidence as follows:

He opined that it is dangerous to pursue a stolen vehicle because it is likely that it has been stolen by a young offender who is more likely to be reckless and not respond appropriately to danger and who is likely not to have much experience as a driver. His opinion was that pursuing a stolen car is too dangerous to the public when balanced against the importance of a car thief getting away. I agree with Mr. D'Aoust that stolen vehicles should not be pursued in high-speed chases through residential neighbourhoods. [At para. 23; emphasis added.]

The trial judge did not refer to the constable's evidence that she had not thought the R.T.B. car was stolen - rather she said she thought the driver might be impaired. Nor did he refer to the fact that there exists no absolute prohibition against pursuing a stolen vehicle, in appropriate conditions. Instead, as has been seen, the regulation and the R.C.M.P. policy provide peace officers with a set of factors - none of which is different from what a non-expert would reasonably expect - to be assessed in the circumstances of each case.

[22] With respect to Corporal Holmes, the trial judge reproduced an excerpt from his testimony in which he acknowledged that there is nothing "more dangerous" than "a high-speed chase on an impaired driver". Without further comment, the trial judge concluded:

In my view, this chase should never have begun. The officer had no specific information that any serious offence had been committed. She had good reason to believe that the driver of the vehicle might be impaired. In my view, there is no justification for commencing a high-speed chase of a suspected impaired driver through a residential area where it is expected that there would be a high volume of pedestrian and vehicular traffic. The danger to the citizens is far too great.

In my view, the evidence outlined so far is sufficient to dispose of the question of liability in favour of the plaintiff. ... [At paras. 26-27; emphasis added.]

[23] The trial judge then reviewed the factors Constable Badyal was required by the regulations to consider in the circumstances. With respect to "the risk of harm posed by the distance, speed or length of time required or likely to be required to exercise the privileges" (of a police officer under s. 122 of the Motor Vehicle Act), the trial judge stated it was apparent that having taken off at "high speed" down a narrow lane with limited visibility, the driver was "likely to take high risks or was so impaired that he did not recognize the risk. He was not likely to stop in response to a chase, nor did he." He was critical of the fact that Constable Badyal had "no plan" as to how the chase would come to an end, since she had testified that alternatives such as having other police officers in the area form a roadblock would normally be resorted to only in chases of longer duration.

[24] The next factor referred to by the regulations was "the volume and nature of pedestrian or vehicular traffic that is, or might reasonably be expected to be, in the area". Although Constable Badyal had testified that she had "looked at the situation and assessed that there was little or no traffic or pedestrians" in the area, the trial judge noted that she had not been able to see what was in front of the R.T.B. vehicle - i.e. the Burbank family vehicle that was a block to a block and a half ahead of her. The trial judge observed that "The car that was struck contained a family that was coming home from a picnic, the very kind of traffic one would expect to be in the area at that time. It was clearly dangerous to conduct a high-speed chase in this area."

[25] At para. 35, the trial judge found that Constable Badyal had not abandoned the chase until the point at which the R.T.B. vehicle was a second or two away from the intersection. In his analysis, there was "no way the Toyota [driven by R.T.B.] could have stopped before going through the stop sign. This is far too little and far too late. By that time, there was little hope of preventing an accident." (At paras. 35-36.) Finally, the trial judge found at para. 37 that the constable had breached the provincial regulations by:

1. Pursuing a vehicle she knew, or ought to have known, would not stop in response to a pursuit;
2. Pursuing a suspected impaired driver through a residential area where Constable Badyal expected that there would be a large traffic and pedestrian flow;
3. Continuing a pursuit which she knew would be longer, rather than shorter, thereby increasing the risk to innocent citizens;
4. Engaging in a high-speed pursuit in an area that [sic] where the officer expected a high volume of vehicular and pedestrian traffic; and
5. Abandoning the pursuit when it was too late to prevent a collision.

[26] In the result, he assigned 15% liability for the accident to Constable Badyal and 85% to R.T.B.

On Appeal

[27] The appellants stated their grounds of appeal in their factum in very abbreviated terms, namely:

The learned Trial Judge erred in law in:

- a) concluding Cst. Badyal was negligent, in the absence of evidence that she failed to meet the standard of care of a reasonably competent police officer; and
- b) concluding the terminated pursuit caused or contributed to the Accident, in the absence of evidence with respect to causation.

However, in both their written and oral submissions, the appellants made more general submissions regarding the role of expert evidence, the standard of care, and the trial judge's application of that standard to the evidence before the court.

[28] It is trite law, at least in this province, that the relevant standard of care applicable to the constable is that of a reasonable police officer, "acting reasonably and within the statutory powers imposed upon him or her, according to the circumstances of the case." (Per Kirkpatrick J., as she then was, in *Doern v. Phillips Estate* [1995] 4 W.W.R. 1, 2 B.C.L.R. (3d) 349 (S.C.), at para. 68, aff'd (1997) 43 B.C.L.R. (3d) 53 (C.A.).) It is also clear that the regulations and R.C.M.P. guidelines are a significant consideration in determining the standard of care. As Kirkpatrick J. stated in *Doern*:

The police pursuit policy was obviously carefully and thoughtfully crafted. It was designed to assist officers in the conduct of the activity that put them at more risk of harm than any of their other duties. Although the policy does not, in itself, constitute the standard of care, compliance with the policy, in my view, is a very important factor to consider in determining whether the standard of care has been met. [At para. 68.]

[29] In *Doern*, a two-person police unit had attempted to pull over a car at night to investigate possible impaired driving in downtown Vancouver. The car sped away down "very, very narrow" and damp streets which were described as "hazardous". The suspect car went through a stop sign and at one point lost control in turning a corner. The police car gave chase but the officers failed to broadcast to their dispatcher the fact that the civilian car had narrowly avoided hitting another civilian vehicle and appeared to be accelerating to 80-90 km/h towards and through a major intersection. The trial judge found that had this information been broadcast, it would have "signalled the existence of clear danger and should have triggered a decision to terminate the pursuit." (At para. 76.) Another police car also gave chase but also failed to broadcast the fact of civilian traffic on the route of the pursued car, again foreclosing the dispatcher from terminating the chase. What information he did pass along was inaccurate and was found to have "caused confusion as to the direction in which the pursuit was moving." (At para. 86.) Errors were also made by the chief dispatcher and a supervising officer, who was found to have misunderstood the pursuit rules and the importance of "communication and command" in police pursuits. Overall, the trial judge said:

It is perhaps conceivable that, if there had been only one such occurrence of clear danger, it might not have been appropriate to terminate the pursuit. However, the accumulation of occurrences of clear danger in this pursuit, which obviously went unreported to those in command, would mandate termination. In failing to terminate in the face of clear danger, I find the police failed to meet the standard of care expected of them. [At para. 97.]

The pursuit lasted some eight minutes, ending as the pursued car went through a red light and hit another car, severely injuring the other driver. The trial judge found the police (collectively) responsible to the extent of 25% for the resulting injuries to the plaintiff.

[30] On appeal to this court, one of the grounds of appeal in Doern was that the trial judge had erred in considering expert opinion evidence concerning police pursuit policies and, according to the trial judgment at para. 8, "whether each of the members of the Vancouver Police Department involved in the pursuit on October 19, 1989, complied with the pursuit policy." In rejecting this ground of appeal, Finch J.A. (now C.J.B.C.) said this:

As to the admissibility of opinion evidence on whether the police complied with the pursuit policy, one simple test is whether the expert's testimony would be helpful to the tribunal (see Sopinka, Lederman and Bryant on Evidence at 534). Given the subjective language used in the policy, and the unfamiliarity of a lay person such as a judge as to how that language should be interpreted and applied by officers in the field, I am in no doubt that the learned trial judge was fully justified in looking to the opinions of Mr. Crich, and others, for assistance in understanding the practical application of the policy. It may be that the judge could have come to a correct interpretation and application of the policy, without such assistance, but the views of those experienced in the field were bound to make her task easier, and the likelihood of a correct interpretation and application more probable. In that sense, it could properly be said that the opinion evidence was necessary to the judge's conclusions. Nor do I think that the opinion evidence should have been excluded as going to the ultimate issue. Sopinka (supra) at pp. 540-546 discusses this subject, and gives a number of examples where opinions on the ultimate issue have been held to be admissible.

In this case the ultimate issue was whether police officers were negligent in the discharge of their duties. Mr. Crich's opinions went to the question whether the officers["] conduct conformed to the police pursuit policy. That was not the ultimate issue, although it was no doubt an important consideration on the issue of negligence. I can see nothing in the careful reasons of the learned trial judge to suggest that she felt obliged to accept Mr. Crich's opinions as conclusive of the issues she had to decide. She appears rather to have weighed and evaluated those opinions along with the other evidence before her. [At paras. 9-10; emphasis added.]

[31] The second ground of appeal in Doern was that the trial judge had held the police to too high a standard of care. Again, the court rejected this argument and endorsed Kirkpatrick J.'s statement of the applicable standard of care (quoted above). In the penultimate paragraph of his reasons, Finch J.A. continued:

Every one must recognize that the members of our police forces should not be unduly hampered in the discharge of their difficult and often dangerous work. The police vehicle pursuit policy is a guideline for officers which attempts to balance the public interest in the apprehension of suspected criminals, with the need to maintain reasonable levels of safety for the police and the public as the police discharge their duties. Whether particular police conduct departs so far from the guidelines and from the standard of care imposed by law, as to constitute negligence is a heavily fact dependent question. Even if I held a different view of the evidence to that of the trial judge, which I do not, it would not be open to us to substitute our judgment for hers in a case which is essentially one of fact. [At para. 18.]

[32] This brings us to the matter of standard of review and the by now well-known passages from the majority judgment of the Supreme Court of Canada in *Housen v. Nikolaisen* [2002] 2 S.C.R. 235, 2002 SCC 33 concerning questions of law, fact, and mixed fact and law. The Court noted that in cases of negligence, distinguishing between these can be difficult. In the words of Iacobucci and Major JJ. at para. 26:

Questions of mixed fact and law involve applying a legal standard to a set of facts: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 35. On the other hand, factual findings or inferences require making a conclusion of fact based on a set of facts. Both mixed fact and law and fact findings often involve drawing inferences; the difference lies in whether the inference drawn is legal or factual. Because of this similarity, the two types of questions are sometimes confounded. This confusion was pointed out by A. L. Goodhart in "Appeals on Questions of Fact" (1955), 71 L.Q.R. 402, at p. 405:

The distinction between [the perception of facts and the evaluation of facts] tends to be obfuscated because we use such a phrase as "the judge found as a fact that the defendant had been negligent," when what we mean to say is that "the judge found as a fact that the defendant had done acts A and B, and as a matter of opinion he reached the conclusion that it was not reasonable for the defendant to have acted in that way."

[33] The Court in *Housen* noted at paragraph 27 that what appears to be a question of mixed fact and law may, upon reflection, actually be an error of pure law, citing the example given at para. 39 of *Canada (Director of Investigation and Research) v. Southam Inc.* [1997] 1 S.C.R. 748. However, the Court continued:

... where the error does not amount to an error of law, a higher standard is mandated. Where the trier of fact has considered all the evidence that the law requires him or her to consider and still comes to the wrong conclusion, then this amounts to an error of mixed law and fact and is subject to a more stringent standard of review: *Southam*, supra, at paras. 41 and 45. While easy to state, this distinction can be difficult in practice because matters of mixed law and fact fall along a spectrum of particularity. This difficulty was pointed out in *Southam*, at para. 37:

... the matrices of facts at issue in some cases are so particular, indeed so unique, that decisions about whether they satisfy legal tests do not have any great precedential value. If a court were to decide that driving at a certain speed on a certain road under certain conditions was negligent, its decision would not have any great value as a precedent. In short, as the level of generality of the challenged proposition approaches utter particularity, the matter approaches pure application, and hence draws nigh to being an unqualified question of mixed law and fact. See R. P. Kerans, *Standards of Review Employed by Appellate Courts* (1994), at pp. 103-108. Of course, it is not easy to say precisely where the line should be drawn; though in most cases it should be sufficiently clear whether the dispute is over a general proposition that might qualify as a principle of law or over a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future.

When the question of mixed fact and law at issue is a finding of negligence, this Court has held that a finding of negligence by the trial judge should be deferred to by appellate courts. In *Jaegli Enterprises Ltd. v. Taylor*, [1981] 2 S.C.R. 2, at p. 4, Dickson J. (as he then was) set aside the holding of the British Columbia Court of Appeal that the trial judge had erred in his finding of negligence on the basis that "it is wrong for an appellate court to set aside a trial judgment where there is not palpable and overriding error, and the only point at issue is the interpretation of the evidence as a whole" (see also *Schreiber Brothers Ltd. v. Currie Products Ltd.*, [1980] 2 S.C.R. 78, at p. 84).

This more stringent standard of review for findings of negligence is appropriate, given that findings of negligence at the trial level can also be made by juries. If the standard were instead correctness, this would result in the appellate court assessing even jury findings of negligence on a correctness standard. At present, absent misdirection on law by the trial judge, such review is not available. The general rule is that courts accord great deference to a jury's findings in civil negligence proceedings:

The principle has been laid down in many judgments of this Court to this effect, that the verdict of a jury will not be set aside as against the weight of evidence unless it is so plainly unreasonable and unjust as to satisfy the Court that no jury reviewing the evidence as a whole and acting judicially could have reached it.

(*McCannell v. McLean*, [1937] S.C.R. 341, at p. 343)

See also *Dube v. Labar*, [1986] 1 S.C.R. 649, at p. 662, and *C.N.R. v. Muller*, [1934] 1 D.L.R. 768 (S.C.C.). To adopt a correctness standard would change the law and undermine the traditional function of the jury. Therefore, requiring a standard of "palpable and overriding error" for findings of negligence made by either a trial judge or a jury reinforces the proper relationship between the appellate and trial court levels and accords with the established standard of review applicable to a finding of negligence by a jury.

Where, however, the erroneous finding of negligence of the trial judge rests on an incorrect statement of the legal standard, this can amount to an error of law. This distinction was pointed out by Cory J. in *Galaske v. O'Donnell*, [1994] 1 S.C.R. 670, at pp. 690-91:

The definition of the standard of care is a mixed question of law and fact. It will usually be for the trial judge to determine, in light of the circumstances of the case, what would constitute reasonable conduct on the part of the legendary reasonable man placed in the same circumstances. In some situations a simple reminder may suffice while in others, for example when a very young child is the passenger, the driver may have to put the seat belt on the child himself. In this case, however, the driver took no steps whatsoever to ensure that the child passenger wore a seat belt. It follows that the trial judge's decision on the issue amounted to a finding that there was no duty at all resting upon the driver. This was an error of law.

[At paras. 28-31.]

[34] The Court also noted that the same reasoning was applicable to inferences of fact and law and that the "numerous policy reasons" supporting a deferential approach to a trial judge's inferences of fact, also support "to a certain extent ... showing deference to the trial judge's inferences of mixed fact and law." On the other hand, where an erroneous finding of a trial judge can be traced to an error in his or her "characterization of the legal standard", less deference is required, "consistent with a 'correctness' standard of review." In summary, Iacobucci and Major JJ. stated:

To summarize, a finding of negligence by a trial judge involves applying a legal standard to a set of facts, and thus is a question of mixed fact and law. Matters of mixed fact and law lie along a spectrum. Where, for instance, an error with respect to a finding of negligence can be attributed to the application of an incorrect standard, a failure to consider a required element of a legal test, or similar error in principle, such an error can be characterized as an error of law, subject to a standard of correctness. Appellate courts must be cautious, however, in finding that a trial judge erred in law in his or her determination of negligence, as it is often difficult to extricate the legal questions from the factual. It is for this reason that these matters are referred to as questions of "mixed law and fact". Where the legal principle is not readily extricable, then the matter is one of "mixed law and fact" and is subject to a more stringent standard. The general rule, as stated in *Jaegli Enterprises*, supra, is that, where the issue on appeal involves the trial judge's interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error. [At para. 36.]

[35] In *H.L. v. Canada (Attorney General)* [2005] 1 S.C.R. 401, 2005 SCC 25, the Court elaborated further on the meaning of "palpable and overriding error", which standard, the majority said, was not intended to "displace alternative formulations of the governing standard." In the words of Fish J.:

In *Housen*, for example, the majority (at para. 22) and the minority (at para. 103) agreed that inferences of fact at trial may be set aside on appeal if they are "clearly wrong". Both expressions encapsulate the same principle: an appellate court will not interfere with the trial judge's findings of fact unless it can plainly identify the imputed error, and that error is shown to have affected the result.

In my respectful view, the test is met as well where the trial judge's findings of fact can properly be characterized as "unreasonable" or "unsupported by the evidence". [At paras. 55-56.]

At paragraph 69, Fish J. added that "palpable" is defined in the *New Oxford Dictionary of English* (1998) as "clear to the mind or plain to see"; and at paragraph 70, as containing a flaw or mistake that one can "put one's finger on". At the same time, he agreed with Bastarache J. that there is no meaningful difference between "concluding that it was 'unreasonable' or 'palpably wrong' for a trial judge to draw an inference from the facts as found by him or her and concluding that the inference was not reasonably supported by those facts." (At para. 71, quoting *Housen*, at para. 104.) Finally, Fish J. noted, those portions of the majority's reasons in *Housen* dealing with errors of fact "should not be taken to have decided that inferences of fact drawn by a trial judge are

impervious to review though unsupported by the evidence", nor to have restricted appellate scrutiny of the judge's inferences to an "examination of the primary findings upon which they are founded and the process of reasoning by which they were reached." (At para. 73.)

- [36] Counsel for the appellants in the case at bar accepts the high degree of deference mandated to factual findings by the Supreme Court of Canada, and that a finding of negligence is a "heavily fact-dependent question". However, as I understand Ms. Bowers's submission, it is that the trial judge erred in law in applying a standard of perfection to Constable Badyal's conduct and, in the alternative, that he erred in finding negligence in the absence of persuasive evidence - here, expert evidence - that her conduct fell below that of the reasonable peace officer. In addition, the appellants say the trial judge's findings that the constable breached the provincial regulations in the five respects set out at his paragraph 37 were unreasonable or "clearly wrong".
- [37] On the question of the applicable standard of care, the appellants rely on a decision of this court, *Roy v. British Columbia (Attorney General)* (2005) 38 B.C.L.R. (4th) 103, 2005 BCCA 88 (Ive. to app. refused (2005) 346 N.R. 199 (n.)). It did not involve a police "chase", but did involve the death of a man while in police custody. The man had been picked up off the streets of White Rock in an apparently drunken condition. He was placed in the 'drunk tank' and when he was checked, he was found to be snoring. Six minutes later, on checking again, the guard discovered that the prisoner was not breathing. An ambulance was called immediately. Mr. Roy was pronounced dead in hospital from ingesting a large quantity of alcohol. The family of the deceased claimed that the police had disobeyed the R.C.M.P. policy, which stated that if a prisoner was of questionable consciousness, police should call for medical attention. The defendants had not done so because Mr. Roy had not appeared to them to be in need of such attention. The trial judge found that the police guards had not lived up to the applicable standard of care in failing to "perform any adequate assessment or investigation into Mr. Roy's state of consciousness or its cause."
- [38] On appeal, however, the claim against the police was dismissed. The Court, per Southin J.A. with Hall J.A. concurring, held that the trial judge had erred in analyzing the R.C.M.P. policy as if it were a statute, when the question was "whether these peace officers, acting reasonably according to the standards of their profession, ought to have recognized that Mr. Roy's condition was one of 'questionable consciousness' rather than that of the usual passed out drunk." (At para. 37.) Southin J.A. offered the following four propositions as established law:
1. A peace officer owes a duty to his prisoner to take reasonable care for the prisoner's safety but he is not an insurer.
 2. "[A]n error of judgment may, or may not, be negligent; it depends on the nature of the error. If it is one that would not have been made by a reasonably competent professional man professing to have the standard and type of skill that the defendant held himself out as having, and acting with ordinary care, then it is negligent. If, on the other hand, it is an

error that a man, acting with ordinary care, might have made, then it is not negligence." [Whitehouse v. Jordan, [1981] 1 All E.R. 267 (C.A.) at 281, adopted by Craig J.A. in Smith v. British Columbia (Attorney General) (1988), 30 B.C.L.R. (2d) 356 (B.C.C.A.) at 363.]

3. The policy of a police force is an important factor in determining the standard of care a peace officer must observe, but it is not determinative, nor is it to be treated as if it were a statute imposing civil obligations.
 4. Where, as here, at issue is the standard of a competent member of a trade or profession (and the occupation of peace officer falls within that rubric), evidence of those carrying on that occupation is necessary unless, in the words which McPherson C.J.M., in Anderson v. Chasney, [1949] 2 W.W.R. 337 (Man. C.A.) at 341, adopted from the American case of Mehigan v. Sheehan, 51 Atlantic Rep. 2nd series, 632, the matter is one of "non-technical matters or those of which an ordinary person may be expected to have knowledge." [At para. 36.]
- [39] Southin J.A. observed that in the absence of evidence that Canadian police officers generally know or are trained to know the difference between a person who is merely "passed out" and one who is on the verge of central nervous system failure, it could not be said that the police had acted unreasonably. Again in her words:

But in the absence of evidence that those are the standards of peace officers in Canada it was not, in my opinion, for the learned judge to impose her standard. In coming to this conclusion, I think it right that we remind ourselves of what the principal duty of a peace officer is. It is to keep the Queen's peace, an obligation which includes the prevention of crime and the detection of criminals. Peace officers are not emergency services personnel and cannot be held, unless and until they receive similar training, to a standard which would be appropriate for such persons.

Much can be learned from hindsight. Hindsight, in and of itself, cannot be a foundation for liability in circumstances such as these. [At paras. 41-42.]

- [40] Counsel for the appellants argued by analogy that in the instant case, there was at the end of the day "no evidence" from either of the experts that Constable Badyal had failed to meet the standard of a reasonable police officer. It is fair to say that in making this assertion, counsel for the appellants was discounting Mr. D'Aoust's written opinion, quoted earlier in these reasons at para. 13, to the effect that Constable Badyal's decision to commence the pursuit was "questionable" and that the pursuit guidelines suggested that Constable Badyal "should not have commenced the pursuit at all in this area, based on what she then knew about the suspect vehicle." But the appellants are correct in their assertion that that evidence must be read in light of Mr. D'Aoust's acknowledgement at trial that he would not have "responded differently", and indeed probably would have commenced the pursuit a little earlier, than Constable Badyal had. At the least, it appears that Mr. D'Aoust's critical opinion regarding the commencement of the pursuit was not supported by his testimony at trial. More importantly, he did not opine on, and was not asked specifically about, Constable Badyal's pursuit of the R.T.B. car down 135th Street prior to deciding it was unsafe to continue.

- [41] The trial judge nevertheless found that the chase "should never have begun", that there was "no justification" for beginning a "high-speed chase of a suspected impaired driver through a residential area. ..." (At para. 26.) With respect, I believe the learned trial judge here erred in law in two respects. First, he grounded liability on the commencement of the chase, which did not become a "high-speed chase" until after the cars emerged from the alleyways and turned onto 135th Street. The constable's commencement of the chase and proceeding at speeds of up to 35 km/h down the alleys, checking at each intersection for traffic and pedestrians, did not result in injury to anyone. Yet the trial judge found that liability on the part of the constable followed from the commencement of the chase alone. If this was correct, Constable Badyal would be liable for anything that occurred in the course of the pursuit, even though she might have discontinued her pursuit at the stop sign at 70B Avenue and 135th Street. The fact is that police pursuits are permitted by law in appropriate circumstances, notwithstanding the trial judge's opinion that "... stolen vehicles should not be pursued in high-speed chases through residential neighbourhoods." (Para. 23.) The question before the Court, with respect, was whether the plaintiffs' injuries were caused by a breach of the applicable standard of care by Constable Badyal - not whether the constable should or should not have started the chase at all, or whether the police should under any circumstances undertake chases of stolen cars.
- [42] Second, I believe the trial judge erred in imposing a standard of perfection on the constable in giving pursuit to the R.T.B. vehicle and in deciding when to discontinue the pursuit. If the "chase" down the alleys "should never have begun", no pursuit would ever be justified: this one was at the very low end of risk. Police officers would be obliged to sit idly by while traffic infractions are committed in front of them, even where there is some indication that the driver may be impaired; speeds are relatively low; and even where no traffic or pedestrians are present in the vicinity. This would impose a standard that does not balance public safety on the highways with the other public duties of police officers - to enforce the law and minimize the number of drunk drivers on public highways. Presumably, this "balancing" is what led Mr. D'Aoust to acknowledge that had he been in the same situation as Constable Badyal, he would also have given chase.
- [43] The trial judge also seemed to draw from Corporal Holmes's evidence that he could think of nothing more dangerous than a "high-speed chase on [sic] an impaired driver". Again, however, once the chase became "high-speed", Constable Badyal terminated. She recognized that the danger to the public was "far too great" - even though it might be said that allowing an impaired driver to continue driving along the roads unimpeded might be as great as trying to stop him or her. Neither expert opined that the constable stopped pursuing at a point that was outside the reasonable range.
- [44] I do not mean to suggest that it was not open to the trial judge to make a finding of breach of the applicable standard of care without an expert's opinion to that effect; but the lack of expert evidence to this effect should perhaps have signalled to the trial judge that here more caution was required in making his findings. Although at para. 34 of his reasons he seemed

to accept Constable Badyal's evidence that R.T.B.'s car was a block to a block and a half ahead of her when she stopped, he also found that the R.T.B. car "must have been a second or two from the intersection when Constable Badyal abandoned the pursuit." (See also para. 35.) Obviously, the R.T.B. vehicle accelerated along 135th Street - that is why Constable Badyal decided to stop the chase. Between making that decision (at 'D' on the map) and pulling over into the spot marked 'X' on the map, she covered about a block in distance.

[45] The trial judge's conclusion that this was "far too little and far too late" seems to be based on the conclusion that the constable had breached the provincial regulations regarding high-speed pursuits. However, most of these findings (which are mainly factual) seem to me to be clearly and palpably wrong, and to have implicit in them a standard of perfection. There is no evidence, for example, that Constable Badyal "knew or ought to have known" that the R.T.B. vehicle would not stop in response to the pursuit. It had already slowed down twice during the pursuit and was legally required to pull over. To impute to the constable the "knowledge" R.T.B. would not do so is both unrealistic and unfair. The same is true of the finding that she knew the pursuit would be "longer rather than shorter". As far as her "expectation" of a high volume of vehicular and pedestrian traffic, Constable Badyal checked as she went along for such traffic and saw none in the alleys or on 135th Street. She could not be expected to see what lay in front of the R.T.B. vehicle, and in any event, once the pursuit speeded up on 135th Street, she discontinued the chase. Corporal Holmes stated that it was reasonable to pull over before deactivating her siren, and there was no evidence to the contrary. The fact that it was "too late to prevent a collision" does not lead necessarily to a finding of failure to take reasonable care. As Southin J.A. stated for the majority in Roy, supra, "Hindsight, in and of itself, cannot be a foundation for liability in circumstances such as these."

[46] As Southin J.A. also observed in Roy, the policy of a police force is not determinative of civil liability and is not to be treated as if it were a statute imposing civil obligations. (See also Canada v. Saskatchewan Wheat Pool [1983] 1 S.C.R. 205.) In addition to being under a duty to take all reasonable care for public safety, police are also under a duty to enforce the law and detain lawbreakers. Thus the Emergency Vehicle Driving Regulations and the R.C.M.P. guidelines do not establish any absolute rules beyond those at s. 3(1), quoted above, but confirm the various factors that a peace officer must consider in commencing a chase and continue to assess as the chase progresses. The trial judge in this case, however, obviously disapproved of police chases in almost any circumstances, even at slow speeds down alleyways where no traffic was present and where the car being pursued was being driven by a driver who, as it turned out, was impaired, unlicensed and in a stolen car.

[47] I would allow the appeal and dismiss the claim against the appellants.

"The Honourable Madam Justice Newbury"

SCHEDULE

Reasons for Judgment of the Honourable Mr. Justice Lowry:

- [48] R.B. was the driver of a stolen vehicle that sped through a stop sign and collided with an automobile carrying members of a family travelling home from a summer picnic. The collision took the life of one child; others were seriously injured. R.B., who was 15 years of age, was impaired by methadone, and for one minute immediately before the collision, he was being pursued by Constable Sharan Badyal of the R.C.M.P. R.B. was subsequently convicted of criminal negligence causing death.
- [49] Two actions in negligence were brought against R.B., the police officer and the Attorney General of British Columbia; the first on behalf of an injured child and his mother, and the second by two adult passengers in the vehicle. The actions were tried together before Mr. Justice Maczko who found that the officer and R.B. had breached the standard of care owed to the children and in so doing had caused the collision. He held R.B. to be 85% at fault and the officer 15% at fault: 50 B.C.L.R. (4th) 115, 2005 BCSC 1506. The Attorney General is liable on behalf of the Government for the conduct of the officer, but the action against her personally was dismissed because a police officer cannot be held liable for other than gross negligence, which the judge found could not be attributed to Constable Badyal.
- [50] The Attorney General appeals. He raises two grounds upon which it is contended the judge erred. He first says that it was not open to the judge to find the officer was negligent in having breached the standard of care in the absence of any evidence that she failed to meet the standard required of a competent police officer. He then says the judge erred in concluding that the officer's conduct in pursuing R.B. caused the collision in the absence of any evidence with respect to causation. Both grounds are then predicated on there being an absence of evidence to prove two of the requisite elements of the tort of negligence.
- [51] After briefly outlining the pursuit that preceded the collision and the judge's conclusions, I consider what is said to be the complete absence of evidence regarding the standard of care and the cause of the collision.

The Pursuit and the Judge's Conclusions

- [52] What the judge described as a "high-speed chase" began after the officer had followed and stopped R.B., whom she had observed commit two minor traffic violations in full view of her marked police car and who she rightfully suspected was impaired. He had turned quickly, without stopping, out of a lane onto a thoroughfare and then he had failed to stop at a stop sign. The officer also observed him veer to the left and then recover while she was following him. She did not know the car R.B. was driving had been stolen but, using her onboard computer, she did determine the vehicle had been the subject of a recent police inquiry. R.B. stopped only briefly and then, while the officer was sitting in her car, he sped away, turning into a narrow lane and then into another that ran through a commercial, and then a residential, area. The officer followed. Her speed in the lane was just over 30 km/h, which she understood to be the speed limit. (The limit was actually 20 km/h.) R.B.'s speed was

greater. The officer activated her emergency equipment. She lost sight of R.B.'s vehicle but regained visual contact when she reached the end of the lane and turned onto a street. R.B. was then a short distance away approaching an intersection. He slowed; the driver's door opened giving the appearance that the two occupants were going to "bail". As the officer approached, R.B. turned at the intersection and accelerated away. The officer followed and the speed of the two vehicles increased over a distance of 260 metres. When the police car reached 85 km/h with the vehicles a block and a half apart, the officer discontinued the pursuit because she considered it had become too dangerous, but within a second or two, before she had turned off her emergency equipment, the collision occurred.

- [53] The judge recognized the dilemma to which the circumstances of this case give rise:
- [12] The difficult dilemma in these cases is to decide whether to allocate some responsibility for the accident to a police officer who was doing her job, which is to protect the public by apprehending suspected criminals, and by doing so inhibit the apprehension of suspected criminals, or to protect innocent citizens who may be injured or killed, as happened here, by putting some limits on high-speed chases. The police feel they are "damned if they do and damned if they don't". The injured citizens feel that it would be better to let suspected criminals escape or that some other means be used to apprehend them than to put innocent lives at risk.
- [54] He then considered the governing legislation that authorizes police pursuits where emergency equipment is activated and the pursuing officer has reason to believe that the driver of the vehicle being pursued has committed, is committing, or is about to commit a criminal offence, the seriousness of which and the need for immediate apprehension outweigh the risk to the safety of the public (Emergency Vehicle Driving Regulation, B.C. Reg. 133/98). The judge characterized the regulations as requiring a police officer in pursuit to strike a balance between the two competing interests. He pointed out that the legislation is not determinative of liability and stated the standard of care required of a police officer engaged in a pursuit to be as stated by Kirkpatrick J. (as she then was) in *Doern v. Phillips Estate* (1994), 2 B.C.L.R. (3d) 349 at para. 68 (S.C.), *aff'd* (1997), 43 B.C.L.R. (3d) 53 (C.A.):

Based on the authorities provided, there is little doubt that the standard of care to which a police officer will be held is that of a reasonable police officer, acting reasonably and within the statutory powers imposed upon him or her, according to the circumstances of the case.

- [55] The judge expressed his conclusion with respect to the pursuit of R.B., before and after discussing the evidence, as follows:
- [20] No case or example can be determinative because each case is dependent on its own facts. In this case, I have concluded that Constable Badyal was negligent in commencing a high-speed chase of a suspected impaired driver through a residential neighbourhood when she knew there would likely be heavy vehicular and pedestrian traffic.

* * *

[26] In my view, this chase should never have begun. The officer had no specific information that any serious offence had been committed. She had good reason to believe that the driver of the vehicle might be impaired. In my view, there is no justification for commencing a high-speed chase of a suspected impaired driver through a residential area where it is expected that there would be a high volume of pedestrian and vehicular traffic. The danger to the citizens is far too great.

The Standard of Care

- [56] The Attorney General contends that no evidence was adduced upon which the judge could determine the standard of care. It was not proven. In particular, he says there was no evidence that a reasonably competent police officer would have conducted herself differently than did Constable Badyal. Expert evidence was required. He relies on the recent decision of this Court in *Roy v. British Columbia (Attorney General)*, 38 B.C.L.R. (4th) 103, 2005 BCCA 88 at para. 36, leave refused [2005] S.C.C.A. No. 188, where, writing for the majority of four, Southin J.A. said:
4. Where, as here, at issue is the standard of a competent member of a trade or profession (and the occupation of peace officer falls within that rubric), evidence of those carrying on that occupation is necessary unless, in the words which McPherson C.J.M., in *Anderson v. Chasney*, [1949] 2 W.W.R. 337 (Man. C.A.) at 341, adopted from the American case of *Mehigan v. Sheehan*, 51 A.2d 632 (U.S. N.H. S.C. 1947), the matter is one of "non-technical matters or those of which an ordinary person may be expected to have knowledge."
- [57] It is first important to recognize that in a negligence action it is not usually necessary to adduce evidence, much less expert evidence, to prove the standard of care. It is generally a matter to be determined by the trier of fact based on common experience having due regard for what may be taken from any applicable legislation or policies governing the activity in question; in some instances, evidence of custom associated with any particular conduct may also be germane. It is only where the subject matter of the inquiry is beyond the common understanding of judge and jury that expert evidence may be adduced to assist the court in determining the appropriate standard of care.
- [58] In *DesBrisay v. Canadian Government Merchant Marine Ltd.*, [1941] S.C.R. 230, Davis J. (Crocket J. concurring) characterized the applicable standard of care as a question of fact. He cited the following passage from *Caswell v. Powell*, [1940] A.C. 152 at 176:

The degree of want of care which constitutes negligence must vary with the circumstances. What that degree is, is a question for the jury or the Court in lieu of a jury. It is not a matter of uniform standard. It may vary according to the circumstances from man to man, from place to place, from time to time.

[59] According to G.H.L. Fridman in *The Law of Torts in Canada*, 2d ed. (Toronto: Carswell, 2002) at 385, the applicable standard of care should be seen as a question of mixed law and fact: the "standard is to be determined by the trial judge having regard to what kind of action was reasonable in all the circumstances". Similarly, in *Tort Law*, 3d ed. (Toronto: Carswell, 2003), Professor Klar states at 297:

Whether a defendant's conduct can be termed negligent is a question of fact left to the best judgment of judge or jury. As with all elements of the negligence action, however, there are of course important considerations of law that are brought into play. How one defines the standard, and what factors must be considered by the fact finder in applying it to the facts of each case are questions of law. Thus this issue, as with most issues, can perhaps better be described as a question of "mixed law and fact". Ultimately, however, it is the fact finder who is called upon to apply the rules and decide whether the standard of care has been met.

[60] Professor Fridman elaborates on the scope of liability as follows (387-88):

What is reasonable depends on the facts of each case, including the likelihood of harm or foreseeable harm, the gravity of the harm, and the burden or costs that will be incurred to prevent the injury. Whether a defendant is negligent will depend on whether he used common and ordinary caution in the given circumstances...

The care to be taken is that of a "reasonable and prudent man." Such a person is not an extraordinary or unusual creature; he is not required to display the highest skill of which anyone is capable. He is a person of normal intelligence who makes prudence a guide to his conduct. He acts in accord with general and approved practice. His conduct is guided by circumstances which ordinarily regulate the conduct of business affairs. His conduct is the standard "adopted in the community by persons of ordinary intelligence and prudence."

[61] In assessing whether a defendant's conduct created an unreasonable risk of harm (thereby constituting a breach of the standard of care), the court balances the danger created by the defendant's conduct against the utility of that conduct. If the hazard outweighs the social value of the conduct, the court imposes liability. The relevant factors in this value judgment are the likelihood that harm will culminate, the gravity of the potential harm of an accident, the purpose of the conduct, and the cost to the defendant to eliminate the hazard (Allen M. Linden, *Canadian Tort Law*, 7th ed. (Markham: Butterworths, 2001) at 120).

[62] Professor Linden (now Linden J.A.) emphasizes (at 121) that the assessment of risk is:

a very human process. This is necessarily so when each case must be decided by the judge or jury according to its unique circumstances. Rarely can all of the variable facts surrounding an accident be duplicated. Consequently, stare decisis is of little avail here. Legal rules are absent. One jury does not bind another, nor does one judge bind the next. The tribunal must make a fresh decision in each case. Values are involved in this determination. What must be judged is whether the conduct of this particular defendant in this singular situation was acceptable or unacceptable to the community. The responsibility rests on the instant judge or jury and

authoritative guidance is virtually non-existent. There is almost no law of negligence - there is merely an approach that each tribunal will utilize.

[63] Thus, it is for the trier of fact in each instance to assess the conduct and the consequences in question in the context of the risk of harm measured against the utility of the activity to determine the standard of care and whether it has been met. In cases like this, it is generally more a matter of process based on the evidence of the conduct involved than it is one of evidence as to what constitutes the applicable standard.

i) Legislation

[64] As the judge recognized, legislation governing the activity in question may be some evidence of a breach of the standard of care but it is not determinative. In *Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205, which concerned a breach of a provision of the Canada Grain Act, S.C. 1970-71-72, c. 7, the court established that proof of statutory breach, causative of damages, may be evidence of negligence and that the statutory formulation of a duty of care may provide a specific, useful standard of reasonable conduct. Accordingly, a court may take into account the fact of a statutory breach, but it is not controlled by this evidence. Professor Linden notes that although a defendant who has contravened a statute is not obliged to prove use of reasonable care, the statutory breach may ground liability if the defendant remains silent (Linden, *supra* at 212).

[65] In *Stewart v. Pettie*, [1995] 1 S.C.R. 131, the court noted applicable legislation prohibiting the serving of alcohol to persons who are apparently intoxicated. However, the court affirmed that the fact of violation of legislation alone does not ground liability. Similarly, in *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201, the court allowed an appeal from a decision of this Court, which had decided that because the railways had complied with applicable regulations, they could not be found negligent with respect to configuration of tracks. However, the Supreme Court of Canada emphasized as follows, at para. 29:

Legislative standards are relevant to the common law standard of care, but the two are not necessarily co-extensive. The fact that a statute prescribes or prohibits certain activities may constitute evidence of reasonable conduct in a given situation, but it does not extinguish the underlying obligation of reasonableness. See *R. in right of Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205. Thus, a statutory breach does not automatically give rise to civil liability; it is merely some evidence of negligence. See, e.g., *Stewart v. Pettie*, [1995] 1 S.C.R. 131, at para. 36, and *Saskatchewan Wheat Pool*, at p. 225. By the same token, mere compliance with a statute does not, in and of itself, preclude a finding of civil liability. See Linden, [Canadian Tort Law, 6th ed. (Toronto: Butterworths, 1997)] at p. 219. Statutory standards can, however, be highly relevant to the assessment of reasonable conduct in a particular case, and in fact may render reasonable an act or omission which would otherwise appear to be negligent. This allows courts to consider the legislative framework in which people and companies must operate, while at the same time recognizing that one cannot avoid the underlying obligation of reasonable care simply by discharging statutory duties.

and further, at paras. 39-40:

The weight to be accorded to statutory compliance in the overall assessment of reasonableness depends on the nature of the statute and the circumstances of the case. It should be determined whether the legislative standards are necessarily applicable to the facts of the case. Statutory compliance will have more relevance in "ordinary" cases - i.e., cases clearly within the intended scope of the statute - than in cases involving special or unusual circumstances. See [Paskivski v. Canadian Pacific Ltd., [1976] 1 S.C.R. 687], and Anderson, *supra*. It should also be determined whether the legislative standards are specific or general, and whether they allow for discretion in the manner of performance. It is a well-established principle that an action will lie against any party, public or private, "for doing that which the legislature has authorized, if it be done negligently". See *Geddis v. Proprietors of the Bann Reservoir* (1878), 3 App. Cas. 430 (H.L.), at pp. 455-56; see also [Kamloops (City of) v. Nielsen, [1984] 2 S.C.R. 2], at p. 11, and [Just v. British Columbia, [1989] 2 S.C.R. 1228], at p. 1245. It follows that a party acting under statutory authority must still take such precautions as are reasonable within the range of that authority to minimize the risks which may result from its actions. See [Tock v. St. John's Metropolitan Area Board, [1989] 2 S.C.R. 1181], (applying similar principles in the nuisance context).

Where a statute authorizes certain activities and strictly defines the manner of performance and the precautions to be taken, it is more likely to be found that compliance with the statute constitutes reasonable care and that no additional measures are required. By contrast, where a statute is general or permits discretion as to the manner of performance, or where unusual circumstances exist which are not clearly within the scope of the statute, mere compliance is unlikely to exhaust the standard of care.

[66] In *Galaske v. O'Donnell*, [1994] 1 S.C.R. 670, Cory J. described legislation as a "public indication" of unreasonable conduct or negligence and as "simply another factor" that the court can consider in determining whether there has been a breach of the standard of care.

[67] Here, it must be accepted that the legislation necessarily required the officer to exercise a measure of discretion in determining whether and to what extent R.B. was to be pursued. Broadly, it was, as the judge recognized, for the officer to balance the need to apprehend R.B. against the danger to the public in commencing and continuing the pursuit. That required her to consider several factors that the regulations specified be taken into account such as the nature and circumstances of the offences she had observed R.B. commit (the necessity of pursuit being stipulated to be low if not indictable offences), the risk of harm posed by the manner, speed, or length of time of the pursuit, and the prevailing condition and the use of the roadway by pedestrians and vehicular traffic. The legislation might then be said to be less definitive of the standard of care than it might have been if cast in terms allowing no discretion.

ii) Expert Evidence

[68] The starting point of a consideration of the place for expert evidence to establish the standard of care would appear to be the discussion found in *R. v. Mohan*, [1994] 2 S.C.R. 9. There, in considering the requirements for the admission of such evidence, Sopinka J., writing for the court, said, at 23-24:

In *R. v. Abbey*, [[1982] 2 S.C.R. 24], Dickson J., as he then was, stated, at p. 42:

With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. "An expert's opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary" (*Turner* (1974), 60 Crim. App. R. 80, at p. 83, per Lawton L.J.)

This pre-condition is often expressed in terms as to whether the evidence would be helpful to the trier of fact. The word "helpful" is not quite appropriate and sets too low a standard. However, I would not judge necessity by too strict a standard. What is required is that the opinion be necessary in the sense that it provide information "which is likely to be outside the experience and knowledge of a judge or jury": as quoted by Dickson J. in *R. v. Abbey*, *supra*. As stated by Dickson J., the evidence must be necessary to enable the trier of fact to appreciate the matters in issue due to their technical nature. In *Kelliher (Village of) v. Smith*, [1931] S.C.R. 672, at p. 684, this Court, quoting from *Beven on Negligence* (4th ed. 1928), at p. 141, stated that in order for expert evidence to be admissible, "[t]he subject-matter of the inquiry must be such that ordinary people are unlikely to form a correct judgment about it, if unassisted by persons with special knowledge". More recently, in *R. v. Lavallee*, *supra*, the above passages from *Kelliher* and *Abbey* were applied to admit expert evidence as to the state of mind of a "battered" woman. The judgment stressed that this was an area that is not understood by the average person.

As in the case of relevance, discussed above, the need for the evidence is assessed in light of its potential to distort the fact-finding process. As stated by Lawton L.J. in *R. v. Turner*, [1975] Q.B. 834, at p. 841, and approved by Lord Wilberforce in *Director of Public Prosecutions v. Jordan*, [1977] A.C. 699, at p. 718:

"An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary. In such a case if it is given dressed up in scientific jargon it may make judgment more difficult. The fact that an expert witness has impressive scientific qualifications does not by that fact alone make his opinion on matters of human nature and behaviour within the limits of normality any more helpful than that of the jurors themselves; but there is a danger that they may think it does."

The possibility that evidence will overwhelm the jury and distract them from their task can often be offset by proper instructions.

[69] The necessity of expert evidence to assist the court in determining the standard of care where the conduct of a professional person is at issue was discussed by the Supreme Court of Canada in *ter Neuzen v. Korn*, [1995] 3 S.C.R. 674, which was a medical malpractice case. There it was confirmed that courts should not resolve scientific disputes that necessitate the expertise of the profession: "Where a common and accepted course of conduct is adopted based on the specialized and technical expertise of professionals, it is unsatisfactory for a finder of fact to conclude that such a standard was inherently negligent." (para. 44.) This statement particularly applies in allegations of negligence against medical practitioners. Writing for the majority, Sopinka J. said at para. 38:

It is generally accepted that when a doctor acts in accordance with a recognized and respectable practice of the profession, he or she will not be found to be negligent. This is because courts do not ordinarily have the expertise to tell professionals that they are not behaving appropriately in their field. In a sense, the medical profession as a whole is assumed to have adopted procedures which are in the best interests of patients and are not inherently negligent

[70] The court approved Professor Fleming's statement that conformity with general practice usually dispels a charge of negligence (para. 39).

[71] However, when a custom of a profession ignores the elementary dictates of caution, it is open to a court to find the professional negligent: *Roberge v. Bolduc*, [1991] 1 S.C.R. 374. Madam Justice L'Heureux-Dubé, for the court, stated at 437 that:

The fact that a professional has followed the practice of his or her peers may be strong evidence of reasonable and diligent conduct, but it is not determinative. If the practice is not in accordance with the general standards of liability then the professional who adheres to such a practice can be found liable.

[Emphasis of L'Heureux-Dubé J.]

In *ter Neuzen*, Sopinka J. articulated the following "general rule" at para. 51:

where a procedure involves difficult or uncertain questions of medical treatment or complex, scientific or highly technical matters that are beyond the ordinary experience and understanding of a judge or jury, it will not be open to find a standard medical practice negligent. On the other hand, as an exception to the general rule, if a standard practice fails to adopt obvious and reasonable precautions which are readily apparent to the ordinary finder of fact, then it is no excuse for a practitioner to claim that he or she was merely conforming to such a negligent common practice.

[72] Thus, where the conduct of a professional person is in question, expert evidence may be necessary to establish that the conduct conformed to the standard of care for the particular profession, at least where scientific or technical considerations arise that are beyond common understanding. Even then, however, it remains open to judge and jury to determine that the standard of the profession is inadequate where, for example, it is apparent, based on common experience, that obvious precautions are not taken.

[73] While expert evidence may be necessary in establishing the standard of care in some instances where professional conduct is said to have been negligent, it is not always necessary. In *Zink v. Adrian*, 37 B.C.L.R. (4th) 389, 2005 BCCA 93, Southin J.A. (concurring) suggested that "in cases of alleged negligence by a solicitor, judges can only rarely make such a finding in the absence of expert evidence as to the standard of a competent solicitor conducting the business in question" (para. 43). She added at para. 44:

The judge can only properly do so, in my opinion, if the matter is one of "non-technical matters or those of which an ordinary person may be expected to have knowledge." See *Anderson v. Chasney*, [1949] 2 W.W.R. 337 at 341 (Man. C.A.). There is an underlying reason - the expert witness can be cross-examined with a view to showing he knows not whereof he speaks.

[74] However, in *Roberge v. Huberman*, 62 B.C.L.R. (3d) 385, 1999 BCCA 196 at paras. 54, 56, Esson J.A. made the following comments on the necessity of expert evidence on the standard of care in an action for solicitor's negligence:

The trial judge referred to no authority in support of the proposition that, without expert evidence as to the "appropriate documentation", there was no evidence of breach of the standard of care. In this court, the defendants made no effort to support that conclusion. In my respectful view, it cannot be supported.

* * *

There may be cases in which the issue as to standard of duty turns so much on the question of "appropriate documentation" that only lawyers practising in the particular field can throw light on the question. Evidence of that kind is undoubtedly useful in some cases, most commonly where the issues involve abstruse questions of conveyancing practice. The issues in this case are sufficiently removed from such areas that it may be doubtful that expert evidence would be helpful to the court. The test for determining whether expert evidence is necessary was stated thus in *R. v. Abbey*, [1982] 2 S.C.R. 24 (S.C.C.) by Dickson J. (as he then was), speaking for the court, at 42: [as quoted in *R. v. Mohan* above].

[75] In *317159 B.C. Ltd. v. C.A. Boom Engineering (1985) Ltd.*, [1990] B.C.J. No. 2699 (Q.L.) (C.A.), this Court concluded that the trial judge had erred in holding that expert evidence from a professional engineer was necessary to establish a breach of the standard of care. The trial judge had remarked that it would be wrong for him to take judicial notice of the applicable standard. *Anderson v. Chasney*, [1949] 4 D.L.R. 7 (Man. C.A.), was cited approving the American decision of *Mehigan v. Sheehan*, 51 Atl. Rep. (2d) 632, 94 N.H. 274 (1947) to the

effect that "[e]xpert testimony is not necessary for proof of negligence in non-technical matters or matters of which an ordinary person may be expected to have knowledge".

[76] Further, in *Roberge v. Huberman*, Esson J.A. clarified at para. 58 that:

What the court was called on to do by the case presented for the plaintiff was to consider and assess, with the assistance of counsel's submissions, any evidence adduced by the plaintiff which was potentially relevant to the question whether there had been a breach of duty. That process involves the court applying its experience and knowledge in the way that judges and juries do every day, most often without expert evidence.

[77] In *Roy*, upon which the Attorney General relies, it was said, as quoted above, that where the standard of a competent member of a profession is at issue, evidence of those who are a part of the profession is necessary unless the matter in question is not technical or is within the knowledge of an ordinary person. The case was concerned with the conduct of police officers. The issue was whether they had met the requisite standard of care in placing a heavily intoxicated man in a "drunk tank" where he died, rather than taking him to a hospital for treatment. What was determinative was whether, by virtue of their training and experience, police officers can be expected to recognize the symptoms of the failing of the central nervous system caused by the consumption of alcohol. There was no evidence upon which it could be established that police officers could be expected to recognize such symptoms. What is important for present purposes is that the question related to matters beyond common experience. Evidence, which need not necessarily have been expert evidence, was required to prove that the training which police officers receive elevates the standard of care they owe to those in their custody to the point of the officers being able to recognize a serious medical condition such as confronted the two officers who put the intoxicated man in a cell. The case does not stand for the proposition for which it is cited here by the Attorney General. Evidence, whether expert evidence or otherwise, is not invariably necessary to establish the standard of care where the conduct of a professional person is alleged to have been negligent.

[78] In *Doern*, which was concerned with the conduct of police officers engaged in a pursuit that ended in a collision killing the driver of the vehicle being pursued and injuring the driver of the automobile he struck, this Court upheld the admission of the expert evidence that served to assist the court on the question of compliance with an internal policy the police had regarding the circumstances under which a pursuit had to be terminated. The policy was said to contain subjective language the interpretation and application of which would be unfamiliar to a judge. On that basis, the evidence was said to be admissible because it served to assist the judge. The Court was of the view that the judge may have been able to properly interpret and understand the application of the policy, but the expert evidence was necessary because it enhanced the probability of her doing so. I do not consider that what was said in that case is to be seen as a departure from the principles established for the admissibility of expert evidence in *Mohan*. It does not, in any event, lend support to the Attorney General's contention that evidence of the standard of care is essential to prove

negligence on the part of a police officer engaged in a pursuit.

- [79] Expert evidence would only be necessary (and therefore admissible) to establish the standard of care in a negligence case of this kind if the conduct in question gave rise to considerations beyond common understanding. Evidence that need not invariably be expert evidence might be adduced to prove the training police officers are given, or to explain police practice, or where needed to interpret and explain the application of requirements contained in legislation or policy with which the trier of fact is unlikely to be familiar. These are just examples of the kind of evidence that where needed might go toward assisting the court in establishing the standard of care. But unless the nature of the inquiry into the conduct of a police officer is actually beyond the common understanding or experience of judge or jury, evidence of the standard of care, particularly expert opinion, is not required and should not be admitted. It is not otherwise necessary to adduce evidence that a police officer failed to meet the standard of care of a competent police officer.
- [80] The expert opinion of a retired member of the R.C.M.P. was adduced to support the case against Constable Badyal. It was met with an opinion from a similarly qualified witness adduced in her support. The Attorney General says the first opinion did not establish the standard of care which the officer failed to meet, but I do not consider it was necessary that it do so in any event. The witness considered a statement of facts that differed somewhat from those found by the judge. In particular, he assumed that the speed the officer was travelling through the lanes was "well in excess of 30 km/h". He questioned whether the officer should have commenced the pursuit (although he said he could not say he would not have done so) and expressed the opinion that she should not have driven more than 20 km/h in the lanes and should have terminated the pursuit immediately when she lost sight of R.B.'s vehicle. It would have been better if counsel had instructed the witness not to say what he would have done or what the officer should have done but to confine his opinion to what police training or practice dictated in the circumstances with any explanation he was able to give. It was for the judge to determine what Constable Badyal should or should not have done.
- [81] Evidence of the standard of care was not required in this case because the nature of the inquiry into the police officer's conduct in pursuing R.B. was not beyond common understanding. In the final analysis, the question the judge had to address was simply whether in the circumstances the officer should have pursued R.B. when she believed him to be impaired. Put another way, was the risk of the possible consequences of the pursuit, which became tragically manifest within a minute of it having been commenced, a risk that the officer was justified in taking in order to pursue and attempt to apprehend the young impaired driver? No evidence, expert or otherwise, was needed to assist the judge in giving the answer. Because of the great importance society places on keeping impaired drivers off the road, it may not have been an easy question, but the answer did not lie beyond common knowledge and experience. It was the kind of question judges regularly have to answer in negligence cases when they weigh the utility of the activity against the risk of harm in

determining whether the requisite standard of care has been met. The judge decided the question was to be answered in the negative. It was his decision to make.

[82] I do not understand why the judge said the officer commenced a "high-speed" pursuit. She commenced a pursuit, but the speed of the police car could not, in my view, be described to have been "high" until the last 260 metres, shortly before the pursuit was discontinued. But there is no suggestion that the judge misunderstood the circumstances of the pursuit and it was then open to him to conclude, as he did, that, for the reasons he gave, the pursuit should not have been commenced. Pursuing R.B. when he was believed to be, and was in fact, impaired was, in the particular circumstances of the case, too dangerous. The Attorney General says that the judge effectively imposed a standard of care that is too high. While I accept there may be room for argument in that regard, I consider an attempt to address whether that is so, and whether if it is it would constitute an error - be it one of fact or law or mixed fact and law - permitting the intervention of this Court, would be to carry the disposition of this appeal well beyond the grounds the Attorney General has advanced and on which the appeal has been argued. Those are the grounds the respondents were required to address. I confine myself to the conclusion that the judge did not err in finding a measure of negligence on the part of the police officer because there was an absence of evidence of the standard of care.

[83] I would not accede to the first ground of appeal.

Causation

[84] The Attorney General says the evidence does not establish that Constable Badyal's conduct in pursuing R.B. actually caused the accident. The judge made no specific reasoned finding in this regard but it is encompassed in his holding the officer at fault to the extent of 15%.

[85] The contention is that it was R.B. who caused the collision. It was he who refused to stop, as required, when being followed by a police car with emergency lights flashing and siren sounding, and it was he who sped past the stop sign into the intersection where the collision occurred. The Attorney General says there is no evidence the pursuit actually caused the collision.

[86] I am unable to see what further evidence was required. The Supreme Court of Canada recently affirmed, in *Resurfice Corp. v. Hanke*, 2007 SCC 7 at paras. 20-28, what is referred to as the "but for" test in negligence cases. Where, as here, it can be applied, the test leads to a finding of causation if it can be said that but for the impugned conduct the injury that is the subject of the claim would not have been suffered. I do not see how it could be said that this collision would have occurred if no pursuit had been commenced. There is no basis to suggest that R.B. would have sped through the stop sign at the intersection if the police officer had not been pursuing him. He drove as he did to escape. His object was obviously to distance himself from the police car sufficiently to permit him and the other occupant to abandon the stolen car and get away. That is no doubt why they appeared to be going to bail

out but changed their minds as the police car approached, accelerating over the last 260 metres of the pursuit to the collision.

[87] I would also not accede to the second ground of the appeal.

Disposition

[88] It follows that I would dismiss the appeal.

"The Honourable Mr. Justice Lowry"

Reasons for Judgment of the Honourable Mr. Justice Chiasson:

[89] I have had the privilege of reading in draft the reasons for judgment of Madam Justice Newbury and Mr. Justice Lowry. I agree with the conclusion of Lowry J.A. and generally with his comments, but approach the issue somewhat differently.

[90] Lowry J.A. has commented on the expert evidence that was adduced in this case. I share his view that expert evidence in such cases generally is not required, but, in my view, it was capable of assisting the trial judge and was admissible as necessary in this case. This is consonant with the observations of Finch J.A., as he then was, in *Doern v. Phillips Estate* (1997), 43 B.C.L.R. (3d) 53 (C.A.).

[91] An issue on appeal in *Doern* was whether the trial judge erred by admitting opinion evidence concerning the standard of care that applied to police officers in a chase. It was asserted that it was not necessary, which made it irrelevant and inadmissible. The court held that the evidence was admissible. His Lordship stated:

Given the subjective language used in the policy [governing police pursuit driving], and the unfamiliarity of a lay person such as a judge as to how that language should be interpreted and applied by officers in the field, I am in no doubt that the learned trial judge was fully justified in looking to the opinions of Mr. Crich, and others, for assistance in understanding the practical application of the policy. It may be that the judge could have come to a correct interpretation and application of the policy, without such assistance, but the views of those experienced in the field were bound to make her task easier, and the likelihood of a correct interpretation and application more probable. In that sense, it could properly be said that the opinion evidence was necessary to the judge's conclusions. [At para. 9.]

[92] Evidence concerning practice and policy can inform the court's decision on the standard of care. That is not to say that evidence of practice and policy is essential. The judge can decide the standard of care without it, but may be assisted by an expert if he or she were to take into account practice and policy. In the limited way described by Finch J.A., the evidence in this case is necessary and meets the test of admissibility.

[93] The difficulty I have in this case is the nature of the so-called opinion evidence and the use the judge made of it.

[94] It is clear from the authorities referred to by Lowry J.A. that expert evidence is admissible to assist the trier of fact when considering issues of a technical nature or matters on which "ordinary people are unlikely to form a correct judgment . . . if unassisted by persons with special knowledge". Of particular application in this case is the passage quoted by Sopinka J. in *R. v. Mohan*, [1994] 2 S.C.R. 9 at 24 [quoting from *R. v. Turner*, [1975] Q.B. 834 at 841, approved by Lord Wilberforce in *Director of Public Prosecutions v. Jordan*, [1977] A.C. 699 at 718]:

. . . The fact that an expert witness has impressive scientific qualifications does not by that fact alone make his opinion on matters of human nature and behaviour within the limits of normality any more helpful than that of the jurors themselves; but there is a danger that they may think it does.

[95] In this case a great deal of the so-called expert evidence stated what the experts themselves would have done in like circumstances, criticized Constable Badyal and asserted legal conclusions. The appellant's factum recited such evidence at length. I agree with Lowry J.A. that it would have been better if the experts were to have confined their opinions to matters of procedure and policy.

[96] The trial judge appears to have been influenced by the evidence as is apparent from the following passage from his reasons:

. . . [The expert witness] was asked if an impaired driver should be pursued and the following is an excerpt from his evidence:

Q.: And the reason that she concluded that was because the driver had committed two infractions right in front of her and had veered once, and she said that because of that, she suspected this was an impaired driver.

A.: Yes.

Q.: She also said that as she was following the car, she did a CPIC check, and it came back what she described as a no hit, which meant that there was a hit, but no description as to what it was.

A.: That's correct, My Lord.

Q.: You knew that, did you?

A.: Yes.

Q.: And then she stopped the car. One of the things that you didn't respond to, and I would like your response to this, and that is that if it's risky to chase a stolen car, how risky is it to chase a car where the driver is impaired?

A.: I've often asked that question myself, My Lord. To me if you have an impaired driver, or there is a good chance that it's an impaired driver, who doesn't have all their faculties about them in operating the vehicle, and then you put him under a high stress situation, once again, it's the seriousness of the situation. And are there people around? Do I have - - what's this driver going to be. There's just so many things to think about. It is - - it could be very dangerous.

Q.: Let me try it this way: if you have an area which is a residential area.

A.: Yes.

Q.: Generally known to be an area in which there are lots of people and cars. You have an impaired driver and a high-speed chase on an impaired driver.

A.: Yes.

Q.: Tell me something that could be more dangerous than that?

A.: I can't tell you of anything. It would be dangerous.

Q.: Yes. Well, is there anything more dangerous than that?

A.: Not - - not behind the wheel of a vehicle, My Lord, no.

Q.: If the reason for not chasing a stolen car is the likelihood that it's a juvenile, and juveniles have no experience, isn't an impaired driver even that much worse?

A.: You're right, My Lord.

Q.: Then how do you conclude that this was a safe chase?

A.: From the statement of facts I got, My Lord, and you just reiterated them: she saw two minor traffic offences, [sic] and then she saw the vehicle veer, so she was just starting into her investigation of an impaired driver. She never actually dealt with the driver to find out what his physical - - how he was physically, whether or not he actually was impaired. So to me, she had enough to pull the vehicle over, but she - - it was only the start of her investigation for an actual impaired.

Q.: So she suspected it was - -

A.: Suspected.

Q.: And if you suspect that someone is impaired because you have some evidence of it, [sic] it would it justify the chase until you know for sure? I am trying to translate what you just told me.

A.: Yeah. No, it wouldn't. But I think she - - she has to form - - she formed some sort of opinion in relation to driving so that - -

Q.: She said she formed the opinion that this was probably an impaired driver and - - or could be an impaired driver, and she was going to stop the vehicle to investigate that?

A.: Yes, and that's what I took it from the statement of facts.

Q.: Well, if you suspected an impaired driver, and the driver takes off under the circumstances I describe, does that justify the chase?

A.: I would say no, not given that.

In my view, this chase should never have begun. The officer had no specific information that any serious offence had been committed. She had good reason to believe that the driver of the vehicle might be impaired. In my view, there is no justification for commencing a high-speed chase of a suspected impaired driver through a residential area where it is expected that there would be a high volume of pedestrian and vehicular traffic. The danger to the citizens is far too great. [At paras. 25-26.]

[97] In my view this evidence should not have been admitted and I consider that the judge erred by relying on it, but I am satisfied that his conclusion on the evidence before him did not give rise to an overriding and palpable error.

[98] The statutory and policy considerations that apply to a police chase have been addressed by my colleagues and I do not repeat them, but it is important to remember that s. 122 of the Motor Vehicle Act, R.S.B.C. 1996, c. 318 provides an exemption allowing emergency vehicles to violate mandatory provisions of the Act under certain conditions. The conditions require an assessment of the circumstances including the amount of traffic that might reasonably be expected in the area. This is reflected in the policy directive of the R.C.M.P. and was clearly understood by Constable Badyal. The object of the assessment is to consider and give priority to public safety.

[99] In this case, the officer followed R.B.'s car and after observing that the driver committed several minor traffic infractions, put on her emergency lights to pull over the vehicle. It stopped. The constable started to get out of her car, but being concerned that the other car apparently still was in gear, she got back into her vehicle to seek further information. When she did so, R.B. sped away.

[100] The judge quoted from her evidence at trial as follows:

The driver had taken off at high speed down a narrow lane with limited visibility. It was apparent that the driver was likely to take high risks or was so impaired that he did not recognize the risk. He was not likely to stop in response to a chase, nor did he. Constable Badyal agreed and said in cross examination:

Q.: You had experienced that the driver of this vehicle was not going to obey a siren and lights, because it bolted for you after initially pulling over, right?

A.: Yes.

The officer was asked how she expected to bring the chase to an end.

Q.: What do you do if you catch it? If you get up close behind it, what do you do? Pull in front and cut him off or something? What do you do - - how do you plan this thing by the way?

A.: Well, in a pursuit that's I guess, longer in duration, you can - - you can have other police officers in the area attend and perhaps form a road block in the direction that the vehicle's travelling, the suspect vehicle. You could have something that we call "stop sticks" thrown in front of the vehicle which are - - which basically puncture the tires of the car. So operationally there's - - there's techniques that you can slow the car down, and that's what I was hoping to accomplish.

Q.: So that required you to have a long pursuit then, didn't it?

A.: Yes.

[At para. 29.]

[101] Discovery evidence read in at trial included:

Q At the time you commenced this pursuit, you had no suggestion or conscious awareness that this vehicle was stolen, and for all intents and purposes, you assumed that the registered owner was behind the wheel?

A Yes.

Q To your mind, if that had been the registered owner behind the wheel, with a name, with an address, with a driver's licence, it would have been possible to locate him using alternate means had you decided not to pursue him?

A Yes.

...

Q At this point and prior to placing your cruiser into drive, did you consider simply not commencing a pursuit?

A No.

Q You would agree that in your training that was something you were told to try to evaluate?

A Yes.

Q Prior to starting a pursuit?

A Yes.

...

Q Are you telling me that you didn't consciously start a pursuit? You would agree that when you placed your vehicle in drive after the Toyota took off, ripped around the corner, flew down the alley you did start a pursuit? When you put your vehicle in drive, put it in motion and accelerated, did you consciously make the decision to enter into a pursuit, or was it something you instinctively did?

A Instinctively did.

Q The rabbit ran and you chased after it?

A Yes.

...

Q At the point when you turned that corner to travel southbound through the open bay garage, did you consider abandoning the pursuit of this Toyota?

A Not at that point.

Q Was it still sort of the situation that the rabbit is running and I'm after it and you are not weighing niceties?

A Yes.

...

Q Constable Badyal, as you continued your pursuit southbound through the open bay garage, you knew that there was a significant risk that there were people around this area, did you not?

A I understood that there may be pedestrian and vehicular traffic, yes.

...

Q In your report to Crown counsel, the very last line before "this is the extent of Constable Badyal's involvement in this case," you write -- these are your words, I'm assuming: "He was travelling at a high rate of speed through an area that is usually flooded with large pedestrian traffic flow." Those are your words, correct?

A Yes.

Q You would agree that this general area where the pursuit took place is usually flooded with pedestrian traffic flow?

A Yes.

Q You knew that at the time that you were pursuing the Toyota southbound down the alleyway?

A Yes.

...

Q Constable Badyal, I'm not concerned so much with your apprehension of risk to pedestrians and other vehicles that your vehicle might have posed. I'm interested in the fact that you could not see whether there was pedestrian or vehicular traffic in front of this Toyota that was fleeing from you as it travelled southbound down the alleyway between 71A Avenue and 71 Avenue. You just couldn't see that?

A I couldn't see in front of the Toyota, no.

Q You couldn't see the Toyota itself?

A No.

...

Q This was a driver who was desperate to get away from you?

A Yes.

Q Was fleeing from you as quickly as his car would carry him?

A Yes.

Q Down narrow alleys?

A Yes.

...

Q And the Toyota was making distance between your cruiser and itself, correct? It was gaining on you and was going quicker than you?

A Yes.

...

Q You would agree that in the circumstances in which you continued this pursuit, there was a high risk of harm or injury should a pedestrian or vehicle materialize in the path of the fleeing Toyota?

A Yes.

[102] Also of interest is the constable's report to Crown counsel. In it she stated:

... A hit was returned on the plate stating that [the vehicle] was involved in a file from earlier today.

... As soon as [Cst. Badyal] got back into her car, the offending vehicle took off. The vehicle ripped around the corner from where the police vehicle and it were previously stationary. The vehicle flew down the alley west bound between the Robin Hood Pub and the Hall road apartments at a high rate of speed. ... [The suspect vehicle] emerged onto 70b avenue making a hard left turn at a high rate of speed without yielding or stopping for any possible traffic. [The suspect vehicle] was now traveling eastbound on 70b avenue, as CST. BADYAL came out of the alley, she noticed that [the suspect vehicle] was rapidly approaching the intersection of 135 and 70b avenue, she noticed that the driver side door swung open, and called out to dispatch that the suspect may be bailing on foot. The suspect vehicle shut the driver door and sped around the corner of 70b avenue and 135 street now traveling south bound at a high rate of speed. CST. BADYAL could not catch up to the vehicle. Her speed at this point was 80km hour, however the vehicle was pulling away from her.

...

. . . [R.B.] was traveling at a high rate of speed through an area that is usually flooded with a large pedestrian traffic flow.

[103] In my view the evidence amply supports the conclusion of the judge that the chase should never have been started. R.B.'s car sped away. It was obvious that he was fleeing and had no intention of being apprehended. The chase was inherently high speed from the outset. The area was fraught with potential danger which materialized in one minute. The constable made no assessment of the circumstances. She did not weigh public safety with the need to pursue R.B. The policy of the R.C.M.P. states that the fact that a suspect is avoiding apprehension is not a ground to initiate a chase: "[a] suspect's attempt to evade apprehension is not a factor in determining the seriousness of the offence, or the need for immediate apprehension".

[104] I share my colleagues' and the judge's concern with the difficult decision a police officer must make in such circumstances, but the law requires an assessment of circumstances before the requirements of the Motor Vehicle Act can be ignored. This is reinforced by the policy of the R.C.M.P. The standard of care reflects the legislation, the policy and common sense. In my view, the constable did not adhere to the applicable standard of care in this case.

[105] I would dismiss this appeal.

"The Honourable Mr. Justice Chiasson"

CORRECTION - 29 June 2007

The Schedule that is between paras. [47] and [48] was not included when the judgment was originally published. The Schedule, which is a map, has been inserted.

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