CANADA / JUDGMENT

R. v. Bekkers

2012 BCSC 471

COURT
Supreme Court of British Columbia

DECIDED
30 March 2012

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2012 BCSC 471 R. v. Bekkers

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Bekkers,

2012 BCSC 471

Date: 20120330

Docket: 69727-2

Registry: Nanaimo

Regina

v.

Clare Suzanne Bekkers

Before: The Honourable Mr. Justice D. Halfyard

Corrected Judgment: The text of the judgment was edited at paragraph 448 on May 31, 2013

Reasons for Judgment

Counsel for the Crown:

F. Dubenski & K. Paziuk

Counsel for the accused:

A.E. King, Q.C.

Place and Date of Trial:

Nanaimo, B.C.

September 6, 7, 8, 9, November 14, 15, 16, 28, 29 and December 6,7 and 14, 2011, February 20, 21 and March 30, 2012

Place and Date of Judgment:

Nanaimo, B.C.

March 30, 2012

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The Charges

[1] Clare Suzanne Bekkers is on trial on an Indictment which charges her with eight motor-vehicle related criminal offences, all of which are alleged to have occurred on or about December 22, 2008, at or near Nanaimo. There are two counts of dangerous driving causing death, two counts of dangerous driving causing bodily harm, two counts of impaired driving causing death and two counts of impaired driving causing bodily harm.

[2] The charges arise from a very serious motor vehicle accident that occurred at about 4:20 p.m. on Monday, December 22, 2008, on Highway 1 just south of the Nanaimo River Bridge and roughly adjacent to the Cassidy Inn, about 15 kilometres south of downtown Nanaimo.

Overview of the trial

[3] The Crown called 16 witnesses and introduced numerous documentary exhibits, which included an Agreed Statement of Facts relating to several issues. Two witnesses (Corporal Jaret Irving and Ronald Pon) gave expert opinion evidence.

[4] The defence called seven witnesses including the accused, and presented the evidence of an eighth witness by way of his police statement and preliminary hearing testimony. Other documentary exhibits were filed. Geoffrey Evans, P. Eng., gave expert opinion evidence.

[5] The Crown applied for and was granted leave to call further expert evidence to rebut evidence given by the defence expert, Geoffrey Evans. Two rebuttal witnesses were called.

[6] The evidence and final argument occupied 14 days spread over 5 ½ months.

Preliminary findings of fact

[7] Many of the facts on which the charges are based are admitted, and some other relevant facts are not in contest. From the admissions and the undisputed evidence, I make the following preliminary findings of fact.

[8] At about 4:20 p.m. on December 22, 2008, the accused Ms. Bekkers was driving a 2004 Ford Escape SUV motor vehicle in a northerly direction on Highway 1, which is part of the Trans Canada Highway. Ms. Bekkers four children were riding as passengers in her motor vehicle. Lukas Bekkers aged nine, was riding in the front passenger seat, alongside his mother. The other three children were riding in the back seat. They were Lunden Bekkers aged seven, Pyper Bekkers aged four and Cooper Bekkers aged two. Ms. Bekkers had driven past the intersection of the road into the Nanaimo Airport, she had crossed over the Haslam Creek Bridge and she was driving into a slight curve to her left. The Cassidy Inn was ahead of her, and to her right (i.e. on the east side). The curve straightens out at or near the point where it passes by the Cassidy Inn, and the road (for northbound traffic) then curves to the right and crosses over the Nanaimo River Bridge.

[9] In the area where the accident occurred, the highway is paved and consists of two lanes for northbound traffic and two lanes for southbound traffic. The northbound lanes and the southbound lanes are separated only by a narrow median marked by a painted yellow line on each side. This median gets wider in the stretch of highway between the Cassidy Inn and the south end of the Nanaimo River Bridge, so as to accommodate southbound drivers who intend to turn left at Beck Road (which leads into the area of the Cassidy Inn). The highway is fairly level in this area, having only a one percent uphill grade for northbound vehicles. The speed limit was 80 kilometres per hour ("kph").

[10] It had been snowing in the Nanaimo area during the period from about 6:00 p.m. on December 20 until about 10:00 a.m. on December 22. About 33 centimetres of snow had accumulated at the nearby Nanaimo Airport, during this time. (At the Victoria Airport, 47 centimetres of snow fell between 6:00 p.m. on December 20 and 7:00 a.m. on December 22). The travel lanes of Highway 1 had been ploughed in the area where the accident occurred. The shoulders of the road on both sides were covered by ploughed snow banks which were about 1 1/2 metres deep.

[11] The air temperatures (in degrees Celsius) at the Nanaimo Airport on December 22, 2008, before and after the time of the accident, were as follows:

Time

Temperature

3:00 p.m.

minus .6 degrees C.

4:00 p.m.

minus 2.7 degrees C.

5:00 p.m.

minus 6.2 degrees C.

6:00 p.m.

minus 6.6 degrees C.

7:00 p.m.

minus 8.6 degrees C.

[12] While she was driving north after crossing the Haslam Creek Bridge, and before reaching the Cassidy Inn, Ms. Bekkers lost control of her motor vehicle and it travelled to her left, crossed over the center lines of the highway and into the lanes for southbound traffic. Her vehicle collided violently with two oncoming southbound vehicles which had been travelling between 80 and 90 kph. As a result of these two collisions (and mainly due to the second collision), Lukas Bekkers and Cooper Bekkers were fatally injured. Lunden Bekkers and Pyper Bekkers sustained injuries amounting to "bodily harm" as a result of the collisions, with Lunden's injuries being much more serious.

[13] Ms. Bekkers sustained fairly serious injuries in the accident (one of her lungs was punctured). The driver (Jone Yang) and four passengers of the second vehicle that collided with Ms. Bekkers' vehicle (a 1996 Nissan Pathfinder) suffered some physical injuries, which did not appear to have been serious.

[14] The motor vehicle that Ms. Bekkers was driving was in good condition and her loss of control was not caused by any mechanical fault. (What caused Ms. Bekkers to lose control of her vehicle has been a major issue in this trial.)

[15] Ms. Bekkers and her two injured children were taken to the Nanaimo Regional Hospital for treatment. One or more persons who attended on Ms. Bekkers after her arrival at the hospital smelled the odour of alcohol on her breath.

[16] At 6:00 p.m. on December 22, 2008, hospital personnel at Nanaimo took blood from Ms. Bekkers. A test conducted in the hospital laboratory showed that the concentration of alcohol in Ms. Bekkers' blood was 11 millimoles of ethanol per litre of blood.

[17] The blood samples collected by the hospital staff were seized by police on December 30, 2008, pursuant to a search warrant. There were three vials seized by police, one which contained Ms. Bekkers' blood, one which contained her blood serum, and one which contained her separated blood.

[18] At a later date, Forensic Toxicologist, Ronald Pon, conducted tests on the blood and blood serum that had been collected at the Nanaimo Regional Hospital. His tests established that Ms. Bekkers' blood alcohol concentration at 6:00 p.m. on December 22, 2008 was 42 milligrams of alcohol per 100 millilitres of blood.

[19] The tests conducted by Mr. Pon also showed that there were other chemical substances in Ms. Bekkers' blood, namely, anti-depressant medication and metabolytes of cocaine (but not cocaine).

The law relating to the dangerous driving charges

[20] In order to establish that the accused is guilty of any of the four dangerous driving counts, the Crown must first prove that the accused operated a motor vehicle in a manner that was dangerous to the public having regard to all of the circumstances, including the nature, condition and use of the place at which the motor vehicle was being operated and the amount of traffic that at the time was or might be expected to be at that place. See s.249(1)(a) of the Criminal Code.

[21] Proof that an accused person's manner of driving was dangerous to the public in the criminal sense, requires the Crown to establish that the accused's driving conduct was objectively dangerous, and also that the dangerous driving conduct fell so far below the standard of care that would have been exercised by a reasonable driver, that it amounted to a marked departure from that standard, so as to justify the inference of criminal fault.

[22] A reasonable driver is not a perfect driver. He or she is a person who possesses and exercises reasonable driving skills and who exercises reasonable care for the safety of other persons who are using the highway, commensurate with the existing circumstances. Proof that an accused person's driving was a departure from (i.e. fell below) the standard of care that would have been exercised by a reasonable driver, will amount to civil negligence. But before the mental fault required for the criminal offence of dangerous driving can be inferred, the court must be satisfied that this departure from the norm was a marked departure. If the driving conduct is found to be a marked departure, then the degree of moral blameworthiness required to attract criminal liability, may be inferred from that conduct. "The degree of negligence is the determinative question because criminal fault must be based on conduct that merits punishment:" R. v. Beatty, [2008]. 1 S.C.R. 49 at para. 35.

[23] The third element that must be proved is that the accused's dangerous driving caused death or bodily harm to the person or persons named in the Indictment (See s.249(3) and (4).). This element of causation may be satisfied by proof that the accused's dangerous driving was a contributing cause of the death or bodily harm, outside the de minimis range. This means that the dangerous driving must be shown to have been a significant contributing cause, and not just a minimal or insignificant cause, of the death or bodily harm. It need not be proved that the act or omission of the accused was the only cause or even the substantial cause.

[24] Where it is obvious that the death or injury was caused by a motor vehicle collision, the Crown will have to prove that the dangerous driving of the accused was a significant contributing cause of that collision (and thus a cause of the death or bodily harm).

[25] If the actus reus and the mens rea of dangerous driving are proved, but this element of causation is not proved, then the accused would be found guilty of the included offence of dangerous driving, but must be acquitted of dangerous driving causing death or bodily harm.

[26] My summary of the law which interprets s. 249 of the Criminal Code is based on R. v. Beatty (supra); R. v. Andrew (1994), 91 C.C.C. (3d) 97; R. v. Roy 2010 BCCA 130 (paras. 20,22, and 24); and R. v. De Ciantis 2011 BCCA 437. In R. v. Nette, [2001] 3 S.C.R. 488, the Supreme Court suggested that the required degree of causation should be expressed in a positive way, i.e., "a significant contributing cause."

The law relating to the impaired driving offences

[27] In order to establish that the accused is guilty of any of the four impaired driving counts, the Crown must first prove beyond a reasonable doubt that, at the time and place charged, the accused was operating a motor vehicle while her ability to do so was impaired by alcohol or a drug. See s. 253(1)(a) of the Criminal Code.

[28] Proof that an accused person's ability to drive a motor vehicle was impaired by alcohol or a drug, to any degree, will suffice. See R. v. Stellato, [1994] 2 S.C.R. 478.

[29] If impairment by alcohol or a drug of the accused's ability to operate a motor vehicle is proved, the Crown must next prove that the accused's impaired ability to drive caused the death or bodily harm which is charged. See s. 255(2) and (3) of the Criminal Code. Two facts are required to constitute this element of causation, each of which must be proved to exist, beyond a reasonable doubt.

[30] First, it must be proved that the accident which caused the death or bodily harm was caused by the faulty driving of the accused. The Crown is not required to prove that the accused was driving dangerously. But it must prove that the driving was negligent, and that the accused's negligent driving caused the accident. Driving will be negligent if it falls below the standard of care that a reasonable driver would have exercised, in the same circumstances. It must be shown that the accused did something that a reasonable driver would not have done, or failed to do or perceive something that a reasonable driver would have done or perceived; and that this act or omission caused the accident. The necessary degree of causation between the negligent driving and the accident will be established by proof that the negligent driving was a contributing cause of the accident, beyond the de minimis range (i.e., a significant contributing cause).

[31] The second fact that must be proved to establish causation is that the negligent driving conduct of the accused which caused the accident, was itself caused by the impairment (by alcohol or a drug) of the accused's ability to drive. This aspect of causation will be established if it is proved that the accused's impaired driving ability was at least a contributing cause of the negligent driving, outside the de minimis range. A contributing cause must be more than just a minimal or insignificant cause of the accident. But it need not be proved that the impairment of the accused was the sole cause of the accident (or even the substantial cause) in order to establish the necessary degree of causation between the impairment of the accused's ability to drive, and the accident which caused the death or bodily harm. See R. v. Andrew (1994), 91 C.C.C. (3d) 97 (BCCA).

[32] If both of these aspects of causation are not proved, then the accused will be found guilty of the included offence of impaired driving, but must be found not guilty of impaired driving causing death, or bodily harm.

The Issues

[33] In this case, the defence has admitted several of the essential elements of the crimes charged. It is admitted that Ms. Bekkers was driving a motor vehicle at the time and place charged, and that her vehicle was involved in an accident. It is also admitted that Lukas and Cooper died, and Lunden and Pyper were injured, as a result of that accident.

[34] The defence further admits that the accident was caused by Ms. Bekkers' vehicle crossing over the centre line into the path of oncoming southbound traffic, and that her vehicle crossed the centre line because she lost control of it.

[35] These admissions having been made, the remaining potential issues with respect to the dangerous driving charges are:

a) Did Ms. Bekkers lose control of her motor vehicle because she was driving in a manner that was negligent?

b) If so, then was her negligent driving also objectively dangerous?

c) If so, then did Ms. Bekkers' manner of driving fall so far below the standard of a reasonable driver that it amounted to a marked departure from that standard?

d) If so, then was the dangerous driving of Ms. Bekkers a significant contributing cause of the collision (which caused the deaths and injuries)?

[36] As to the impaired driving charges, the remaining issues are:

a) Was Ms. Bekkers' ability to operate a motor vehicle impaired by alcohol or a drug, at the time she lost control of her motor vehicle?

b) If so, then did the impairment of her ability to drive a motor vehicle (by alcohol or a drug) cause her to drive in a negligent manner which in turn caused her to lose control of her motor vehicle?

c) If so, then was the impaired driving of Ms. Bekkers a significant contributing cause of the collision (which caused the deaths and injuries)?

[37] I must review the evidence presented by the Crown and the defence. But I will only give a summary of the testimony given by each witness relating to the material issues and (where challenges have been made) to the issue of credibility.

Crown witnesses

Carolyn Daniels

[38] Carolyn Daniels and Clare Bekkers had been close friends since childhood. They are about the same age, presently 38. Both of them grew up in Victoria and the parents of each of them still live in the Victoria area.

[39] Ms. Daniels and her two young children were visiting at the home of her mother in Saanichton on December 20, 2008. Ms. Bekkers had been living in Nanaimo with her husband and four children for about four years by that time. Ms. Bekkers and her children were visiting at her (Ms. Bekkers') parents' home in Oak Bay. She and Ms. Bekkers communicated with each other and it was arranged that Ms. Bekkers and her daughter Pyper would come to visit with Ms. Daniels (at Ms. Daniels' mother's place) on Sunday, December 21. Ms. Bekkers and Pyper arrived there, at about 1:00 p.m. on Sunday, December 21.

[40] Ms. Daniels and Ms. Bekkers went to the liquor store and purchased a 26 ounce bottle of rum and a case of cans of Kokanee beer. She and Ms. Bekkers began drinking at about 3:00 p.m. on Sunday. Ms. Bekkers drank beer at that time and then later during dinner. Ms. Daniels went to bed around 12 midnight, but Ms. Bekkers stayed up. Ms. Daniels herself had consumed half of the bottle of rum, and Ms. Bekkers was also drinking rum after dinner. When Ms. Daniels went to bed, she and Ms. Bekkers "weren't sober."

[41] On Sunday evening Ms. Bekkers had communicated with Sherry Harrison (her brother's wife or ex-wife), who lived in Nanaimo, using the Skype feature on a computer. During this conversation, she heard Ms. Bekkers ask Sherry if she had "any". From a conversation she had with Ms. Bekkers after she (Ms. Daniels) returned from the bathroom, Ms. Daniels understood that Ms. Bekkers had asked Sherry if she had any cocaine. Before Ms. Bekkers had come to visit, in a telephone conversation, Ms. Daniels asked Ms. Bekkers if she would be bringing cocaine with her. Ms. Bekkers said no, and stated that she had finished what cocaine she had brought, on Saturday night. Ms. Daniels abhorred cocaine.

[42] Ms. Daniels got up around 7:00 a.m. on Monday morning and was feeling the effects of drinking (headache, upset stomach). Ms. Bekkers did not get up until around 11:00 a.m. and told Ms. Daniels that she wasn't feeling well. At that time, the rum bottle was empty and there were eight or ten full cans of Kokanee beer remaining (Ms. Daniels did not know how many cans had been purchased or how many had been consumed by Ms. Bekkers).

[43] When Ms. Bekkers got up on Monday morning, she told Ms. Daniels that she had gone to bed at about 4:00 a.m. She also told Ms. Daniels that she had a sip of beer after she woke up, but that it did not agree with her.

[44] It had snowed heavily over night. Ms. Daniels helped Ms. Bekkers clean the snow off and around her vehicle. They had a conversation in which Ms. Bekkers told Ms. Daniels that she was going to drive to her parents' home, pick up her other daughter Lunden, then pick up her sons at the home of their other grandparents, and then drive home to Nanaimo. Ms.

Daniels suggested that, due to the road conditions, Ms. Bekkers should consider staying in Victoria for another night, but Ms. Bekkers insisted that she wanted to go home. Ms. Bekkers spoke to her husband by telephone, and Ms. Daniels understood that her husband also suggested that Ms. Bekkers stay in Victoria for another night.

[45] Ms. Daniels put the eight to ten cans of Kokanee beer in the back storage compartment of Ms. Bekkers' vehicle and Ms. Bekkers knew she had put the beer in her vehicle. Ms. Bekkers and Pyper left Ms. Daniels' mother's place at about 12:30 p.m.

[46] Ms. Daniels and Ms. Bekkers communicated with each other by texting after she and Pyper had left, while they were still in the Victoria area. During these communications she asked Ms. Bekkers if she was feeling okay to drive home, and Ms. Bekkers said that she was.

[47] Later that day, Ms. Daniels heard that Ms. Bekkers and her children had been involved in a serious motor vehicle accident. She went to visit Ms. Bekkers at the Nanaimo Regional Hospital on December 26, 2008. She saw Ms. Bekkers' parents there, and Ms. Bekkers' father showed her to his daughter's room. During her conversation with Ms. Bekkers, Ms. Bekkers told her in substance, that she had received surgical treatment for a collapsed lung. Ms. Bekkers was an emotional wreck, she was grieving, and she was sedated.

[48] Ms. Daniels asked Ms. Bekkers what had happened and whether she had been drinking on the way home before the accident. Ms. Bekkers told her that she and the children had stopped at a MacDonald's restaurant in Duncan to get something to eat and that she had a sip of beer at that time, but it did not agree with her so she did not drink anything more. She told Ms. Daniels that she had put down the cup that had beer in it, beside her in her vehicle.

[49] Ms. Daniels told Ms. Bekkers about what she had been reading in the newspapers about the accident, including that there had been a smell of alcohol in her vehicle after the accident. Ms. Bekkers told her in effect, that it must have come from the beer cans being broken by the force of the collision.

[50] Ms. Daniels told Ms. Bekkers that (according to the newspaper report) people had said that she was swerving in and out of traffic before the accident occurred. Ms. Bekkers "seemed stunned by the accusations."

[51] Ms. Daniels asked Ms. Bekkers if she had taken any cocaine on the way home and Ms. Bekkers said no.

[52] Ms. Daniels first found out in February, 2008, that Ms. Bekkers was using cocaine. At that time, at Ms. Daniels' sister's "staggette" party in Victoria, she saw Ms. Bekkers snorting cocaine in the bathroom. In late June or early July, 2008, on a camping trip at Horne Lake, a number of persons who were on the trip were using cocaine, and Ms. Bekkers told her (Ms. Daniels) that she had snorted cocaine.

[53] Ms. Daniels estimated that Ms. Bekkers' bodyweight at the time of the accident was about 105 to 110 pounds, but said she looked much heavier at the trial.

[54] In cross-examination, Ms. Daniels agreed that the last time she had spoken to Ms. Bekkers was in February or March of 2009, which she said was long before any charges were laid against Ms. Bekkers. She said that at some time after charges were laid, she contacted the police and offered to make a statement. She agreed that she gave a lengthy statement to police on November 4, 2010. She denied contacting police after seeing Ms. Bekkers' lawyer on television (and later stated that she had not even seen Mr. King on television).

[55] Ms. Daniels stated that, during her visit at the hospital on December 26, 2008, Ms. Bekkers had told her, among other things, that she was fine to drive (on the day of the accident).

[56] Ms. Daniels stated that Ms. Bekkers had been her best friend for many years, and that she loved Ms. Bekkers' children. Under questioning by defence counsel, Ms. Daniels eventually agreed that she would not have let Ms. Bekkers drive away from her (Ms. Daniels') mother's place if she had believed there was any risk to Pyper's safety.

[57] Ms. Daniels conceded that she had not made any notes of her conversation with Ms. Bekkers at the hospital. She said they did later communicate by email.

[58] Ms. Daniels admitted that, in her statement to the police she stated, in effect, that Ms. Bekkers' had given up her right to be a mother, by living away from home with her boyfriend and letting her two surviving children live with their father; and that she was angry with Ms. Bekkers, because she did not seem to be remorseful about what had happened. She seemed to say she got that impression from statements made by Ms. Bekkers at the funeral for the children, to the effect that she wanted Ms. Daniels to be happy, not sad.

[59] Ms. Daniels acknowledged that she believed Ms. Bekkers' parents and her husband's parents, were good grandparents. She stated that the last person to see Ms. Bekkers before she left the Victoria area was Holly Mecheder, a friend who lived in Langford (which is on the way out of Victoria). It was unclear how Ms. Daniels had obtained that information. But she stated that Holly Mecheder was a good friend of Ms. Bekkers and was a good mother. She said she was unaware that any of Ms. Bekkers' children stayed with her husband's parents that weekend.

[60] Ms. Daniels denied the suggestion that she herself used cocaine during the Horne Lake camping trip in the summer of 2008. She said that she had "just pretended to use it", by going into the bathroom, alone.

Tana Liew

[61] Ms. Liew left her home in Ladysmith at or about 4:00 p.m. on December 22, 2008, and was going to pick up her husband at his place of work at the north end of Nanaimo. She was driving a Ford F150, 4 x 4 pickup, but was not using the four-wheel drive system. Her vehicle was red in colour, and was almost new. The road conditions were "dry" and "good for winter."

[62] She stopped for a traffic light on Highway 1, at a place where a Mohawk gas station was adjacent to the highway. (I infer that this traffic light was located at a point which is somewhere between Ladysmith to the south and the Nanaimo Airport road intersection (Spitfire Road) to the north.) She stopped her pickup in the fast lane, at the stop light adjacent to the Mohawk gas station. At that time, she first noticed that there was a black SUV behind her, also stopped in the fast lane. There was another vehicle beside her, in the slow lane, at that time. The black SUV followed her very closely after they pulled away from the traffic light at the Mohawk gas station, the vehicle in the slow lane stayed approximately beside her, and the black SUV was tailgating both vehicles, moving back and forth from the fast lane to the slow lane. Both she and the driver beside her increased their speed to the speed limit of 90 kph. She reduced her speed to 80 kph when the speed limit changed (near the south end of the airport). The black SUV was trying to pass them but could not do so, because the vehicle in the slow lane remained approximately beside her as they continued northward. The black SUV was driving too close behind her, she thought the distance was unsafe and the tailgating by the driver of the black SUV made her feel uncomfortable.

[63] Ms. Liew's vehicle, the vehicle beside her and the black SUV behind her, all had to stop for a red traffic light at the Nanaimo Airport road intersection (Spitfire Road). Up to the point where the three vehicles stopped at Spitfire Road, the black SUV had changed lanes back and forth behind her, "at least 15 times." When the three of them pulled away after the traffic light turned green, her vehicle got ahead of the car that had been beside her, and a small space or gap was created. The black SUV immediately passed by that car (which was in the slow lane) and then the black SUV pulled to the right into the slow lane and passed by her pickup truck, while travelling in the slow lane. She maintained her position in the fast lane, and was travelling at 80 kph, when the driver of the black SUV executed this maneuver. She noticed that, when the black SUV passed her on the inside, she saw that there was a woman driving, and one child in the front passenger seat. The black SUV was travelling at about 80 kph when it was beside her in the slow lane, but it then "took off like a bullet," travelling towards Haslam Road and the Haslam Creek Bridge up ahead. The black SUV moved slightly to its left to go around a snow clearing machine at the entrance of Haslam Road and then went fully back into the slow lane, travelling at a speed that she estimated to be just under 90 kph, at that point.

[64] The distance between her vehicle and the black SUV was increasing after it passed her. There were no vehicles ahead of the black SUV.

[65] The speed of the black SUV increased after it passed the snow clearing machine, up to perhaps 105 to 110 kph, by the time it had crossed the Haslam Creek Bridge. Just before the black SUV reached the turn off into the Cassidy Pub, it appeared to make a sharp left hand turn, across the fast lane and across the centre line, into the lanes for oncoming southbound traffic. She did not see any brake lights go on and did not see the black SUV slide or skid. She saw the black SUV hit a black Nissan. She then slammed on her brakes and steered to the left into the painted median area between the northbound lanes and the southbound lanes. She

stopped almost instantly and her vehicle did not slide or skid.

[66] She got out of her vehicle. The road was not slippery to walk on. She went to offer assistance to the occupants of the black Nissan and the black SUV. The driver of the black SUV was still sitting in the driver's seat. She looked dazed, but conscious. The driver eventually got out of the vehicle, and was concerned about her children. Ms. Liew did not smell any odour of alcohol, but was not right in the driver's face.

[67] Ms. Liew went to a damaged Monte Carlo, checked on the driver of that vehicle, and found him to be okay.

[68] Ms. Liew had dyslexia and a painful arthritic condition for which she had been taking morphine for about 20 years, but neither the dyslexia nor the medication had any effect on her ability to perceive or to remember events.

[69] In cross-examination, Ms. Liew testified that she had been taking Oxycontin for pain, back in December 2008, and that she had taken this pain killer that morning, but said that it was a low dosage.

[70] She said the roads were not wet, there was no snow on the travel lanes, it was a very nice day, and it was daylight.

[71] On being shown photograph #1 in Exhibit 2 (the Book of Photographs), Ms. Liew stated that the photograph had been taken about 20 minutes before she left the accident scene, and said that she had been there four to five hours before leaving. (Constable Armstrong had testified that she took photograph 1, without using a flash, shortly after her arrival at 4:37 p.m.)

[72] Ms. Liew acknowledged that she was not good at estimating distances, and that she might not always be good at estimating speeds.

[73] Ms. Liew insisted that she kept her vehicle in the fast lane for the whole distance from the Mohawk gas station to the place where the accident occurred, and that the car that was beside her when she stopped at the Mohawk gas station stayed beside her vehicle (in the slow lane) until it fell behind and the "gap" was created, after the vehicles pulled away from the stop light at Spitfire Road.

[74] Ms. Liew said that she did not see the black SUV hit any motor vehicle except the Nissan. Ms. Liew estimated that she was approximately 20 car lengths behind the black SUV when it suddenly veered sharply to the left. She said that the black SUV stayed in the slow lane all the way up to the point where it suddenly turned left.

[75] Ms. Liew confirmed that the black SUV had changed lanes behind her, 15 to 20 times before it passed her vehicle. It was then established that, at the preliminary hearing, she had testified that the black SUV had switched lanes back and forth 10 or 15 times.

[76] Defence counsel questioned Ms. Liew about her description of how the black SUV went across the centre line. It was established that, at the preliminary hearing, Ms. Liew had described the movement of the black SUV as appearing to "just shoot right across the highway."

[77] Ms. Liew was challenged on her evidence as to the length of time that she had spent at the accident scene, i.e. four to five hours. She agreed that she left the accident scene 15 or 20 minutes after she had given her statement to the police. It was then established that she had given her statement to the police officer during the time from 5:25 p.m. to 5:34 p.m. (That would mean that Ms. Liew had left the accident scene by 6:00 p.m., which was one hour and 40 minutes after the accident, not four to five hours.)

[78] Ms. Liew acknowledged that, in her statement to Constable Maizis at the accident scene, she had stated that she did not see the black SUV hit the silver car but told the police officer that she had seen that the black SUV "kinda slid." But Ms. Liew testified here at trial that the black SUV did not slide when it went across the centre line (which implied that she saw it slide after it had crossed the centre line).

[79] Ms. Liew agreed that she told Constable Maizis, on being asked what she saw the black SUV do, that:

She was in the slow lane northbound, then all of a sudden it was like she was turning left - kinda normal up to then.

[80] Based on that evidence, defence counsel suggested that the driver of the black SUV had been driving normally, up to the time it veered to the left. Ms. Liew did not agree, and testified that she was now better able to describe the movements of the black SUV, than she was when giving her statement at the accident scene.

[81] Ms. Liew repeated at the end of her cross-examination that, just before the black SUV veered across the highway, it was in the slow lane, travelling at a speed of about 105 to 110 kph., that there were no brakes lights and that it was not veering from side to side.

Daniel Lundstrom

[82] Daniel Lundstrom was in the process of driving his 2003 Honda Civic from his place of work in Cobble Hill (south of Duncan) to his home in Nanaimo. He was travelling north and driving in the fast lane when he was driving past the Nanaimo Airport. There was one vehicle beside him in the slow lane, and there was one vehicle behind him. The speed limit was 80 kph but he was travelling at 65 to 70 kph, and the vehicle beside him in the slow lane was travelling at about the same speed as he was. He was not having any difficulty driving, but he believed that the road conditions were dangerous, with some snow on the road, but less snow covering the fast lane. As he and the vehicle beside him in the slow lane were approaching the Haslam Creek Bridge (or perhaps before that), he saw a dark coloured SUV come up behind them, and he believed it was following too closely behind him and was

dangerous. He felt that the road conditions were too dangerous to speed up and pass the car beside him (to permit the dark SUV to pass by in the fast lane), so he slowed down and pulled over into the slow lane (which implies that he pulled in behind the vehicle that had been travelling beside him in the slow lane).

[83] The dark SUV then passed by him in the fast lane, before he reached the Haslam Creek Bridge. The SUV was going noticeably faster than he was, and he estimates that it was travelling at about 100 kph. (It was unclear whether Mr. Lundstrom was saying that he watched the dark Ford SUV travel across the Haslam Creek Bridge, but he did say that the next time he saw the SUV, it was in the snow bank on the other side of the road.)

[84] After Mr. Lundstrom's vehicle crossed the bridge, a Toyota truck (which might have been red) swerved across from the southbound lanes into the northbound lanes and went into the snow bank at the east side of the northbound lanes. He was able to avoid it. The vehicle ahead of him also avoided colliding with the Toyota truck. (From Mr. Lundstrom's description of this event, it is uncertain whether the vehicle ahead of him was Ms. Liew's Ford pickup truck or some other motor vehicle.

[85] Mr. Lundstrom testified that he stopped and got out after these events. He said that he was shocked by what he had seen, and that he had never seen anything like it. Other people had stopped and were going to the vehicles that had collided with each other. He left the accident scene a few minutes later (before the police arrived) and continued driving north to Nanaimo.

[86] In cross-examination, Mr. Lundstrom stated that he was driving in the fast lane, before reaching the Haslam Creek Bridge, and that he moved over into the slow lane about 50 to 100 meters south of that bridge. He insisted that he had been travelling in the fast lane, all the way along the highway past the airport, but said he did not recall stopping at a traffic light at the airport road intersection. He said that the SUV was about 10 to 15 feet behind his car, when he moved over into the slow lane to let it pass him. He said he could not recall whether or not there was a vehicle in front of him in the fast lane or in the slow lane, at the time the SUV passed him. He said that the SUV was driving in the fast lane when it passed by his car.

[87] Mr. Lundstrom then said that, when he moved over into the slow lane, a red pickup truck was travelling in the slow lane beside him. Under further questioning, Mr. Lundstrom stated that he was behind a red truck (which was already in the slow lane) when he moved over into the slow lane, to let the SUV pass.

[88] Mr. Lundstrom said that the last time he saw the dark Ford SUV, it was travelling in the fast lane, just as it crossed the north end of the Haslam Creek Bridge.

[89] Mr. Lundstrom insisted that it had been snowing, from Ladysmith all the way up to the place where the accident occurred. He said that there was compact snow on the road, and that it was snowing at the time of the accident. He said that it was "getting dark" at the time the accident occurred.

[90] Mr. Lundstrom testified that he had last seen the dark SUV, when it was just across the Haslam Creek Bridge. It was then shown that, at the preliminary hearing, he had testified:

. . . I let it pass me just before the bridge, so I went to the right lane, and I probably last saw it just before the bridge or on the bridge.

[91] Mr. Lundstrom adopted his preliminary hearing testimony as being likely more accurate than his trial testimony on this point.

[92] Mr. Lundstrom testified that, when he was avoiding a collision with the Toyota Tacoma pickup truck, his car did "two fishtails and two donuts" before he stopped. He said that he could not recall ever seeing the gold Ford Explorer (the vehicle that was being driven by Douglas Priest).

[93] It was shown that, when Mr. Lundstrom made his statement about the accident to Constable Halskov on January 8, 2009, he had described the vehicle that had been tailgating him as being a Ford "Explorer". (But he told the police officer that the colour of it could be black or dark grey, and I do not consider this discrepancy to be of any significance.)

[94] Mr. Lundstrom stated that he recalled seeing a "Ford Escape" in the centre of the road after the accident. (Since he had told Constable Halskov that he thought the vehicle that had been tailgating him was "in the snow bank", I conclude that Mr. Lundstrom misidentified the Nissan Pathfinder as being a Ford Escape.)

Kenneth Wilson

[95] Kenneth Wilson had been Christmas shopping in Nanaimo and was on his way home to Ladysmith, at the time of the accident. He was driving his 2001 Chevrolet Monte Carlo in a southerly direction at the time of the accident. He had crossed the Nanaimo River bridge and was travelling in the lane closest to the centre line (the fast lane), at a speed of about 80 kph. He saw an oncoming vehicle on the northbound side of the highway. The headlights were moving up and down, and the vehicle was fishtailing. He could not estimate the speed of that vehicle. He thought the driver of that vehicle would regain control but he believed he should nevertheless move over into the outside lane, to address the risk. He looked to his right, and was in the process of changing lanes, when his vehicle was hit by that oncoming vehicle, on the driver's side door and front wheel area. He did not see the vehicle cross the centre line and come at him, before it hit his car.

[96] After the collision, all the air bags in his car inflated. He ended up being stopped on the shoulder on the west side of the southbound lanes, pointing south. His vehicle had sustained extensive damage in the collision, but he was not injured.

[97] Mr. Wilson got out of his vehicle via the passenger door, and called his wife to tell her what had happened. He was wearing running shoes, and his feet did not slip. He walked back to a black vehicle that was damaged, thinking that it was the vehicle that had hit his car, but it wasn't. He spoke to the driver and discovered that the occupants of her vehicle were alright, except that her husband needed a few stitches. He gave her his first aid kit. He identified that vehicle as being the black 1996 Nissan Pathfinder, from photographs 3 and 5 of Exhibit 2.

[98] Mr. Wilson had not encountered any black ice on the highway.

[99] Mr. Wilson testified in cross-examination that the road was wet in spots but safe to drive on, and there was no snow or black ice on the road. He was unable to say what kind of a day it was or whether or not it was still daylight.

[100] He said that he had seen the oncoming northbound vehicle bucking and fishtailing after it had crossed the Haslam Creek Bridge, and when it was in the slow lane. He repeated that he did not see the car come across the centre line and hit his car.

[101] Mr. Wilson said that he had not walked in the northbound lanes and so could not say what condition the road surface was in on that side of the highway.

Jone Yang

[102] Jone Yang had been skiing with her family at Mt. Washington and they were returning to their home in Victoria, at the time of the accident. She had been driving their Nissan Pathfinder without difficulty. She was travelling in the fast lane at a speed of about 80 kph after crossing the Nanaimo River bridge. All of a sudden a black vehicle came from her left, into the path of her vehicle. She slammed on the brakes. The front end of her vehicle struck that vehicle on the passenger side. The front air bags inflated inside her vehicle. Then her vehicle got hit from behind.

[103] When her vehicle stopped, Ms. Yang got out right away. She suffered some injury to her right shoulder and to her knees. Her daughter had struck her face on the console. A woman came and attended to the children in the back seat. She also tended to her children and her husband.

[104] It was not slippery or icy where she was walking. Her husband had banged his head on the windshield and his knees were hurting. She did not go to any of the other vehicles involved in the accident.

[105] Ms. Yang said that she did not recall the road being slippery to walk on, and said that she was worried about her children and her husband. She did not know if her car had slid or swerved when she hit the brakes. She said she was travelling at just under 80 kph at the time the other vehicle appeared in front of her.

[106] Ms. Yang could not recall if it was clear or if it was snowing. She said she had not encountered any black ice up to the time when the accident occurred. She said that the road appeared to be wet, but was clear. She said she was following a silver car, but could not say how far she was behind it.

Glenn Budd

[107] Glenn Budd was riding as a passenger in a 2008 Chevrolet Colorado pickup truck which was being driven by his brother Steven Budd, at the time of the accident. They were travelling at about normal highway speed, southbound. It was a fairly clear day. Most of the roadway was clear but there was some snow on some parts of the road surface. They were travelling in the slow lane.

[108] He saw the brake lights of the vehicle ahead of them go on, and saw a crash occur ahead of them. He was not sure of how many vehicles had collided, but the vehicles ahead were coming to a rapid stop. He yelled to his brother to steer to the left because he believed they would not be able to stop behind the vehicles without running into them. His brother started to steer to the left. The car ahead of them seemed to hit another vehicle and shoot to the left (at the same time as his brother was trying to steer to the left), and the front part of the passenger side of their pickup truck hit that vehicle.

[109] The force of that collision caused their pickup truck to shoot off to the left out of control, and across the centre line into the northbound lanes of travel. The truck was fishtailing and heading for the shoulder of the northbound lanes, as his brother tried to regain control. His brother did regain control of the pickup and steered back into the southbound lanes. He pulled over onto the shoulder and stopped the pickup. He thought that the pickup truck was travelling at about 50 kph when it hit the vehicle ahead of them and went out of control.

[110] When the pickup stopped, he and his brother got out through the driver's side door. They were not injured. They walked back to the north, toward the other vehicles that had been involved in the accident. They first went to the man who had been driving a car which had sustained heavy damage (this had to be Kenneth Wilson). They asked the man if he was okay and he said that he was. They went to the next vehicle, an SUV in which an Asian family had been riding. They spoke to these people, looked at them and did not see any serious injuries. While they were doing this, he told his brother to go and check out the next vehicle.

[111] He heard yelling and screaming coming from the next vehicle (which was Ms. Bekkers' vehicle) and so he hurried over to it. His brother was on the passenger side of the vehicle (which was into the snow-bank) and he was screaming. He told his brother to go and try to find someone who had medical training. He could see that one child might be dead and that the other children were obviously injured.

[112] He saw a woman in the driver's seat of this vehicle, and she looked unconscious. She later woke up and became aware of his presence. Then she saw her children and started screaming. She got out of the driver's door.

[113] By this time, more people had come to this vehicle. The woman who had been driving went around the front of her car, trying to get to her children, but other persons stopped her. He had no further contact with the woman who had been driving. After a person came who said he was an army medic, Mr. Budd left that vehicle and went back to the south, looking for a doctor or someone having medical training (his brother had gone north). He went up to the drivers of the numerous vehicles that were stopped in the northbound lanes of travel as a result of the accident. He had no difficulty walking or jogging. He had not smelled any unusual odour in the vehicle that was in the snow bank.

[114] Mr. Budd said that he first gave a statement to the police about a year after the motor vehicle accident occurred, and agreed that his memory would have been better on the date of the accident.

[115] He agreed with counsel's suggestion that the place where the accident occurred could get colder, before other nearby areas, because the sun had gone down in the West, behind the tree covered bank on the west side of the highway.

[116] He said that they had been travelling at about 80 to 90 kph, as they got adjacent to the Cassidy Pub, and then slowed down to maybe 70 kph.

[117] Mr. Budd said that he had good winter boots on. When questioned further about the condition of the road surface, he said, in effect, that he could not say it was not slippery, only that he does not recall slipping himself. He ended up saying he was not sure if it was slippery or not.

[118] Mr. Budd said that he may not have walked into the northbound lanes of travel, when he went to the drivers' side of the vehicles that were backed up in traffic, looking for medical help.

[119] He repeated that the woman driver of the SUV stuck in the snow back looked unconscious, and then "came to" after which time she was concerned about her children.

Jaron Dubyna

[120] Jaron Dubyna was driving a red 2007 Toyota Tacoma pickup truck in a southerly direction, at the time of the accident. He was on his way to the Nanaimo Airport. The weather was clear, it was not snowing, and it was daylight. The road was wet, with snow banks along the sides. There was no snow on the road itself. He was driving in the fast lane at a speed of about 90 kph. Visibility was good. He believes that there were two vehicles up ahead of him, one of which was silver.

[121] After he crossed the Nanaimo River bridge, he saw a small SUV that was on the northbound side of the highway, come across the centre line, sliding sideways. He put on the brakes. He is sure that at least one of the two cars up ahead of him collided with that northbound vehicle. He swerved to his left into an open gap, so as to avoid the other vehicles ahead of him, and in doing so, his vehicle went across the centre line and into the northbound lanes. His vehicle ended up stopping in the snow bank on the shoulder of the northbound lanes.

[122] Just before his truck went into the snow bank, it was hit by an oncoming northbound vehicle. The passenger side of that northbound vehicle came into contact with the right rear corner (passenger side) of his truck. The impact was not severe and did not cause any serious damage to either vehicle and did not cause injury.

[123] After a few vehicles went past his truck travelling northbound, he drove his pickup truck out of the snow bank, across the northbound lanes and back across the southbound traffic lanes, and parked on the southbound shoulder, facing south. He got out of his vehicle, to go and see if anyone in other vehicles needed help.

[124] He walked around the accident scene for a few minutes. He does not recall whether the road surface was slippery or not. He supplied some blankets from his truck, at the request of someone who was helping the occupants of other vehicles. He waited for the police, and was at the accident scene for about two hours before leaving.

[125] In cross-examination, Mr. Dubyna said that he believed that the drivers of southbound vehicles were travelling at about 90 kph, which he thought was a safe speed. He said the road was wet, it was a beautiful day and there had been no ice on the road before he reached the place where the accident occurred.

[126] He testified that the northbound vehicle which came across the centre line surprised him, and it came across at about a 45 degree angle.

[127] Mr. Dubyna said that he only walked about 50 feet or so from his vehicle, and repeated that he could not say whether or not the road surface was slippery.

Douglas Priest

[128] Douglas Priest had been working in Duncan and was driving home from work to Nanaimo, at the time that the accident occurred. He was a driver of long experience, including winter driving. Just before the accident, the vehicle traffic was moving slower than normal, in both directions. He was driving his gold coloured Ford Explorer at about 60 to 70 kph, to fit the weather and road conditions and the flow of traffic. As he approached the Haslam Creek Bridge, he had been driving in the fast lane, but moved over into the slow lane to let a following vehicle pass him. After he crossed the Haslam Creek Bridge, he saw a red pickup truck which was travelling southbound, come across the centre line into his path. He swerved to the left, into the fast lane, so as to avoid a collision with the red pickup truck, but the passenger side of his vehicle came into contact with the rear corner of the pickup truck on the passenger's side. His vehicle was spun around and ended up in the northbound slow lane, facing south.

[129] This incident occurred approximately adjacent to the Cassidy Inn. He did not see anything that would explain why the red pickup truck had cut over across the centre line from the southbound lanes.

[130] He got out of his Explorer. He saw that the red pickup truck had stopped on the northbound side of the highway, facing south. He saw two vehicles in the southbound lanes that appeared to have been involved in an accident. He went first to the vehicle that was stopped on the roadway, and then to the vehicle that had gone off the road, into the snow bank on the shoulder outside the southbound lanes. He saw a person in the driver's seat and there were other occupants, but no one inside the vehicle was moving. He knew that these people required medical help. He walked to the north looking for someone with medical training, in the cars that had stopped as a result of the accident. He located a retired nurse, and then he went back to the vehicle in the snow bank. The driver was still in the driver's seat, and there was no movement in the car. Other people had surrounded the vehicle.

[131] He saw the driver get out of the vehicle, and he helped her through the snow. Someone passed a child out of the car, and he took the child in his arms and walked away with the driver and the child. The child was favouring her arm. The driver was upset and he tried to calm her down. She wanted to go back to the other children in the vehicle, but he kept her from doing that. She was close to hysterical.

[132] He waited with the woman and child until the paramedics got there, which seemed a long time. He smelled an odour of alcohol and perfume coming from the woman. He had been holding his arm around her shoulder to steady her, as there was no place to sit down. When the ambulance arrived, he took the woman and child to the ambulance and turned them over to the paramedics.

[133] When he got out of his vehicle, he noticed immediately that the road surface was slick and slippery. He slipped when he stepped out, and caught his balance on his vehicle. He walked in a shuffle movement, as one would walk on the ice in a hockey rink while wearing shoes.

[134] He left the scene of the motor vehicle accident at about 6:00 p.m. and drove away in his own vehicle. He did not encounter any difficulty in doing so.

[135] Mr. Priest testified that the road conditions had been variable as he drove from Duncan to where the accident occurred. He said that the road was mainly clear, as he passed by the Nanaimo Airport. He had stopped at a traffic light at either Timberland Road or at the Airport Road, before he crossed the Haslam Creek Bridge.

[136] Mr. Priest stated that, when he stepped out, he almost fell down. He said the road was slippery, either from snow, or ice. He agreed that, in his statement to Constable Armstrong on December 15, 2009, he told the police officer that the road was "a sheet of ice" when he stepped out of his vehicle, and that this had shocked him. He said that, after he had almost fallen down, he was very careful while walking. He was wearing dress shoes with rubber soles.

[137] In re-examination, Mr. Priest said that he first noticed how slippery it was, when he got out of his vehicle and was crossing around the front of it. He was uncertain whether his feet were on the travel lane of the roadway, at that time.

Edith Eaton

[138] Edith Eaton was an Officer with the Canadian Forces, stationed in Esquimalt, in December 2008. She and her daughter had driven from Victoria to Comox, intending to go on a ski trip, but there was too much snow to get up the road to Mt. Washington. She and her daughter were driving back to Esquimalt on the day that the accident occurred. They stopped to do some shopping in Nanaimo in the afternoon. They then headed out for Victoria.

[139] She drove carefully from Nanaimo out to Cassidy, because of the weather and road conditions. She believed that as it got darker, the temperature got colder and the road would get icier and slipperier.

[140] She did not see any part of the motor vehicle accident that had occurred just south of the Nanaimo River bridge, but had to stop in a traffic lineup, because of the accident. A man came to her car, asking for help. Since she had first aid training, she went with him. He took her to a vehicle which was lodged in a snow bank.

[141] When she walked from her car to the scene of the accident, the road surface was so slippery that she could hardly walk.

[142] She saw three children in the back seat of the vehicle, one child in the front seat, and a woman in the driver's seat leaning over into the back seat. The woman was hysterical. She asked the woman to get out, so that she and other persons wanting to help could get into the vehicle through the driver's door. The woman got out of the vehicle and another person or persons attended to her. Later, after the ambulance had arrived, she spoke to the woman again briefly. She did not smell any alcohol, on the woman.

[143] She did smell an odour in the vehicle that she believed smelled like alcohol.

[144] She did what she could to help the occupants of the damaged vehicles, until the paramedics arrived. She was at the accident scene from five to fifteen minutes. She did not give a statement to the police, before leaving. She was shocked and upset by the tragic consequences of the accident that she had observed.

[145] In cross-examination, Ms. Eaton said that it had been a sunny day, and that it was still light when she came upon the accident scene. She said that she gave a statement to the police about a month after the accident, by telephone, on January 23, 2009.

[146] She said that the road had been wet from melting snow, but that the roads changed, and got icy as she approached the accident scene. She said that she had just crossed the Nanaimo River bridge before she had to stop in the traffic line-up.

[147] She said that, when she got out of her vehicle, the road was very slippery, like a skating rink. She said that she couldn't see it until she got out of her vehicle, and that she almost fell down. She said there was no snow on the roadway, just ice.

[148] Ms. Eaton said that she was face to face with the woman who had been driving the vehicle lodged in the snow bank, and did not smell alcohol on her. She assumed that the accident had occurred very soon before she got there.

[149] In re-examination, Ms. Eaton said that she thought the woman driver was slimmer than what Ms. Bekkers appeared to be, on observing her at the trial.

Dan Brown

[150] Dan Brown is a paramedic of long experience. He and his partner were called out to go to the scene of an accident on December 22, 2008, at about 4:30 p.m. He was driving the ambulance. The road conditions were good, up to the north end of the Nanaimo River bridge. Just north of the bridge, they encountered snow in the southbound lanes of the highway, more in the slow lane.

[151] By the time he arrived at the accident scene, it was "full dark". He turned the ambulance around and parked facing north, and then got out. When his foot hit the ground, it was so slippery that he could hardly walk. It had taken him about 15 to 20 minutes to get to the accident scene.

[152] A woman came up to him, and she was screaming. Then a man came carrying a child in a car seat. The man passed the child in the car seat to him, in the ambulance.

[153] He was wearing good winter boots. When he stepped out, he slipped, and had to hold on to the ambulance to maintain his balance. He asked the man to carry the child in the car seat, to the rear of the ambulance. On assessing the child, it appeared that she had a fractured upper arm. He elected to treat the child first. The child's mother was hysterical. He told her to sit on the stretcher, and he strapped her in. She then quieted down and assisted him. Her arms were not restrained.

[154] He remained with the mother and child on the trip to the hospital, with his partner taking over the driving.

[155] He did not smell any odour of alcohol coming from the woman. She had been screaming into his face from a distance of about 18 inches.

[156] In cross-examination, Mr. Brown said that he did not walk very far after getting out of the ambulance, only from the driver's door around to the side or the back of the vehicle. He said that the road was like a sheet of ice, and he had to put his hand on the ambulance to prevent himself from falling. He said that the road was in that condition, from the south end of the Nanaimo River bridge to the place where the accident occurred.

[157] Mr. Brown agreed that the woman he had tended to, acted like a disturbed mother, worried about her child. He said that after he strapped her in, she calmed down, listened to him, and followed his directions. He said that he automatically looks for signs of alcohol consumption in such situations. He said he did not sense any impairment by alcohol or drugs. He thought the woman had a broken rib. She told him that it didn't matter, and that he should focus his attention on the child, Pyper. He said that the woman gave responsive, intelligent answers to his questions, and that she did not look tired or exhausted.

[158] In re-examination, Mr. Brown said he suspected that the woman was in shock.

Constable Tanaska Armstrong

[159] Constable Tanaska Armstrong was at the Terminal Park Mall in Nanaimo when she received a radio dispatch at 4:22 p.m., to go to the scene of the accident. She drove there and arrived at 4:37 p.m. She got there about a minute after two other police officers had arrived. The sun was just going down over the hillside, and it was just about dark when she got there. The situation was chaotic. There were damaged vehicles and people all over the place.

[160] Within minutes of arriving, she began taking photographs, at first without needing any artificial light. She said that the road surface was slippery, but that she did not have any difficulty walking on it.

[161] She described the photographs that she took of the accident scene and the damaged vehicles. She said that photograph #10 of Exhibit 2 showed the car that had been driven by Ryan Doucet. That vehicle was parked at the edge of the slow lane for southbound traffic, at a point further south than the other vehicles that had been involved in the accident. The Doucet car was not damaged.

[162] In cross-examination, Constable Armstrong said that it was not yet dusk when she received the radio dispatch at 4:22 p.m. She described the road at the scene of the accident as being quite slippery.

[163] She described photograph #4 of Exhibit 2 as having been taken from a point just north of the Chevrolet Monte Carlo and the Colorado pickup truck shown in the photograph. She agreed that there appeared to be some snow on the slow lane for southbound traffic, at that location. She said that the deceased children were still in the black SUV wedged into the snow bank, at the time she took photograph #1 of Exhibit 2.

[164] Constable Armstrong repeated what she had said about Ryan Doucet's car, and added that she did not know whether the car was equipped with snow tires. She said she stayed at the accident scene until approximately 10:00 p.m., and that eventually they opened one lane for southbound traffic.

[165] She said that it was not quite dark when she arrived at the scene of the accident. She testified that the road was slippery when she got out of her police car and walked on it.

[166] Constable Armstrong said that the highway had been changed since the accident, and that a concrete dividing wall had been installed at the centre line of the highway.

[167] In re-examination, Constable Armstrong said that she was wearing boots designed for summer use.

Constable Darren Maizis

[168] Constable Darren Maizis was in downtown Nanaimo when he was dispatched to go to the scene of the accident. He arrived there at approximately 4:30 p.m. He drove as fast and as safely as he could to get there, and did not lose control of his vehicle at any time.

[169] The roads looked wet at the scene of the accident. He could walk around without trouble when he first got there. The temperature dropped, and the road conditions did change considerably while he was there. At some point, one had to be very cautious while walking on the roadway.

[170] He looked into the black SUV that was lodged in the snow bank. It was then covered over with a tarp. He smelled a very strong odour of beer inside the vehicle. The strongest smell of liquor was coming from the rear area of the vehicle. He found a paper cup in the front seat area of the vehicle which was empty, but which he thought smelled slightly of alcohol. The two deceased children were in the vehicle at that time.

[171] He obtained statements from Steven Budd, Jaron Dubyna and Tana Liew, at the accident scene. The scene was chaotic and emotional. People were in shock, crying and upset. Ms. Liew was very calm, collected and articulate when he spoke to her.

[172] In cross-examination, Constable Maizis said that both paper cups he found in the vehicle were on the floor of the front passenger seat area. He said the interior was all in disarray, and that the air bags had inflated. He said it was 8:00 p.m. or later when the two boys were removed from the black SUV.

[173] He said that the alcohol smell in the vehicle seemed to be coming from the rear area. He repeated that one of the two paper cups he had found on the floor of the front passenger seat area smelled like it had contained liquor.

[174] Constable Maizis said that the two paper cups did not have the same odour, but acknowledged that in his statement to the Crown he had said that the suspicious cup "had no odour contrary to the first cup." He then said that his statement to Crown Counsel was true.

[175] Constable Maizis said that he had not made any note about Ms. Liew's demeanor, nor did he mention it in his statement of evidence to Crown Counsel. He said that Ms. Liew was a stranger to him and that he spent only a few minutes in her company that evening.

Constable Michael Halskov

[176] Constable Michael Halskov was a member of the R.C.M.P. Criminal Crash Investigation Team in December 2008 (and had been for over three years). He was at his home in Chemainus when he received a call at about 5:30 p.m. on December 22, 2008, to go to the scene of the accident. He drove there, and arrived about 6:15 p.m. Just north of Ladysmith he encountered a slippery section of highway. He was driving at approximately 80 kph and when he accelerated to pass a car ahead of him, his vehicle skidded and he had to make a correction. After that, he drove more carefully.

[177] The highway was fairly busy with traffic, it being a Monday evening and close to Christmas. The highway was closed at the accident scene when he arrived. He parked in one of the northbound lanes. When he got out, the road was slippery. He could "skate" on one foot, if he pushed with the other foot. He made a note in his notebook that the roads were very icy.

[178] Corporal Jaret Irving had already arrived at the accident scene, and he was briefed by Corporal Irving. He got a paper cup from the hood of the black SUV in the snow bank. It was a large McDonald's paper cup, which had dark liquid droplets in the bottom. He sniffed the cup and believes that the droplets were liquor.

[179] He smelled a distinct odour of liquor inside the vehicle. He did not see where it was coming from. There were items strewn about the car. The two deceased children were still in the car.

[180] He (and the other officers) decided not to make a demand for a blood sample from Ms. Bekkers, due to her condition. But later, on December 30, 2008, he seized Ms. Bekkers' blood samples from the hospital pursuant to a search warrant, and then sent the samples to the R.C.M.P. crime lab for analysis. He also seized the hospital records kept in respect of Ms. Bekkers.

[181] He inquired about having a forensic analysis done of the McDonald's cup, but was informed that such an analysis would probably not produce usable evidence, and so it was not done.

[182] He took a statement from Ryan Doucet on January 8, 2009, and identified an audio recording and a transcript of the recording as being accurate (marked as "C" for identification). Mr. Doucet seemed fine and forthright when he made his statement. It was apparent that Mr. Doucet was pretty shook up from what he had experienced at the accident scene.

[183] In cross-examination, Constable Halskov said he had not encountered any snow or black ice before slipping while passing another vehicle, just north of Ladysmith. He said he would not have accelerated so aggressively to pass another vehicle, if he had known that the road was icy. He said the roads looked wet. He said he was able to correct the skid without difficulty, but drove more cautiously after that to the accident scene. He said it was very slippery at the accident scene.

[184] Constable Halskov said that the southbound lanes of the highway at the place where the accident occurred would be in shade before the northbound lanes, because of the hill on the west side. He had heard of other motor vehicle accidents having occurred in that area.

[185] In re-examination, Constable Halskov said that the other accidents that he was aware of that had occurred in that area did not involve winter driving conditions. He briefly described two other accidents, but said that he had not been involved in the investigations.

Corporal Jaret Irving

[186] Corporal Jaret Irving was qualified to give expert opinion evidence in the field of traffic accident reconstruction, including the determination of points of impact, critical curve velocity, co-efficient of friction and vehicle speed. He has been a member of the R.C.M.P. for 14 years, and has spent all of that time living and working on Vancouver Island. He began training in this field of expertise in 2004, and attained Level 3. In 2008, he attained Level 4, which is the highest level recognized in the R.C.M.P. for collision reconstruction.

[187] Corporal Irving received a call at his home in Duncan at about 4:30 p.m., requesting that he attend at the accident scene. He set out at about 4:45 p.m., and arrived at the accident scene at about 5:45 p.m. Near Ladysmith, while travelling at 100 kph on a curve in the highway, the rear wheels of his vehicle lost traction and the back end slipped a little. He was easily able to regain control. At that point, he put the vehicle in 4 wheel drive and slowed down. He believes that he hit a patch of black ice. The presence of black ice on the road surface

did not surprise him.

[188] When he arrived at the accident scene, he was briefed by the other police officers present. He took photographs. He conducted tests and determined the co-efficient of friction of the road surface in the relevant area to be .26 (as compared with .70 for a dry asphalt road surface). The road was icy at the scene of the accident. He conducted the co-efficient of friction testing at the centre areas of the two southbound lanes. He located the point of impact between Ms. Bekkers' vehicle and the Nissan Pathfinder, which he determined to be 1.1 meters west of the centre line, just south of the intersection of Beck Road.

[189] He could not calculate the speed of Ms. Bekkers' vehicle when it crossed over the centre line, because there were no tire marks from her vehicle leading up to the point of impact. If the tires of her vehicle were slipping and sliding on ice as it came across the highway, then it is unlikely that tire marks would be visible. Because of the severity of the damage to Ms. Bekkers' vehicle and the Nissan Pathfinder, Corporal Irving estimates that the speed of Ms. Bekkers' vehicle was 80 to 100 kph.

[190] Later, Corporal Irving calculated the critical curve speed of the curve on which Ms. Bekkers lost control of her vehicle, from data that he had previously collected. The curve is fairly gentle, having a radius of 497 meters. The super elevation in the northbound lanes at that location was 6.4% (sloping downward towards the centre). From south to north the road has a very slight uphill grade of 1.1%. In good driving conditions, where the pavement was dry and having a co-efficient of friction of .70, the critical curve speed would be 200 to 208 kph. That would be the speed at which the centrifugal force acting on a vehicle rounding the curve would cause it to begin sliding to the outside of the curve. If the co-efficient of friction of the road surface was .26, then the critical curve speed would be 127 kph. In calculating those critical curve speeds, it is assumed that a driver of a vehicle rounding that curve would maintain a consistent speed and direction. A change in speed or direction could cause loss of control at a lower speed than the calculated critical curve speeds.

[191] If the road surface was wet (but not icy), then the co-efficient of friction would be from .5 to .6.

[192] Corporal Irving was unable to determine the point of impact between Ms. Bekkers' vehicle and the Chevrolet Monte Carlo being driving by Kenneth Wilson. He marked the approximate location of the point of impact between Ms. Bekkers' vehicle and the Nissan Pathfinder being driven by Jone Yang, on the two aerial photographs numbered 15 and 16, in Exhibit 5. The curve in question begins just north of Spruston Road to the south and ends at about the intersection of Beck Road.

[193] The photographs attached to Corporal Irving's report (Exhibit 4) demonstrate the final resting positions of Ms. Bekkers' vehicle, Ms. Yang's Nissan Pathfinder, Mr. Wilson's Chevrolet Monte Carlo and Steven Budd's Chevrolet Colorado pickup truck, and the photographs also show the damage that was sustained by each of those vehicles. The diagram prepared by Corporal Irving (the last page of his report) shows the approximate

point of impact between Ms. Bekkers' vehicle and Ms. Yang's Nissan Pathfinder, and the final resting positions of the four vehicles that were involved in collisions in the southbound lanes.

[194] Corporal Irving gave his opinion as to the sequence of the collisions and as to the parts of each vehicle which came into contact with another vehicle. In his opinion, Ms. Bekkers' northbound vehicle crossed the centre line, rotating in a counter-clockwise motion, and its front end hit the passenger side of Mr. Wilson's southbound Monte Carlo. That collision caused Ms. Bekkers' vehicle to rotate 360 degrees and it was then hit on the passenger side by the front of Ms. Yang's southbound Nissan Pathfinder. Steven Budd's southbound Colorado pickup then struck the rear end of the Nissan Pathfinder in a more minor collision. After regaining control Steven Budd drove the Colorado pickup further south, and parked it on the shoulder, up ahead of the Monte Carlo.

[195] From later examination of the vehicles, Corporal Irving was able to obtain information from the data recorders of two vehicles which enabled him to give estimates of the speeds of those vehicles, at and near the time of the collisions. From his interpretation of the data, Corporal Irving estimated that Kenneth Wilson's Chevrolet Monte Carlo was travelling at 91 kph for a few seconds leading up to the collision, and was travelling at 88 kph one second before impact with Ms. Bekkers' vehicle. Based on his interpretation of the information in the data recorder of the 2008 Chevrolet Colorado pickup truck, Corporal Irving estimated that Steven Budd was driving the Colorado pickup at a speed of 86 kph, five seconds before it collided with the rear end of the Nissan Pathfinder; and that it was travelling at 43 kph, one second before impacting the rear end of the Pathfinder.

[196] At the end of his written report dated May 13, 2009, Corporal Irving stated:

The only apparent reasons for the initial loss of control of vehicle one [Ms. Bekkers' vehicle] was the extremely slippery roadway and the vehicle's speed and driver's actions in relation to the road conditions.

[197] At trial, Corporal Irving expressed the further opinion that, because Ms. Bekkers' vehicle did not go off the roadway on the right side (i.e., the Cassidy Inn side), her loss of control was not caused only by the speed at which she was travelling. I understood him to say that, assuming that Ms. Bekkers' was travelling at 100 to 110 kph, she should have been able to travel through that curve without losing control, provided that she maintained a consistent speed and did not make any sharp steering motions.

[198] Before the trial, Corporal Irving measured the approximate distances between several points, and his measurements were the following:

a) From Spitfire Road to the point of impact: 1.34 kilometres;

b) From Spitfire Road to the Haslam Creek Bridge: 960 metres; and

c) From the Haslam Creek Bridge to the point of impact: 380 metres.

[199] Corporal Irving also calculated the time required to drive between these several points. When driving at a constant speed of 80 kph, it takes 60.3 seconds to drive from Spitfire Road to the point of impact, 43.2 seconds to drive from Spitfire Road to the Haslam Creek Bridge, and 17.1 seconds to drive from the Haslam Creek Bridge to the point of impact.

[200] Corporal Irving stated that, if the driving speed is 110 kph, then the driving times for those same distances are:

a) 43.8 seconds from Spitfire Road to the point of impact;

b) 31.4 seconds from Spitfire Road to the Haslam Creek Bridge; and

c) 12.43 seconds from the Haslam Creek Bridge to the point of impact.

[201] Corporal Irving also testified that the distance from McDonald's Restaurant in Duncan to the point of impact is 37.5 kilometres, and if one drives at the posted highway speed limits, it takes 24 minutes and 12 seconds to drive that distance.

[202] In cross-examination, Corporal Irving agreed that the road surface in the area where the accident occurred was very slippery and icy, at the time he arrived there at about 5:45 p.m.

[203] Corporal Irving said that he found no evidence to indicate that a vehicle other than Ms. Bekkers' vehicle had hit the Chevrolet Monte Carlo.

[204] He said that he conducted testing to determine the co-efficient of friction, on both the southbound lanes and the northbound lanes.

[205] Corporal Irving said that he was sure that Ms. Bekkers' vehicle was a front wheel drive vehicle without any four wheel drive feature. When counsel suggested that, if the front wheels of Ms. Bekkers' vehicle had slipped on black ice, and if driving power to the rear wheels then kicked in, but the rear wheels were not on black ice, that would send the vehicle across the centre line, Corporal Irving gave the opinion that such a scenario would not be possible.

[206] Corporal Irving stated that he could not locate the point of impact between Ms. Bekkers' vehicle and the Chevrolet Monte Carlo and he could not identify the path taken by Ms. Bekkers' vehicle when it crossed the centre line. He said that there was black ice on all four lanes of the highway at the accident scene area, when he arrived there.

[207] In re-examination, Corporal Irving said that he had no special knowledge about the various factors that cause ice to form on a road surface. He repeated that he saw no evidence that Ms. Bekkers' vehicle had any four wheel drive capability.

[208] On re-cross-examination, Corporal Irving stated again that only the front wheels on Ms. Bekkers' vehicle were powered by the engine. He said that motor vehicles equipped with an All Wheel Drive feature would always have some power being transmitted to all wheels of the vehicle.

Robert Heaslip

[209] Robert Heaslip has been the road superintendent for Emcon for six years and he was road foreman for two years before that. Emcon is the contractor responsible for road maintenance for Highway 1 on Vancouver Island. He has 33 years of experience in road maintenance work.

[210] He started work on December 22, 2008 at 7 a.m. He left his home on Hammond Bay Road at 6:30 a.m. and drove to the Emcon office which is near Duke Point. He drove a Chevrolet Silverado half-ton pickup truck with two wheel drive. There had been heavy snow the previous day. He believed a snow fall of 50 centimetres had been recorded at the Nanaimo airport. The Emcon drivers were plowing and sanding the highways, in accordance with established procedures. It was lightly snowing that morning as he drove to work. He was driving at 65 to 70 kph on the highway, and had no problems driving. He explained the system followed by Emcon to combat snow and ice conditions on the highways.

[211] On the afternoon of December 22, 2008, he received a call that one of Emcon's trucks had broken down on the highway south of Ladysmith. He left the office at Duke Point at about 3:45 p.m., and drove to the location where the truck was broke down, arriving there at 4:15 p.m. Shortly before 4:00 p.m., he travelled south through the area adjacent to the Cassidy Hotel. The road was bare and wet in all four lanes of travel, when he passed through that area in the southbound lanes. He was driving at 60 to 70 kph through the Cassidy area where the speed limit was 80 kph. There was heavy traffic in both directions and "there was a lot of passing going on". He did not see any other drivers having problems.

[212] While he was dealing with the truck breakdown south of Ladysmith, he received a call informing him that there had been a motor vehicle accident at Cassidy. He drove to Cassidy by a roundabout route, and did not experience any driving problems while doing so. He arrived at the accident scene at about 7:00 p.m. He consulted with the police officers about the road closure and what should be done to combat the icy conditions.

[213] In cross-examination, Mr. Heaslip agreed that the highway in the area where the accident occurred was in the shadow of the hillside at the time of the accident. He said that when the sun goes behind the hill, the temperature can get one to two degrees Celsius colder in the shaded area, before other open unshaded areas get that cold. He said the weather was nice and clear at around 4:00 p.m., and that he drove through the area at 3:55 to 4:00 p.m. He said that a truck had deposited brine on the southbound lanes at about 3:00 p.m. that afternoon.

[214] He said that moisture on the roadway could freeze very quickly when the road surface temperature and the air temperature are below freezing. He said that he measured the road surface temperature as being from zero degrees Celsius to minus one degree Celsius at 4:00 p.m. (using the equipment on his vehicle). (It was unclear to me whether he checked the temperature of the road surface at the Emcon office area, or at some other location on the highway.)

[215] Mr. Heaslip said that the outside air temperature at his Duke Point office on December 22, 2008 was zero degrees Celsius at 9:00 a.m., two degrees Celsius at 3:00 p.m., one degree Celsius at 4:00 p.m. and minus two degrees Celsius at 5:00 p.m. He acknowledged that the office near Duke Point was fairly close to the salt water, and so the temperatures could have been colder at the place where the accident occurred.

Ronald Pon

[216] Ronald Pon is a highly qualified forensic toxicologist. He gave expert opinion evidence as to the concentration of alcohol and drugs which he found in the blood of Ms. Bekkers and as to the effects of those concentrations of alcohol and drugs on the human body (and their potential effects on a person's ability to drive a motor vehicle).

[217] Mr. Pon gave the opinion that, at 4:20 p.m. on December 22, 2008, the concentration of alcohol in Ms. Bekkers' blood was from 59 to 76 milligrams of alcohol per 100 millilitres of blood. This opinion was based on the following assumptions:

a) His analysis of Ms. Bekkers' blood alcohol concentration at 6:00 p.m. on December 22, 2008, as being 42 milligrams of alcohol per 100 millilitres of blood, was accurate.

b) Ms. Bekkers' blood alcohol concentration was declining at 6:00 p.m. (because she did not ingest any alcohol from the time of the accident at 4:20 p.m., to the time that her blood sample was taken at the hospital at 6:00 p.m.).

c) Ms. Bekkers' blood alcohol concentration was declining at 4:20 p.m. (because she had not ingested any alcohol in the 30 minutes before 4:20 p.m.).

d) The rate at which Ms. Bekkers' body eliminates alcohol from her system is between 10 and 20 milligrams of alcohol per hour (because 90% of people eliminate alcohol within that range).

[218] Mr. Pon expressed the opinion that, at a blood alcohol concentration of 100 milligrams of alcohol per 100 millilitres of blood, all persons are impaired to some degree in their ability to drive a motor vehicle. But he gave the further opinion that the ability of some people to drive a motor vehicle can be impaired at a blood alcohol concentration as low as 50 milligrams of alcohol per 100 millilitres of blood.

[219] Based on hypothetical assumptions contained in a question by Crown counsel, Mr. Pon gave these further opinions relating to Ms. Bekkers' blood alcohol concentration earlier in the day on December 22, 2008:

a) At 12:30 p.m., her blood alcohol concentration was from 93 to 148 milligrams of alcohol per 100 millilitres of blood; and

b) At 1:30 p.m., her blood alcohol concentration was between 83 and 128 milligrams of alcohol per 100 millilitres of blood.

[220] The facts that Crown counsel asked Mr. Pon to assume as the basis for these opinions were:

a) that Ms. Bekkers weighed between 110 and 141 pounds;

b) that she stopped drinking at 4:00 a.m. on December 22;

c) that she had a sip of 5%beer (about 1 ounce) at 11:30 a.m. on December 22;

d) that she had another sip of 5% beer (about 1 ounce) at 3:45 p.m.; and

e) that her blood alcohol concentration at 6:00 p.m. on December 22 was 42 milligrams of alcohol per 100 millilitres of blood.

[221] Mr. Pon said that Ms. Bekkers' body weight was of no consequence.

[222] Mr. Pon found that venlafaxine was present in Ms. Bekkers' blood in a concentration of 509 nanograms per millilitre of blood; and that it was present in her blood serum in a concentration of 392 nanograms per millilitre of serum. He said that this compound was an anti-depressant used in the treatment of various disorders including mental depression and anxiety. He said that the trade name for this therapeutic drug is Effexor. (It was admitted that Ms. Bekkers had not ingested any Effexor between 4:20 p.m. and 6:00 p.m. on December 22, 2008). Mr. Pon stated that normal therapeutic use of Effexor would be 225 mgm per day, and would result in concentrations of from 200 to 400 nanograms of venlafaxine per millilitre of blood.

[223] Mr. Pon stated that this kind of anti-depressant does not have a depressive effect on the central nervous system, unless taken in "excessive doses." He said that if an excessive amount is ingested, common side effects would be sedation and drowsiness. I understood Mr. Pon to say that the concentration of 509 nanograms per millilitre was considerably higher than the 200 to 400 nanograms to be expected from normal therapeutic use. But he did not expressly state that such a concentration reflected that an "excessive dose" had been taken.

[224] Mr. Pon did not find any cocaine present in Ms. Bekkers' blood. He did detect the presence of three metabolites of cocaine. Two of these, methylecgonine and benzoylecgonine, have no pharmacological effects on a person and cannot affect a person's ability to drive a motor vehicle. But Mr. Pon expressed the opinion that the concentration of benzoylecgonine, 873 nanograms per millilitre, was a high concentration which indicated that Ms. Bekkers had

been using cocaine repeatedly at a previous time, which he described as "bingeing" or "binge use".

[225] Mr. Pon was unable to estimate when Ms. Bekkers had last ingested cocaine, beyond saying that (my interpretation) she may have ingested a very large amount of cocaine in the 24 to 48 hours preceding the accident.

[226] Mr. Pon found that a third metabolite of cocaine, cocaethylene, was present in Ms. Bekkers' blood in a concentration of 30 nanograms of cocaethylene per millilitre of blood. He said that this metabolite is a product of the reaction between alcohol and cocaine when they are both present in the blood. Mr. Pon stated that cocaethylene, if present in the blood in sufficient concentration, has a potent stimulating effect similar to that of cocaine. However, Mr. Pon said that the concentration of cocaethylene in Ms. Bekkers' blood (i.e., less than 30 nanograms per millilitre of blood) was such a small amount that he was unable to say that it would have any impairing effect on her ability to drive a motor vehicle. I understood him to say only, that it could have had (or contributed to) such an effect.

[227] Through the evidence of Mr. Pon, Crown counsel presented a theory which, if accepted, could lead indirectly to the conclusion that Ms. Bekkers' ability to operate a motor vehicle was impaired by alcohol or a drug (or a combination of these) at the time of the accident. In substance, Mr. Pon expressed the opinion that Ms. Bekkers' ability to drive a motor vehicle could have been impaired, and she could have fallen asleep at the wheel if the following facts existed:

a) If Ms. Bekkers ingested a large amount of cocaine in a short period of time, in the period from 24 to 48 hours before the accident;

b) If, after stopping her use of cocaine, Ms. Bekkers entered into a state of dysphoria, in which she experienced feelings of anxiety, suspiciousness and rapid flight of ideas;

c) If, following the state of dysphoria, Ms. Bekkers entered into a "crash" phase, in which she became extremely fatigued and drowsy; and

d) If Ms. Bekkers had a moderate amount of alcohol in her blood when she was in the "crash" phase.

[228] In cross-examination, Mr. Pon did not resile from his opinions to any appreciable extent. He did make some concessions.

[229] Mr. Pon repeated that Effexor by itself has no depressant effect on a person's central nervous system. He concluded that, although the amount of Effexor in Ms. Bekkers' blood, in combination with alcohol, might have had some impairing effect on her ability to drive, he could not say that it did have any such effect. He was unable to give the source of the information he relied on in giving his opinion that the normal daily dosage for Effexor was 225 mgm. except to say (or imply) that he had seen it in "the literature" in the field.

[230] Mr. Pon agreed that, if Ms. Bekkers had ingested cocaine and alcohol on Saturday night (December 20th), this could account for the presence of cocaethylene in her blood. But he said, in substance, that the amount of cocaethylene was so small that it would have had little or no effect on her ability to drive.

[231] Mr. Pon acknowledged that, although some persons can be impaired in their ability to drive a motor vehicle at a blood alcohol concentration less than 100 mgm. of alcohol in 100 ml. of blood, such persons could only be identified by individual testing.

[232] Mr. Pon agreed that a person who was in the "tweaking" (dysphoric) phase or crash phase from cocaine withdrawal, might exhibit symptoms which could be detected by other persons.

[233] Mr. Pon said, in effect, that if a person in the withdrawal stage from cocaine drank coffee or coke, the caffeine in such liquids could possibly act as a stimulant to offset the tiredness that the person would likely be feeling.

[234] Mr. Pon agreed that some people may eliminate alcohol from their system, slower than 10 mgm. per hour, or faster than 20 mgm. per hour, but stated that 90 percent of the population eliminate alcohol in the range of 10 to 20 mgm per hour. There followed some confusing questions and answers about what the effects on his opinion would be, if Ms. Bekkers eliminated alcohol at a slower rate, or a faster rate, than the 90 percent majority.

[235] Mr. Pon said that if a man and a woman of the same body weight each ingested the same amount of alcohol, the woman would likely reach a higher blood alcohol concentration than the man would. But he said that both men and women eliminate alcohol from their bodies at the same rate.

Defence witnesses

Clare Suzanne Bekkers

[236] The accused Clare Suzanne Bekkers testified in her own defence. She is now 38 years of age. In December 2008 she was living with her husband and four children at a residence in the Extension area of Nanaimo. She was working part-time for DHL Courier Service. She finished work at either 3:30 a.m. or 4:30 a.m. on the morning of Saturday, December 20, 2008, went home and slept until 10:30 or 11:00 a.m.

[237] She got up, got herself and her four children ready for a planned trip to Victoria, and then drove with them from their home in Extension to Victoria. They arrived in Victoria in the early afternoon. There was snow on the ground when she left home, but she had no trouble driving to Victoria.

[238] She drove to the home of her husband's parents, Joseph and Judith Bekkers, and left Lukas and Cooper there, to visit with their grandparents. Then she drove to the home of her parents, who lived in the Oak Bay area which took 15 or 20 minutes. She, Lunden and Pyper stayed overnight at her parents' place as did the girl Chloe, who was the daughter of Ms. Bekkers' friend, Holly Mecheder. Lunden and Cloe were good friends. Ms. Mecheder lived in Langford.

[239] She had been taking the drug Effexor, in dosages prescribed by her doctor, for depression. She had been taking this anti-depressant each day since 2006, after Cooper was born. It did not affect her ability to drive. She had been using cocaine on a frequency of once every few months. She drank alcohol socially. Alcohol and drugs "were never a big part" of her life. She snorted cocaine at a stag party in Victoria in 2008, and again during a Horne Lake camping trip in the summer of 2008. She likely consumed cocaine one other time before December 20, 2008.

[240] On the night of Saturday, December 20, at her parents' home, she ingested $80.00 worth of cocaine by snorting it secretly in her room in the basement. Before that she probably had a glass of wine at dinner. She went to bed at about 1:00 a.m. Sunday morning and got up at around 10 or 10:30 a.m. In the early afternoon she took Pyper with her and drove to the home of Carolyn Daniels' mother, which was about a 20 minute drive, out the Pat Bay Highway towards Swartz Bay. She and Ms. Daniels were long time friends, and she and Pyper were going to stay overnight there to visit with Ms. Daniels and her children. She does not recall Ms. Daniels telling her not to bring any cocaine with her. She did not ask Ms. Daniels if she (Ms. Daniels) had any cocaine. She likely told Ms. Daniels that she had used cocaine the previous night.

[241] She and Ms. Daniels drove to a liquor store in Ms. Bekkers' vehicle. Ms. Daniels went in and bought a bottle of spiced rum and 12 or 15 cans of Kokanee beer. She waited in the car. When Ms. Daniels returned they drove back to the home of Ms. Daniels' mother. The time was about 3:30 or 4:00 p.m.

[242] At dinner, she and Ms. Daniels drank some of the liquor. After dinner they continued visiting and drinking. She had a long conversation with Sherry Harrison, her then sister-in-law, who lived in Nanaimo, using Skype communication, when Ms. Daniels was present. She is not sure whether she did or did not ask Sherry if she (Sherry) had any cocaine, but she had no reason to do so.

[243] She and Ms. Daniels each drank about one-half the bottle of rum. She drank some beer, but does not know how many. Ms. Daniels did not drink any beer, but may have drunk some coolers that were already at her mother's place.

[244] She left Ms. Daniels' room at sometime "after 1:00 a.m.", went to bed, and went to sleep. She did not drink anything more, before going to bed.

[245] She got up at about 10:30 a.m. on the morning of Monday, December 22. She likely took her daily dosage of Effexor. She did not drink any alcohol after getting up. She does not recall feeling any effects of the alcohol she had drank the night before. She had no concerns about her ability to drive to Nanaimo, which she planned to do. Her ability to drive a motor vehicle was not impaired by alcohol or cocaine.

[246] She did not tell Ms. Daniels what time she went to bed, or that she had taken a drink when she woke up.

[247] She and Pyper left Ms. Daniels' mother's place at about 11:30 a.m. It had snowed overnight, but she does not recall there being a lot of snow. She does not recall Ms. Daniels suggesting to her that she should stay in Victoria for another night, because of the snow conditions. She did not take any of the remaining beer with her, and she did not know that Ms. Daniels had put beer in the back storage area of her vehicle.

[248] She drove to her parents' place and got there by 12:00 or 12:30 p.m. She stayed there 20 to 30 minutes and then took Pyper, Lunden and Chloe and drove to the home of Mr. and Mrs. Bekkers, where Lukas and Cooper had been staying. She was there for possibly an hour. Chloe needed to get home but her vehicle was not large enough and only had five seatbelts. Because of this, Mr. and Mrs. Bekkers took some of the children with them (the three girls) in their vehicle and she took Lukas and Cooper with her. They then drove to Holly Mecheder's place in Langford. Mr. and Mrs. Bekkers dropped the three girls off. Chloe went home, and Lunden and Pyper got into their mother's vehicle. Mr. and Mrs. Bekkers were there only for a few minutes, and then left. She talked with Holly outside her place for a time, and then she got back into her vehicle, and drove off with her four children, for Nanaimo.

[249] She had not experienced any difficulty driving around the Victoria and Langford area. Lukas was in the front passenger seat. Cooper was in the back seat, behind Lukas. Pyper was in the back seat behind her mother and Lunden was in the middle of the back seat.

[250] She drove from Langford to Ladysmith, at speeds she believed were normal, without any difficulties and without encountering ice on the road. She stopped at Ladysmith, and went to the McDonald's Restaurant drive-thru, to get some food for Lunden, Pyper and herself. She got a hamburger, chips and a coke for herself, but shared the food with Lukas. They ate as they drove. She did not drink any beer at any time that day in Victoria, or during the trip from Victoria.

[251] She had no problems driving after leaving Ladysmith. She does not recall her speed or any interaction with other vehicles, in the few minutes before the accident occurred. After she crossed the Haslam Creek Bridge, she was driving in the slow lane. She had been planning to turn right a short distance past the Nanaimo River bridge, to drive to their home in the Cinnabar Valley area, by way of White Rapids Road. But she thought that the roads on that route might not be plowed, so she decided not to take it. She then decided to move over into the fast lane, because it seemed to her that it was clearer and safer than the slow lane.

[252] Just before she got to the Cassidy Inn, she steered to her left, to change lanes. But her vehicle just kept going, she couldn't keep it in the fast lane, and it slid straight across the road. It felt like she was flying. She deliberately did not put on her brakes, and she had taken her foot off the gas pedal.

[253] She does not recall colliding with any vehicle. The next thing she remembers is hearing her daughter cry, and realizing that they had been in an accident. The air bags of her vehicle had inflated, but she had no recollection of it. There were people around. She got out, and wanted to get Pyper out of the car. Someone else took Pyper out, in her car seat. She went with a man who carried Pyper to the ambulance. She got into the ambulance. She asked the ambulance driver about her other children, and was told that Lunden was hurt, but her sons were dead. She basically "blanked out" after that.

[254] She does not recall getting to the Nanaimo Hospital, and remembers little or nothing about being there. She had suffered a punctured lung, and was treated for it, but she does not know how long she was in hospital. Her next clear recollection is visiting Lunden in hospital in Vancouver, with her father.

[255] She does not recall seeing or talking to Carolyn Daniels at the hospital in Nanaimo. But she believes that she would not have told Ms. Daniels that she had stopped at McDonalds in Duncan, or that she had a sip of beer while stopped there, because she did not do either of those things.

[256] Since the accident, she has been feeling depressed and anxious. At the time of the accident, she weighed about 140 pounds. She now weighs about 175 pounds. She has not weighed 110 pounds since she was young.

[257] On cross-examination, Crown Counsel challenged Ms. Bekkers' on several parts of her evidence.

[258] Counsel first suggested to Ms. Bekkers that there were a considerable number of details about incidents that occurred that weekend and events leading up to the accident that she said she could not remember, including road, weather and traffic conditions, and her speed. Ms. Bekkers admitted this was true. She said she had no health condition that affected her memory. She denied that her memory was affected by the alcohol she had consumed on Saturday night and into early Sunday morning. She denied she had a drinking problem or a cocaine problem. She admitted that, in the past, she had been unable to remember events that occurred while she was intoxicated, because she had "blacked out" from drinking. She did not think the Effexor she was taking for depression, affected her memory.

[259] She admitted that she developed a drinking problem, after the accident.

[260] She was questioned about the cocaine and alcohol she had ingested on Saturday and Sunday (December 20, and 21). She could not say what time she went to bed early Sunday morning, only that it was "after 1:00 a.m." She denied drinking any alcohol after getting up on Monday morning. She agreed that she felt "hung-over" when she got up, but said that her hang-over faded, after she got moving. She said that she would never drive with her children in the car, if she was feeling drunk.

[261] She said her depression had started after Cooper was born. She said she took the dosage of Effexor that her doctor prescribed, she was taking four pills a day, and she thought the total dosage was around 200 milligrams per day. She believes she took her regular dosage, on December 20, 21, and 22. She said she did not know what effects could be caused by mixing Effexor and alcohol, or Effexor and cocaine, or all three of them. She said she had taken all three of these things on a few other occasions. She said she would not drive after taking those three substances, until after she had slept.

[262] She denied that she and her husband had separated, but admitted that she stayed with a woman friend of hers, from time to time. She denied telling that woman that she had a beer on the day of the accident.

[263] She was questioned in detail about her cocaine use. She admitted that she and three other persons had previously shared $200 worth of cocaine, but said that she had never ingested $80 worth of cocaine by herself, before December 20, 2008.

[264] She confirmed that she could not recall her speeds, or her interaction with other vehicles, during the trip from Langford to the place where the accident occurred. She also did not know what her speed was, when she lost control of her vehicle and said she cannot remember whether she signalled her intent to change lanes, or not.

[265] Ms. Bekkers was asked why she thought the fast lane was safer to travel in, and she said that she could see snow at the right side of the slow lane. She said she was not really worried about driving in the slow lane, only that it seemed to her that it would be safer in the fast lane.

[266] She said that, after leaving the restaurant in Ladysmith, she was eating while driving, but passed her hamburger to Lukas before they got through Ladysmith. She said she continued to drink her coke after that, but did not eat any more French fries, and said she did not believe that drinking from the coke container interfered with her driving. The conduct of her children did not interfere with her driving.

[267] On being questioned further about events leading up to the accident, Ms. Bekkers said she could not recall if she had turned on her full headlights (as opposed to just the automatic "driving lights"). She denied that her steering to her left was like making a left hand turn, but said "it was a quick lane change." She said she did not realize that she was in a slight curve to the left, when she made the lane change. She said that the vehicle slid in a different direction than she was trying to steer, that she panicked, took her foot off the gas

pedal, and that she could not remember anything else. She did not know whether her vehicle had anti-lock brakes.

[268] She denied that she was sleepy or groggy, and denied that she lost consciousness before she changed lanes. She could not recall if her vehicle "fishtailed." She did not take any other actions to gain control of the vehicle.

[269] When asked whether she was in a rush to get home, Ms. Bekkers paused, and then answered: "not to my knowledge".

[270] She said she had never knowingly had the experience of driving on black ice, but agreed she had driven on roads covered with snow and ice, before. She said she knew that moisture on the road surface can freeze, in winter. She said she had no thought during the drive from Victoria that there might be black ice on the road.

[271] She denied that she was tired, and said that she was getting sufficient sleep in the days leading up to the day of the accident. She said she was not exhausted on the day of the accident, and denied that tiredness had any effect on her ability to drive.

[272] Ms. Bekkers said she could not recall if her husband Paul had suggested that she stay in Victoria another night, due to the weather conditions. She said she had bought the $80.00 worth of cocaine on Friday, December 19, in Nanaimo.

[273] She said that Ms. Daniels had also used cocaine at the stag party, and during the Horne Lake camping trip. She said she did not discuss the subject of cocaine with Ms. Daniels at all, during that weekend of December 20 to 22, 2008.

[274] Crown counsel asked Ms. Bekkers to estimate the degree of her hangover on a scale of one to ten, and she said it was about five out of ten.

[275] She said she believes she left Holly Mecheder's place in Langford at around 2:30 p.m., and that it usually takes her about 1 ½ hours to drive from there to the south end of Nanaimo.

[276] Ms. Bekkers said that she and Ms. Daniels had been friends since childhood, that she still considers Ms. Daniels to be a friend and that they still love each other. It was implicit in her evidence that their friendship had changed after the accident.

[277] She said she does not recall if she told Ms. Daniels on the morning of December 22, that she had gone to bed at about 4:00 a.m. She said she did not think she told Ms. Daniels that she had taken a sip of beer after waking up, but she stated that she did not have a sip of beer that morning. She said that she did not recall Ms. Daniels and her (Ms. Daniels') mother digging her (Ms. Bekkers') vehicle out of the snow, before she left their place, and did not recall whether Ms. Daniels suggested that she stay another night in Victoria.

[278] At the end of her cross-examination, when asked to explain why her vehicle went across the centre-line of the highway, Ms. Bekkers said that she lost control of her vehicle.

John Harrison

[279] John Harrison is the father of the accused. He and his wife were very close to their daughter and her children, and visited with them about twice a month after they moved from Victoria to Nanaimo in about 2005. Their daughter was very affectionate and close to her children, and very protective of them.

[280] He did not believe that she had an alcohol problem.

[281] The tires on the Ford Escape that she had been driving were All Season Radials, and were in good condition.

[282] He and his wife live in the Oak Bay area of Victoria, which is about a ten minute drive from the home of Joseph and Judith Bekkers, and about a 20 to 30 minute drive from Holly Mecheder's place in Langford.

[283] He saw his daughter at his home on the early afternoon of Saturday, December 20, when she came with her two girls, Lunden and Pyper. He did not see her drink any alcohol at their place. They stayed overnight, as did Chloe, Lunden's friend. The next day, she and Pyper went to visit Carolyn Daniels. She was normal, and he had no concerns about her ability to drive.

[284] He next saw his daughter on Monday, December 22, when she and Pyper returned from the visit with Ms. Daniels, at about noon.

[285] He does not recall there being any snow or ice on the roads. His daughter looked fine, and he did not observe anything unusual about her. He had no concern about her ability to drive to Nanaimo. His wife was there, and she did not express any concerns. He thought his daughter and the three girls left their place at about 12:30 p.m. and he understood that she was going to the Bekkers' place.

[286] Late that afternoon, they received a call telling them that their daughter and her children had been in a motor vehicle accident. He and his wife drove to Nanaimo that night. They stayed at the hospital. He slept in her room, the whole time she was there.

[287] He did not recall Carolyn Daniels coming to see his daughter while she was in the hospital at Nanaimo.

[288] His daughter was sedated, he believes, and she was very upset and emotional while in hospital. He never heard his daughter talk to anyone about the accident, or about alcohol or drugs, except for Adrian Brooks, a lawyer who came to see her in hospital.

[289] In cross-examination, Mr. Harrison said he had never had any concerns about his daughter's drinking, and did not consider her to have a drinking problem. He did not know she used cocaine. He agreed that a good mother would not drive a car with her children in it, if her blood alcohol level was over the legal limit.

[290] Mr. Harrison said he had no reason to believe that his daughter was over the legal limit when he saw her on Monday, December 22. He said that if he had such a belief, he would not have allowed her to drive. He estimated that she was at their place for about 15 minutes, before leaving to go to the Bekkers' place.

[291] Mr. Harrison did not think that his daughter and Carolyn Daniels became close friends, until they were 17 or 18 years old, although he said he knew that they had known each other before that.

[292] He could not recall much about the weather that weekend, or how much snow had fallen.

[293] On being questioned about the people who came to the hospital to see his daughter, Mr. Harrison said he was unable to say who had visited her on December 26.

[294] He said his daughter did not say she had a hang-over, on December 22.

Joseph Bekkers

[295] Joseph Bekkers is the father-in-law of the accused. He had known Ms. Bekkers long before she and his son were married. He and his wife visited quite often with their son and his family, even after they moved to Nanaimo, likely about twice a month. He said Ms. Bekkers was a very good mother and that he and his wife were very close to their grandchildren.

[296] He said he did not see Ms. Bekkers on the weekend in question, until Monday December 22, when she came to pick up her two boys who had been staying at his place.

[297] He did not recall there being very much snow over the weekend. Ms. Bekkers arrived at their place at about 12:30 or 1:00 p.m. and stayed for about 20 to 30 minutes. She looked normal, and he did not see or detect any sign that she had drank any alcohol or taken any drugs. He had no concern whatever about her ability to drive to Nanaimo. If he did have such a concern, he would not have allowed her to drive.

[298] Ms. Bekkers sat in a chair in the living room area of their small condominium, for part of the time she was there, and had a glass of water. The children played. He was playing a game of Yahtze with Lukas. They loaded the boys' things into their mother's car. He and his wife followed Ms. Bekkers to Holly Mecheder's place in Langford. They were carrying the three girls with them in their car, and Ms. Bekkers took Lukas and Cooper in her vehicle. They had no trouble driving to Holly's place, which was about 10 to 15 kilometres away. He saw her vehicle up ahead a few times and she was driving without any difficulty.

[299] When they got to Holly's place, his wife and the girls got out, while he stayed in the car. He and his wife drove away about five minutes after getting to Holly's place.

[300] In cross-examination, Mr. Bekkers said the roads were clear when they drove to Holly's place, which usually takes about 15 to 25 minutes. He said he did not recall one to one and a half feet of snow falling that weekend. He confirmed that they had the three girls with them and Ms. Bekkers had the two boys with her.

[301] He said that he knew Ms. Bekkers was taking medication for depression. He had seen her drink alcohol in moderation, and did not think there was anything wrong for her to mix alcohol with that medication. He knew nothing of any cocaine use by her, and had not heard of such a thing before the accident.

[302] He said he knew it would be dangerous for a person to drive while under the influence of alcohol. He said that if he had thought Ms. Bekkers was over the legal limit when she was leaving his place, he would not have allowed her to drive. He did not recall her saying anything about being hung-over. He said he did not have a lot of interaction with Ms. Bekkers that day.

[303] He said his wife had slipped while walking on the drive-way into Holly's place, but was not hurt. He said there was more snow at that location than at their place.

Judith Bekkers

[304] Judith Bekkers is the accused's mother-in-law. She described Ms. Bekkers as being a phenomenal mother whose children "were her whole life." She confirmed her husband's evidence about their having regular contact with their son and daughter-in-law, and their children. She said Ms. Bekkers was very protective of her children.

[305] Ms. Bekkers had dropped off Lukas and Cooper at their place on Saturday, December 20. She had Chloe with her, and she left with the girls after being there for perhaps half an hour.

[306] She next saw Ms. Bekkers on Monday, December 22, when she came to pick up the boys, after phoning and saying she would be there at about 1:00 p.m. She arrived at about ten minutes after one, and stayed about half an hour.

[307] In her opinion, Ms. Bekkers was normal in every way. She did not notice anything about her eyes, her smell, her speech or her walk that indicated she was under the influence of alcohol or drugs. She had no concern about Ms. Bekkers' ability to drive a motor vehicle, and would not have allowed her to drive, if she had any such concern.

[308] She did not recall if Ms. Bekkers sat in a chair in the living room while she was at their place.

[309] She and her husband drove the three girls to Holly's place, because Ms. Bekkers did not have enough seat belts in her car, for five children. Ms. Bekkers took the two boys with her. There had been some snow, but by then there was no snow on the roads and there was no trouble driving. When they got to Holly's place, they dropped off the girls, and she and her husband left.

[310] Later that afternoon, about 4:30 p.m. they got a call that Ms. Bekkers and the children had been in an accident. They left soon after that, and drove to Nanaimo. When they were travelling up the Malahat, they received word that the two boys were dead.

[311] They had to bypass Cassidy, to get to Nanaimo, because of the accident. She saw Ms. Bekkers in the hospital that night, at about 7:00 or 7:30 p.m. About five days later, she saw her in a hospital in Vancouver.

[312] In cross-examination, Crown counsel first established that Judith Bekkers had not asked Ms. Bekkers about how the accident happened, and that Ms. Bekkers did not say anything about it.

[313] She said she knew Ms. Bekkers had been taking anti-depressant medication in December 2008. She said she had been with Ms. Bekkers in the past, when she had consumed alcohol. She did not know that Ms. Bekkers had been drinking the night before, and Ms. Bekkers did not say that she had a hang-over. She knew nothing of any cocaine use by Ms. Bekkers.

[314] She said her husband and Lukas were playing a game on the computer in the study of their 1000 square foot condo, but she did not know what game it was. She said they did have a Yahtze board game at their place.

[315] She said her husband drove to Holly's place by a different route than Ms. Bekkers took, and she did not see Ms. Bekkers' car during the drive. They got to Holly's place just after Ms. Bekkers did. She herself got out with the three girls, and crossed the road with them, to where Ms. Bekkers had parked her car. Then Holly came out and they greeted each other. Then she returned to their car, and she and her husband left.

[316] Judith Bekkers said that her daughter-in-law was at their home for 20 to 30 minutes and that she did not recall her having a glass of water while she was there.

[317] She said the road was slushy over the Malahat. She said they were driving slowly because she and her husband were in deep shock and were sobbing, after getting word that the boys had died.

[318] She said she had slipped on the snow on the driveway into Holly's place, but did not hurt herself.

[319] She said she knew that Clare was going to drive to Nanaimo from Holly's place, and that she would not have allowed it if she thought Clare's blood-alcohol concentration was over the legal limit.

[320] In re-examination, she said that Clare did not look like she was hung-over.

Holly Mecheder

[321] Holly Mecheder was and still is a good friend of Ms. Bekkers. She had fairly regular contact with Ms. Bekkers over the years and had seen her about ten times in the five or six months before the accident. She observed no signs that Ms. Bekkers had an alcohol or drug problem and never saw her use cocaine.

[322] She and Ms. Bekkers had arranged for her daughter, Chloe to stay overnight at the home of Ms. Bekkers' parents, on Sunday, December 21, 2008. She herself drove her daughter Chloe to the home of Ms. Bekkers' parents on Sunday afternoon. She saw Ms. Bekkers for about five minutes when she dropped Chloe off at about 12:30 p.m. on Sunday. She appeared completely normal at that time.

[323] She next saw Ms. Bekkers the following day at about 2:00 p.m. at her residence in Langford, when Ms. Bekkers and her in-laws came in two vehicles, to bring Chloe home. She went out to meet them. She spoke to Ms. Bekkers and they hugged. They conversed for about 15 minutes. Ms. Bekkers appeared to be entirely normal but there was a smell of stale alcohol coming from her body or clothes. There was no sign Ms. Bekkers was impaired by alcohol or under the influence of alcohol, and there was nothing to indicate she had been using cocaine. Ms. Bekkers did not look hung-over.

[324] There was snow on the ground, about a couple of inches. She had no concerns about Ms. Bekkers' ability to drive to Nanaimo, in the existing weather conditions.

[325] Ms. Bekkers was "a wonderful mother" to her children.

[326] She received a call that evening at about 7:00 p.m., informing her that Ms. Bekkers and her children had been in a motor vehicle accident.

[327] In cross-examination, Crown counsel first challenged Ms. Mecheder's competence to say that Ms. Bekkers showed no symptoms of cocaine use. She described her knowledge about cocaine use, and firmly repeated her opinion.

[328] She said that, after the accident, but not before, Carolyn Daniels had expressed a concern to her that Ms. Bekkers had a drinking problem.

[329] She had seen Ms. Bekkers drink spiced rum and wine, but had never seen her drunk. She had no reason to think that Ms. Bekkers had a drinking problem before the accident.

[330] She knew that Ms. Bekkers was taking medication for depression. She did not know if Ms. Bekkers took the medication and drank alcohol at the same time.

[331] She would be concerned if Chloe was in Ms. Bekkers' care and she was drinking alcohol, taking anti-depressant medication and ingesting cocaine, or even if she had consumed cocaine, that weekend. She said using cocaine would affect a mother's parenting ability. If she knew that Ms. Bekkers was feeling hung-over at a level of 5 on the scale of 10, on that day, she would have been concerned and might have suggested that she rest for a while. But she said that Ms. Bekkers "seemed absolutely normal."

[332] Crown counsel asked Ms. Mecheder if she would have questioned Ms. Bekkers about her condition, if she had known Ms. Bekkers had taken anti-depressant medication daily, used cocaine on Saturday, and drank a lot of alcohol on Sunday night. Ms. Mecheder said she probably would have made such inquiries, if she had that knowledge. But she repeated that Ms. Bekkers "seemed absolutely normal."

[333] Ms. Mecheder said it had snowed, but she did not consider it to be a heavy snow fall and had not heard any warnings about it. She knew that the Malahat could be a dangerous stretch of highway in winter conditions. She was aware that black ice could form on road surfaces in winter, and believed that a person transporting children should be aware of such risk.

[334] Ms. Mecheder said that Ms. Bekkers was at her place for about 15 minutes, and that she left at about 2:15 p.m. She was asked about Judith Bekkers slipping on the ice, and gave a description of the incident similar to that given by Judith Bekkers.

[335] Crown counsel questioned Ms. Mecheder's ability to distinguish the smell of stale alcohol. She said she had often experienced that smell on her clients in her work as an esthetician.

[336] Ms. Mecheder said that if she had knowledge that Ms. Bekkers' blood alcohol concentration was over the legal limit, she would not have let her drive away on that day, or any other day.

[337] Ms. Mecheder said that she had been friends with Carolyn Daniels for about as long as she had been friends with Ms. Bekkers, but said that she had a closer friendship with Ms. Bekkers than with Ms. Daniels.

[338] She said she did not see Ms. Bekkers in hospital at Nanaimo, but she did see her in Children's Hospital in Vancouver.

[339] She said that, on one occasion after the accident, at Children's Hospital in Vancouver, Ms. Bekkers talked to her about the accident. Ms. Bekkers told her that she had hit some ice, the car slid and she lost control, and she was not sure or didn't remember what happened after that. A friend of Ms. Bekkers from Nanaimo was also present.

[340] She said Ms. Bekkers also spoke to her about events during the drive, before the accident, which included a stop to get some food.

[341] Ms. Mecheder said she knew at that time that a police investigation of the accident was under way, and knew there were suggestions that Ms. Bekkers had been consuming alcohol and drugs. When asked if she questioned Ms. Bekkers about those things, Ms. Mecheder said she had not. When asked why not, she said because she did not believe the allegations that were being made.

[342] Finally, Ms. Mecheder said that she had never known Ms. Bekkers to have any memory problems before the accident, but said she did have some problems with remembering things, after the accident.

Robert Leyland

[343] Robert Leyland was Ms. Bekkers' supervisor in her job with DHL (which later became Loomis). He has known her since 2007. Driving is part of Ms. Bekkers' job.

[344] He supervised 82 workers, but since the takeover by Loomis, he now supervises 42 employees. He saw Ms. Bekkers quite often, after she became a more full-time employee in the fall of 2007, or early in 2008.

[345] He has never seen anything about Ms. Bekkers that caused him to be concerned about her sobriety, or to believe that she was using drugs or alcohol. He has never smelled alcohol on her. He believes it is critically important that employees be sober.

[346] Ms. Bekkers always showed up on time and never missed work, in the fall of 2008. During that time, he had never had any concerns about her ability to drive a motor vehicle.

[347] In cross-examination, Mr. Leland said he had smoked for 40 years and conceded that smoking might have impaired his ability to smell.

[348] He said Ms. Bekkers is a permanent, part-time employee working a minimum of 20 hours per week. Mr. Leyland acknowledged that he did not work night shift, and that he was responsible for five other work locations besides Nanaimo, in the fall of 2008.

Ryan Doucet

[349] The defence applied for leave to present the evidence of Ryan Doucet by way of filing his statement to the police given January 8, 2009, and his testimony at the preliminary hearing held on October 27, 2010. The Crown did not oppose this application, and it was granted.

[350] I first summarize the evidence of Ryan Doucet, from his statement to the police.

[351] In the afternoon of December 22, 2008, he was driving alone in his 2004 Chevrolet Cavalier, southbound on Highway 1. The sun was starting to set but it was still light out. The time was around 4:20 p.m. He was driving across the Nanaimo River bridge, at a speed of about 90 kph. He thinks he was in the slow lane, but is not sure. There were vehicles ahead of him traveling southbound.

[352] He saw a black SUV come across the highway from the northbound lanes and into the southbound lanes. The drivers of the vehicles ahead of him put on their brakes. He put on his brakes, and his vehicle began to slip and slide. He tried to steer one way and then the other, so as to regain control, but his vehicle spun around in several 360 degree circles as it kept sliding forward in the southbound lanes. He heard the sounds of vehicles colliding. Somehow, his vehicle did not collide with any other vehicle. He eased off on the brakes, and his car came to a stop just into the snow bank on the right shoulder of the southbound travel lanes.

[353] When the vehicles ahead of him put on their brakes, it seemed to him that some vehicles got a lot more traction than others.

[354] He saw the black SUV come around the corner northbound, in the slow lane and then lose control. It skidded and slid, and then seemed to speed up and shoot right across the highway at a 90 degree angle. He cannot estimate the speed of the black SUV. He is "pretty sure" there was a vehicle northbound in the fast lane, that the black SUV had passed, just before it went out of control. He saw the black SUV hit the Monte Carlo, and that was when he and the drivers ahead of him hit the brakes.

[355] After his car stopped, he got out. The road was so slippery that he almost fell down. It was like "a sheet of ice" and like "a skating rink." A red Toyota truck that he had not previously seen was stopped on the road ahead of him. He went to see if he could help the drivers and occupants of the other vehicles involved. He first spoke to the driver of the Monte Carlo, and then made his way to the vehicle in which Asian people were travelling, and then to the black SUV. He saw several children inside the vehicle. Other people were there, trying to help. He did not see the driver of the black SUV.

[356] He left the accident scene a little after 5:00 p.m. and it was dark by then. He drove to his home in Ladysmith, and also gave the driver of the Monte Carlo a ride to his home in Ladysmith.

[357] At the preliminary hearing, almost two years later, Mr. Doucet gave the following additional or different information in his direct evidence.

[358] He was 24, at the time of the preliminary hearing. There was moisture on the road that day. His car was green in colour. He was driving at a speed of between 70 and 80 kph, when he crossed the Nanaimo River bridge. Just before he saw the black SUV come around the corner and lose control and slide, it had been "coming up and passing vehicles," while it was in the slow lane. He doesn't know how long he stayed at the accident scene, but thought he left at about 6:00 or 7:00 p.m.

[359] In cross-examination at the preliminary hearing, Mr. Doucet said that when he got out of his car, the road was a sheet of ice, and that he did not expect that.

[360] On being questioned briefly by the presiding judge, Mr. Doucet testified that he lost control after he hit the brakes, and that he did not know how many times his car spun around in a circle, before he was able to stop.

Geoffrey Evans

[361] Geoffrey Evans is a Civil Engineer. He was qualified to give expert opinion evidence relating to the subject of traffic accident reconstruction, which included determination of the cause of motor vehicle accidents, critical curve speeds and coefficients of friction of road surfaces. Mr. Evans was also qualified to give opinions about road design and the proper operation of front-wheel drive motor vehicles on roads which have ice or snow on them.

[362] Although he was not specifically qualified to do so on the qualifications voir dire, Mr. Evans was also permitted to give opinion evidence about the conditions that could cause the formation of black ice on the surface of highways, and as to whether black ice was present at the time and place of the accident. The Crown did not object to Mr. Evans giving opinion evidence on these two subjects.

[363] Mr. Evans was first retained by defence counsel in September 2011. He did a limited investigation and prepared a report dated September 7, 2011. In that report, (Exhibit 19) the opinion he expressed was, in summary, that Ms. Bekkers had lost control of her vehicle and it crossed over the centre line as a result of slipping and sliding on black ice that had formed on the road surface, and that, once that occurred, she could not be expected to have regained control.

[364] Mr. Evans later obtained further information that showed that, in giving his opinion on September 7, 2011, he had relied on three facts being true, that turned out to be false. Those three erroneous assumptions were:

a) that Ms. Bekkers' vehicle was an all-wheel drive vehicle (it was actually only a front-wheel drive);

b) that Ms. Bekkers' vehicle was equipped with an ABS anti-locking braking system (it was not so equipped); and

c) that Ms. Bekkers had applied her brakes after her vehicle began sliding on black ice (the evidence at trial was solely to the effect that Ms. Bekkers did not apply her brakes).

[365] In direct examination at trial, Mr. Evans described his investigation of the roadway in the area where the accident occurred, and the data he had collected about the weather and environmental conditions. He stated (as he had in his report) that he had read Corporal Irving's report and had listened to his testimony on cross-examination at the trial; that he had listened to Ms. Bekkers' trial testimony; that he had read a transcript of the evidence given by witnesses called at the preliminary hearing; and that he had read witness statements and other documents provided by Crown to the defence.

[366] Mr. Evans concluded that there was black ice on the surface of the highway at the place where Ms. Bekkers lost control of her vehicle. In answer to defence counsel's hypothetical questions, Mr. Evans gave opinions as to how and why Ms. Bekkers lost control of her motor vehicle. Defence counsel asked Mr. Evans to assume the following facts (my paraphrasing):

a) that Ms. Bekkers was driving in the slow lane for northbound traffic when she crossed over the Haslam Creek Bridge;

b) that near the location where she lost control, Ms. Bekkers steered to her left to move over into the fast lane;

c) that the speed of Ms. Bekkers' vehicle was about 100 kph;

d) that when she steered to her left, her vehicle did not stay in the fast lane, but began to slide and just kept going to the left and went right across it and across the median at the centre, and into the lane for southbound traffic; and

e) that when the vehicle began to slide, Ms. Bekkers took her foot off the gas pedal and did not apply the brakes.

[367] Defence counsel then asked Mr. Evans to give his opinion about what happened and why.

[368] Mr. Evans then gave the following opinions (my summarizing):

a) The front wheel on the driver's side of the vehicle lost traction and began spinning on a patch of black ice in the fast lane, when Ms. Bekkers steered to her left.

b) The front wheel on the passenger's side of the vehicle did not lose traction and kept turning under power.

c) The slipping of the left-front wheel and the traction of the right-front wheel caused the rear end of the vehicle to move around in an anti-clockwise direction as the vehicle continued to travel in a northerly direction, but angled to the west, across the centre line.

d) Ms. Bekkers had lost control of her motor vehicle and was unable to regain control.

e) Ms. Bekkers' vehicle had a short wheel base, and the rear end was lighter than the front end, and those factors would have contributed to the anti-clockwise rotation.

f) If Ms. Bekkers took her foot off the accelerator, that would have increased the speed of the vehicle's anti-clockwise rotation, and reduced her chances of regaining control.

g) The road surface sloped downward toward the centre of the highway (due to super elevation for the curve), which would tend to cause Ms. Bekkers' vehicle to continue sliding to her left, toward the centre line and the southbound lanes, rather than straight ahead, within the confines of the northbound lanes.

h) Ms. Bekkers could have lost control of her vehicle in the same way and been unable to regain control, even if she had been travelling at a speed of 80 kph.

i) There was rutting (i.e. indentation or grooving) in the road surface of the northbound lanes caused by the tires of heavy trucks turning left out of Spruston Road, and it is possible that these ruts contributed to Ms. Bekkers losing control of her vehicle.

[369] In cross-examination, Crown counsel challenged Mr. Evans on his opinions. One of the grounds of challenge was that several of the important facts Mr. Evans relied on to support his opinions had not been proved.

[370] Mr. Evans admitted that he did not know whether the "flash freeze" (the convergence of the essential conditions for the formation of black ice) had occurred 10 minutes before the accident or 10 minutes after the accident. I understood Mr. Evans to mean that he could not be certain that the black ice had formed, before Ms. Bekkers lost control of her vehicle, but that he was maintaining his opinion that black ice was present, at the relevant time and place.

[371] Mr. Evans acknowledged that the southbound lanes of travel in the accident scene area would likely be in shade at an earlier time than the northbound lanes. Later, he agreed with the suggestion that the southbound lanes could get colder, at an earlier time than the northbound lanes.

[372] Crown counsel suggested to Mr. Evans, in effect, that if a road was slippery to walk on, that would not necessarily mean that the road would be slippery for motor vehicles to drive on. Mr. Evans agreed that if the road was slippery to walk on, it would not be conclusive but would be "a good flag" that the road would be slippery for motor vehicles. Counsel then suggested that, if a person could walk on a road without finding it to be slippery, that would mean that the road would not be slippery for motor vehicles to drive on. Mr. Evans said that would not necessarily follow, because the type of footwear worn by a person could make a difference.

[373] Crown counsel questioned Mr. Evans extensively about the cross-section and profile drawings he had made (Exhibits 20 and 21) and the photographs he had taken of the highway in September 2011 (Exhibit 22). There were many connected questions relating to critical curve speed, the existing super elevations and the centrifugal forces exerted on a motor vehicle travelling through a curve. Eventually, counsel suggested to Mr. Evans, in substance, that if Ms. Bekkers' vehicle was in the slow lane travelling at 80 kph, and if both of her front wheels lost traction on black ice at the same time, then her vehicle would slide straight ahead, and go out of the northbound lanes to the right side, and not off to the left, across the centre-line. Mr. Evans acknowledged that this could happen, but said, in effect, that the vehicle could also slide to the left, and many other factors would have to be known and considered, before a firm opinion could be given. But Mr. Evans did admit that it was more likely that the vehicle would go to the outside (to the right) rather than to the inside (to the left), assuming the truth of the scenario suggested by Crown counsel.

[374] The end result of this line of questioning (which was spread throughout the cross-examination at various points) was, in my view, that Mr. Evans did not retreat from the opinion he had given, but he acknowledged that his opinion about the path taken by Ms. Bekkers' vehicle after loss of control rested on the assumption that the driver's side front wheel lost traction on black ice, but the passenger side front wheel did not.

[375] Mr. Evans did say that the failure of Emcon to deposit brine in the area of the northbound lanes did not contribute to faster formation of black ice, because he had learned that brine would only have been spread over the right turn cut off for Beck Road, in any event. He also said that, with respect to the southbound traffic, brine was only deposited on the left turn lane for Beck Road, and at the place where vehicles turned left out of Spruston Road. I took this to mean that the presence or absence of brining that afternoon, had no measurable effect on the vehicles involved in the collisions and near-collisions.

[376] Mr. Evans was asked to estimate the width of the painted median which separated the northbound and southbound lanes at the centre of the highway, near the location where Ms. Bekkers' vehicle crossed over it. He said that the median at that point was about 3 metres wide, and added that each travel lane was about 3.7 metres wide.

[377] When asked to estimate the distance from the point of impact identified by Corporal Irving (on his diagram at the last page of his report, Exhibit 4) to the Beck Road intersection, Mr. Evans said the distance was about 80 metres to the line just below the words "Beck Road."

[378] Mr. Evans expressed the opinion that the road design in the area of the curve where the accident occurred would easily permit a posted speed limit of 100 kph. He said that the majority of drivers travel that area of highway at 90 kph (although the posted speed limit is 80 kph), but agreed that drivers should not exceed the posted speed limit unless it was safe to do so.

[379] Under further questioning, Mr. Evans stated that a driver can totally lose control when driving on black ice, even if driving properly. He acknowledged that such loss of control is often only momentary, and control is often regained, depending in part on what the driver does, and in part on other factors.

[380] Counsel suggested to Mr. Evans that it would be better for a driver who unexpectedly encounters black ice to be travelling at a slower speed (which I took to mean, slower than the speed limit). Mr. Evans replied that a driver could still lose control on black ice at very slow speeds, but he conceded that a driver could more easily regain control, at slower speeds. Later, he acknowledged, in effect, that it would likely be better to be travelling more slowly, in the first place.

[381] Counsel questioned Mr. Evans extensively on an article issued by Transport Canada about "Winter Driving Tips" (Exhibit 23). Mr. Evans agreed with most of the tips he was questioned about, including tips that drivers should be aware that black ice can form on wet road surfaces if the temperature is around zero degrees Celsius, that drivers should watch the

weather so as to know whether there is a risk that black ice will form, and that drivers should be keeping a lookout for black ice when that risk exists. Mr. Evans disagreed strongly with the tip that a driver might try to correct a skid, by putting the transmission into neutral, and gave reasons for his position. He also said that the majority of drivers do not know what they should do, in order to combat a skid and regain control of their vehicle.

[382] Crown counsel returned to the subject of black ice formation. Mr. Evans repeated his reasons for concluding that black ice was present at the time of the accident, and said that it could form very quickly. He conceded that black ice does not generally develop in small patches. He conceded that the black ice conditions may well have been about the same, in both the northbound and southbound lanes. There followed an elaborate hypothetical question by Crown counsel, which seemed designed to elicit an admission that, since four southbound drivers (Kenneth Wilson, Jone Yang, Steven Budd and Jaron Dubyna) did not lose control of their vehicles (at least not before their vehicles collided with another vehicle), therefore Ms. Bekkers should have been able to maintain control of her vehicle.

[383] Mr. Evans declined to make that admission, on the grounds that more information was needed before that conclusion could be drawn, that he had seen evidence to the effect that at least one other driver did lose control of his vehicle, and that Ms. Bekkers had steered to her left, to change lanes. Crown counsel then put it to Mr. Evans that Kenneth Wilson, the driver of the Monte Carlo, had started to change lanes when his car was hit by Ms. Bekkers vehicle, that Steven Budd had steered to his left before colliding with Ms. Yang's vehicle and that Jaron Dubyna had steered to the left, across the centre line, to avoid colliding with vehicles ahead of him.

[384] Eventually, Mr. Evans was asked a question to this effect: - If all of the other drivers involved directly or indirectly in the accident encountered black ice similar to that presumably encountered by Ms. Bekkers, and if all other drivers maintained proper control of their vehicles up to the time they were in collision with another vehicle, shouldn't Ms. Bekkers have also been able to maintain control of her vehicle?

[385] Mr. Evans answered "yes" to this question.

[386] Next, Mr. Evans agreed that Ms. Bekkers steering to her left to change lanes, was a significant fact in the formation of his opinion. He further agreed with the obvious suggestions that a driver who falls asleep at the wheel would lose control of his or her vehicle, and that falling asleep for only a few seconds could cause such loss of control. Crown counsel then suggested that the path of Ms. Bekkers' vehicle across the centre-line was consistent with her having fallen asleep at the wheel. Mr. Evans disagreed, and said, in effect, that the path taken by her vehicle was more consistent with his opinion of what caused her to lose control than it was with a loss of control by reason of falling asleep.

[387] When asked if the movements of Ms. Bekkers' vehicle would have been the same or different if her right front wheel had lost traction and her left front wheel had not, Mr. Evans said the movements would have been different.

[388] Crown counsel again challenged Mr. Evans on his opinion that there was "a perfect storm" and a "flash freeze" at the time black ice formed on the road surface where Ms. Bekkers lost control. Mr. Evans agreed that the phenomenon which he believes occurred was quite unusual.

[389] There followed much questioning about the erroneous assumptions made by Mr. Evans in his first report. He essentially denied that he had contradicted himself in any way, in reasoning to the opinion that he gave at trial. He did add that he never knew, when he prepared his first report, that Ms. Bekkers may have lifted her foot off the gas pedal, and thought he had assumed that she was accelerating at the relevant time. But Mr. Evans was not able to find any reference in his written report, to that last mentioned assumption. He agreed that if Ms. Bekkers was accelerating, that would make her vehicle pivot faster than if she had taken her foot off the gas. (It was unclear to me whether Mr. Evans had previously assumed Ms. Bekkers was accelerating (increasing) her speed, or had simply kept her foot on the gas pedal and maintained her speed.)

[390] Crown counsel then questioned Mr. Evans at length, in an attempt to elicit the admission that driver error on the part of Ms. Bekkers was a significant cause of her loss of control. Mr. Evans admitted that driver error was a possible cause, but he maintained his opinion to the effect that it was probably not the cause of her loss of control.

[391] Crown counsel questioned Mr. Evans about an article printed off the internet, which contained information for drivers of motor vehicles about how to recover from a skid. One of the options suggested was that a driver should put the transmission in neutral or (if the vehicle had a standard transmission) depress the clutch. Mr. Evans disagreed with these recommendations, and gave reasons for doing so. He did allow that, in certain circumstances, doing those things could possibly slow down the pivot motion of a vehicle.

[392] Counsel challenged Mr. Evans' opinion as to the cause of the accident, on the grounds that he could not identify any authoritative study to support it, that he had not himself published any articles about it, and that he had not supported his opinion (the "Fulcrum Theory") by mathematical calculations. Mr. Evans replied, in effect, that he understood the laws of physics, that he had considerable personal experience in driving in winter conditions (including black ice) and that his opinion was not a matter of mathematical calculation.

[393] Mr. Evans stated that, although he had encountered and slipped on black ice many times while driving a motor vehicle, he had not had any accident as a result.

[394] In re-examination, Mr. Evans was asked to assume the truth of Ryan Doucet's key evidence, namely: that he was driving southbound, behind the Monte Carlo and the Nissan Pathfinder, at 90 kph when Ms. Bekkers' vehicle came across the centre-line, that he hit the brakes, and that his car turned several 360 degree circles before he was able to regain a measure of control and come to a stop and that some drivers appeared to have more traction than others. Mr. Evans said that those facts support the conclusion that there was black ice on the road surface of the southbound lanes (as well as on the northbound lanes).

[395] Mr. Evans said that the southbound lanes may have been in the shade of the hillside longer than had the northbound lanes, but that the time difference would not have been very long, due to the sun's low position in the West in the afternoon, in late December.

[396] Finally, Mr. Evans said that the literature that he had seen about drivers falling asleep at the wheel does not support the proposition that a driver who falls asleep would steer sharply one way or the other. He said a driver could fall asleep in two to two and a half seconds. He added that he had not seen or heard any evidence in this case which indicated that Ms. Bekkers fell asleep.

Crown rebuttal witnesses

[397] The Crown applied for and was granted leave to call further expert evidence, to rebut evidence given by Mr. Evans. That required an adjournment of the trial. The Crown called two witnesses.

Amrit Toor, Ph.D., P. Eng.

[398] The first rebuttal witness was Amrit Toor, a professional engineer who was qualified to give opinion evidence in the fields of mechanical engineering and accident reconstruction. His report dated January 17, 2012 was filed as Exhibit # 28.

[399] Mr. Toor was critical of the report of Geoffrey Evans dated September 7, 2011. Mr. Evans himself acknowledged that his preliminary report was based on erroneous assumptions, and that significant weaknesses and irrelevancies flowed from those wrong assumptions. I find it unnecessary to review Mr. Toor's evidence as to his assessment of Mr. Evans' preliminary report.

[400] Mr. Toor disagreed with Mr. Evans' opinion to the effect that drivers of front wheel drive vehicles should have specialized training about how to drive on roads covered with snow or ice, and that such vehicles can be dangerous in winter conditions, without such training. Mr. Toor also disagreed with Mr. Evans' opinion as to the distribution in braking power between the front and rear axles of front wheel drive vehicles, and as to the extent to which there is a shifting of such a vehicle's weight when the brakes are applied. Mr. Toor gave reasons for his opinions on these subjects.

[401] Mr. Toor contradicted an important part of Mr. Evans' theory as to how Ms. Bekkers lost control of her vehicle. Mr. Evans had said, in substance, that, if the front wheel on the driver's side began to spin on ice as Ms. Bekkers was in the process of moving into the lane to her left, but the front wheel on the passenger side was not on ice and had traction, then the wheel having traction would continue to have 50% of power applied to it. Based on those assumptions, Mr. Evans expressed the opinion that there would be a rapid counter-clockwise rotation of the Bekkers' vehicle which would cause the vehicle to continue travelling to the left (i.e. to the west) and across the centre line.

[402] Mr. Toor testified that the design of Ms. Bekkers' vehicle was such that, if one of the front wheels loses traction and spins, but the other front wheel maintains traction, then the power to the wheel having traction is transferred to the slipping wheel. He said that the wheel having traction would have no rotational power, but would only be coasting.

[403] Mr. Toor further testified to the effect that if Ms. Bekkers lost control of her vehicle when it slid or skidded on black ice after she had steered to her left to change lanes (at 80 to 120 kph), and if the road surface was a continuous sheet of black ice ahead of her, then (absent further, effective driver input) her vehicle would not have continued to travel sharply to the left in the direction it was being steered, but rather it would have travelled forward in a fairly straight line. Mr. Toor said that this would occur even though the vehicle could be rotating in a circle due to a total loss of traction. He said the sideways slope of the road down to the left towards the centre would not have had any significant effect, and would not have caused the vehicle to continue veering off to the left. Mr. Toor seemed to express the opinion that, in order for Ms. Bekkers' vehicle to travel to the left across the centre line as it did, the wheels of her vehicle must have had some traction and she must have done something which caused it to continue travelling in that direction.

[404] Next, Mr. Toor gave an opinion about the significance of vehicle speed, based on the assumption that Ms. Bekkers had lost control of her vehicle when the tires hit black ice. His opinion was to the effect that the higher the speed, the greater the chance that Ms. Bekkers would lose control of her vehicle when driving over black ice. Another factor relevant to that opinion was his evidence that the friction between tires and road surface decreases, as the speed of a vehicle increases. Later, in cross-examination he said that for a vehicle travelling at 100 kph, the co-efficient of friction would be less than the .26 calculated by Corporal Irving using the sled test method. Mr. Toor expressed the further opinion that Ms. Bekkers' "steering input" (presumably, her steering to the left, to change lanes) would be a contributing cause of her losing control if she was driving over black ice. He allowed that she could have made the lane change, if the black ice was not continuous but was patchy. He said, a driver cannot steer a moving vehicle where he or she wants it to go, without traction.

[405] Mr. Toor was asked to give his opinion as to whether Ms. Bekkers' vehicle "was experiencing traction or loss of traction as it moved into oncoming traffic." Mr. Toor reasoned, from Newton's Laws of physics, to the following conclusion (my paraphrasing):

If a moving vehicle (travelling on a fairly level highway) is being steered around a curve to the left in the road, and if the vehicle wheels lose all traction (due to ice on the road), then the vehicle will be unable to traverse the curve, and will travel forward in an approximately straight line and go off the road to the right side.

[406] I understood that this conclusion rested on the assumptions that the total loss of traction continues as the vehicle slides forward, and that there is no driver input (steering, braking or accelerating) or, if there is driver input, it is totally ineffective and cannot change the vehicle's forward direction of travel.

[407] Mr. Toor seemed to say that, in order for Ms. Bekkers' vehicle to follow the path that it did (i.e. a curve to the left, much sharper than the curve of the highway), the tires of her vehicle must have had traction and Ms. Bekkers must have done some act of steering that caused her vehicle to travel (or continue to travel) in the path that it did travel, across the centre line.

[408] I took Mr. Toor to mean that the wheels of Ms. Bekkers' vehicle, or some of them, must have had some degree of traction, for at least part of the distance travelled by her vehicle from the place where she lost control to the place where it first collided with an oncoming southbound vehicle.

[409] In cross-examination, Mr. Toor agreed that, even if Ms. Bekkers' vehicle had an "open differential" mechanism, if one front wheel slipped on black ice but the other front wheel did not, then the cessation of power to the non-slipping wheel would not be instantaneous. But he said it would take a very short time for that to occur. He agreed that black ice can occur in patches on a roadway.

[410] Mr. King put a number of hypothetical scenarios to Mr. Toor in an attempt to elicit opinions more favourable to the defence. For the most part, Mr. Toor maintained the opinions he had given. Counsel did squeeze one concession from Mr. Toor, by asking a hypothetical question to the following effect (my paraphrasing):

If Ms. Bekkers turned to her left to change lanes, and if in doing so she drove over a patch of black ice which caused the front wheels to lose traction and spin; and if the front wheels passed over the patch of black ice onto pavement which provided traction; and if the front wheels remained turned to the left when this occurred, then isn't it true that the regained traction would cause the vehicle to be propelled forward, in the direction that the front wheels were still facing (i.e. to the left)?

[411] Mr. Toor answered, in substance: "Generally speaking, yes."

[412] Mr. Toor said he did not know (and that no one knows) whether the front wheels of Ms. Bekkers' vehicle were driving with rotational power, or sliding, when the vehicle crossed the centre line.

[413] Mr. Toor testified that if he used the sideways slope of the highway that he believed was correct (as opposed to the slope used by Corporal Irving), and if he used the co-efficient of friction determined by Corporal Irving (i.e., .26), then the critical curve speed for vehicles travelling north around the highway curve at the relevant location, would be 154 kph (whereas Corporal Irving said it would be 127 kph). Mr. Toor went on to say that if he used the sideways slope adopted by Corporal Irving, then the critical curve speed would be 121.8 kph. This part of the evidence was confusing to me. The reason given by Mr. Toor for the difference between the critical curve speeds of 127 kph and 121.8 kph appeared to be that the co-efficient of friction would be somewhat lower than .26 for the tires of a vehicle which was negotiating the curve at 100 kph (as opposed to the sled dragged over the road surface by Corporal Irving).

[414] It was apparent from Mr. Toor's evidence that, if Ms. Bekkers steered to her left and into the fast lane, then the radius of the curve she was steering was much smaller than the curve of the highway, and the critical curve speed for her steered curve would have been significantly less than 127 kph or 121.8 kph. But since the radius of that curve is not known, we cannot know whether the speed of Ms. Bekkers' vehicle (about 100 kph) exceeded the critical curve speed for that sharper curve.

Eric Fry

[415] The second rebuttal witness called by the Crown was Eric Fry. He was qualified to give expert opinion evidence in the field of automotive mechanics. His report dated January 24, 2012 was filed as Exhibit #31.

[416] Mr. Fry gave three opinions. The foundation for his first opinion was that Ms. Bekkers' vehicle (a 2004 Ford Escape XLS) was equipped with a front wheel drive automatic transmission which had an "open differential" feature. Mr. Fry said, in substance, that if a vehicle having this feature is being driven and one of the front wheels loses traction but the other does not, then the torque (rotational power) being applied to the non-slipping wheel will cease, and that torque will be transferred to the wheel that is slipping. Mr. Fry gave this example: "If one drive wheel is on ice and the other drive wheel is on asphalt, then the asphalt wheel will be harder to turn therefore the drive torque will be diverted to the wheel on ice." I understood Mr. Fry to say that not all of the torque power of the non-slipping wheel would be transferred to the slipping wheel, unless the slipping wheel had zero traction. The rate of slippage will determine how much torque would be diverted to the wheel having the lesser traction.

[417] Next, Mr. Fry stated that when a motor vehicle is being driven around a curve in the road, the outside wheels have to travel slightly farther than the inside wheels. He said that, in a front-wheel drive vehicle, in that situation, the outside wheel will be turning slightly faster than the inside wheel. But he testified that the difference in revolutions per minute between the two front driving wheels would be very small, when a vehicle is travelling around a curve with a 497 metre radius. Mr. Fry said that, at a speed of 80 kph, on such a curve, the rpm difference between the two drive wheels would be less than 2 rpm. He added that, in those circumstances, "the drive torque will split effectively equally between both of the front drive wheels as long as both tires maintain traction with the road."

[418] The third opinion expressed by Mr. Fry was that, on all motor vehicles, the steering mechanism is designed in such a way that, if the driver steers to the left or to the right, and then lets go of the steering wheel, the steering wheel will tend to return to the straight-ahead position. In Mr. Fry's opinion, with respect to the curve involved in the present case (which has a 497 metre radius), if a northbound driver was travelling around this curve, and let go of the steering wheel, the wheel would return to the straight-ahead position.

[419] In cross-examination, Mr. Fry agreed that his opinion that the steering wheel would return to the straight ahead position if let go while driving through the curve involved in this case, was based on the assumption that the two front driving wheels had equal traction.

[420] Upon being questioned about the transfer of driving power from one front wheel to the other, where one front wheel loses traction on ice, I understood Mr. Fry to say that the transfer of power to the slipping wheel might not be instantaneous, but it would occur very quickly.

Counts 5 to 8 - The impaired driving charges

Was Ms. Bekkers' ability to drive a motor vehicle impaired by alcohol or a drug, at the time of the accident?

[421] It seems logical to decide the issue of impairment first. I say that because evidence that an accused person has consumed alcohol before driving a motor vehicle (whether or not such consumption impaired the accused's ability to drive a motor vehicle) can, in certain circumstances, be relevant to the issue of whether the mens rea required for dangerous driving has been proved. See R. v. Settle 2010 BCCA 426 at para. 48. Accordingly, I intend to decide whether guilt has been established on any of the impaired driving offences charged in Counts 5 to 8, before considering the dangerous driving offences charged in Counts 1 to 4.

The position of the Crown

[422] The main facts alleged by the Crown to support the conclusion that Ms. Bekkers' ability to operate a motor vehicle was impaired by alcohol or a drug at the time of the accident, are the following (my paraphrasing):

a) Ms. Bekkers consumed a large quantity of beer and rum on Sunday night, both before and after midnight. She was feeling the effects of a hang-over when she got up at or around 11:00 a.m. on Monday morning.

b) At the time Ms. Bekkers left Holly Mecheder's residence to begin the drive to Nanaimo (at about 2:15 p.m. to 2:30 p.m.), her blood alcohol concentration was probably at or slightly above the legal driving limit of 80 milligrams of alcohol per 100 millilitres of blood.

c) In the few minutes before the accident, Ms. Bekkers was driving in an erratic manner, in that she was tail-gating the vehicles ahead of her and repeatedly changed lanes while behind them. When she was able to pass these vehicles, Ms. Bekkers accelerated to an excessive speed, at least 20 kph in excess of the speed limit of 80 kph. At a speed of at least 100 kph, she lost control of her motor vehicle, and failed to regain control, before it travelled across the centre line.

d) Ms. Bekkers' blood alcohol concentration at the time of the accident (4:20 p.m.) was between 59 milligrams of alcohol per 100 millilitres of blood and 76 milligrams of alcohol per 100 millilitres of blood.

e) At a blood alcohol concentration of 100 milligrams of alcohol per 100 millilitres of blood, all persons are impaired to some degree, in their ability to drive a motor vehicle. But some people can be impaired in their ability to drive, at a blood alcohol concentration of 50 milligrams of alcohol per 100 millilitres of blood.

f) Although there was no cocaine in Ms. Bekkers' blood at 6:00 p.m. on December 22, there were some metabolites of cocaine in her blood. The presence of these metabolites means that Ms. Bekkers had previously ingested cocaine, but probably not within the 24 hours before 6:00 p.m. on December 22. However, the presence of a significant amount of benzoylecgonine, although having no impairing effects on a person, suggests that Ms. Bekkers had ingested cocaine on several previous occasions and not just once.

g) Ms. Bekkers admits that she had ingested $80 worth of cocaine on the night of Saturday, December 20, which was less than 48 hours before the accident. It is possible that, on the day of the accident, she may have been in a dysphoric or "crash" phase, and if she was, then she could have been extremely fatigued and drowsy at the time of the accident.

h) If Ms. Bekkers was in a crash phase due to previous cocaine use, her fatigue could have been increased by the depressant effects of a moderate amount of alcohol on her central nervous system. If Ms. Bekkers had an excessive amount of Effexor in her blood, that could aggravate such fatigue. This combination of factors could have impaired Ms. Bekkers' ability to remain alert, and thus could have caused Ms. Bekkers to fall asleep while driving her motor vehicle. If she was in such a "compromised state", Ms. Bekkers mental ability to make the decisions necessary for proper driving, would be impaired.

The position of the defence

[423] Ms. Bekkers denies that her ability to drive a motor vehicle was impaired by alcohol or a drug, or any combination of these, during the time leading up to the accident. She further denies that she was feeling any fatigue from the after - effects of cocaine use, or for any other reason.

[424] Ms. Bekkers admits that she consumed a considerable amount of alcohol between dinner time on December 21 and about 1:30 a.m. on Monday, December 22. She also admits that she had ingested $80 worth of cocaine on the night of Saturday, December 20. She admits that she had taken prescribed dosages (approximately 200 milligrams per day) of Effexor, an anti-depressant medication, on Saturday (December 20), Sunday (December 21), and Monday (December 22).

[425] Ms. Bekkers admits that she felt hung over when she got up on Monday, December 22, but says that her hang over diminished as time went on that day.

[426] In support of Ms. Bekkers' position, the defence relies on the testimony of the five witnesses who had contact with Ms. Bekkers on December 22, before she left the Victoria area. In addition, the defence relies on the fact that Ms. Bekkers had driven approximately 100 kilometres before the accident occurred, in winter driving conditions. Ms. Bekkers testified that she encountered no difficulty in driving this distance, and there is no evidence which suggests otherwise.

[427] Ms. Bekkers testified that she does not remember the events which occurred in the few minutes leading up to the accident, and so she cannot contradict the descriptions of her driving given by Tana Liew and Daniel Lundstrom. But the defence challenges the reliability of some of the evidence given by these two witnesses.

[428] Ms. Bekkers admits that at 6:00 p.m. on December 22, her blood contained the substances identified by Mr. Pon, and in the amounts he measured. However, defence counsel submitted that Mr. Pon's opinions as to Ms. Bekkers' blood alcohol concentrations at the time of the accident and earlier that day should be rejected.

Evidentiary issue

[429] As to this last point, Mr. King relied on the case of R. v. Boucher, [2005] 3 S.C.R. 499, which he said supported the proposition that an expert's opinion which extrapolates backwards in time (from a known blood alcohol concentration) should be given no weight unless the expert has personally tested the accused person, to determine the actual rate at which he or she eliminates alcohol from the body.

[430] At the trial in R. v. Boucher, the accused testified as to the quantity of alcohol he had consumed, and called expert opinion evidence to the effect that, if he had consumed that amount of alcohol, his blood alcohol concentration would have been less than 80 milligrams of alcohol per 100 millilitres of blood. The defence was attempting to establish

"evidence to the contrary", so as to rebut the statutory presumption that his blood alcohol concentration at the time of driving was the same as at the time of the breathalyzer test. The trial judge rejected the accused's evidence as to the quantity of alcohol that he had consumed, which removed the critical fact upon which the expert's opinion was based. The accused was convicted, and he appealed. The trial judge's rejection of the accused's testimony was not interfered with.

[431] I do not agree with defence counsel's contention that R. v. Boucher stands for the proposition that he advances. I have the evidence of Mr. Pon, who testified that 90% of the population eliminates alcohol from the body at a rate between 10 and 20 milligrams of alcohol per 100 millilitres of blood, per hour. There is nothing to suggest that this statement is in error, and there is no evidence to show that Ms. Bekkers has a rate of elimination outside that range. I accept that the most important assumptions, on which Mr. Pon's opinions of blood alcohol content are based, have been proven.

[432] Crown counsel referred me to R. v. Lardner 2007 BCSC 986, a decision of Madam Justice Beames. I agree with the reasoning of Beames J. at paras. 19 through 23 of her judgment which includes an analysis of R. v. Boucher.

[433] The defence of course challenges the sufficiency of Mr. Pon's opinions.

Crown's reply position

[434] The Crown challenged the credibility of Ms. Bekkers. Although the ground of this challenge was not clearly identified, it was my impression that Crown counsel called into question both the honesty of Ms. Bekkers and the reliability of her contentious testimony. Moreover, the Crown does not accept as reliable the opinions expressed by the four defence witnesses (John Harrison, Joseph Bekkers, Judith Bekkers and Holly Mecheder) as to Ms. Bekkers' ability to drive a motor vehicle.

[435] The Crown upholds the testimony given by Carolyn Daniels wherever it conflicts with the trial testimony of Ms. Bekkers. (The defence accepts some parts of Ms. Daniels' testimony, but challenges her credibility on other parts of her evidence.)

[436] The positions of the parties require an assessment of the credibility of these witnesses, before the issue of impairment can be decided.

The credibility of the accused and Carolyn Daniels

[437] The Crown challenged Ms. Bekkers' credibility on several grounds. As I understood them, these grounds were as follows:

a) It is highly improbable that Ms. Bekkers' professed inability to recall so many events leading up to and including the accident, is truthful. In the alternative, if she truly cannot remember all of these things, then the absence of memory could have been caused by impairment of her mental abilities by alcohol or a drug, or a combination of these.

b) Ms. Bekkers made pre-trial statements to Carolyn Daniels which are inconsistent with her statements on the same subjects, in her trial testimony.

[438] Ms. Bekkers testified that she could not recall whether she did or did not make several statements attributed to her by Carolyn Daniels. For example, Ms. Bekkers said that she did not recall whether she told Ms. Daniels that she had gone to bed about 4:00 a.m., that she was hung over in the morning, or that she had taken a sip of beer after she had woke up. With respect to this last alleged statement, Ms. Bekkers said she did not think she had made such a statement, but she did not firmly deny making it. But she did deny that she took a sip of beer when she woke up.

[439] Ms. Bekkers said that she did not recall whether Ms. Daniels suggested that she should stay another night in Victoria, due to the road and weather conditions. She said she did not remember whether Ms. Daniels had told her not to bring any cocaine to her mother's place (when she came to visit Ms. Daniels). But she seemed to deny that she and Ms. Daniels had ever discussed the subject of cocaine that weekend.

[440] Ms. Bekkers testified that she did not recall any details about the drive from Victoria to the place where the accident occurred, except for stopping in Ladysmith to get something to eat. She said she did not recall anything about being behind the vehicles being driven by Tana Liew and Daniel Lundstrom, or tailgating those vehicles, or changing lanes behind them, or passing them. She said she did not recall what her speed was just before she lost control, and did not recall passing by a snow clearing machine at the south end of the Haslam Creek Bridge. She said she could not recall whether she signalled a left turn, before steering to her left to make a lane change. She testified, in substance, that after she lost control of her vehicle and it kept going in a direction towards the centre line, she took her foot off the gas pedal and did not apply the brakes, but she remembered nothing further until after her vehicle had crashed into the snow bank and she heard her children crying.

[441] When a person goes into the witness box and testifies that she or he does not now remember whether or not a suggested event occurred in the past, the person is asserting that he or she does not know whether the event did or did not occur. In my opinion, there is no room for such witness to be mistaken. The witness is either telling the truth, or lying, in stating that he or she has no present memory of the event in question.

[442] As I see it, if the alleged unremembered event did in fact occur, and if it appears to have some significance or importance, the professed inability to remember may require an explanation before being accepted. For example, if the event appears to be one that a reasonable person who had perceived or experienced it would not likely forget, a trier of fact will look for an explanation, before accepting the professed lack of memory. If the witness was intoxicated, injured, or under the influence of some extreme emotion such as fear or grief, at or around the time of the prior event, such condition might provide an understandable explanation.

[443] Ms. Bekkers did not directly explain why she was unable to remember so many things that had apparently occurred, some of which were significant. However, I infer that Ms. Bekkers' loss of control of her motor vehicle at high speed would likely induce a feeling of extreme fear. Then she suffered significant injury, and felt extreme fear for the well-being of her children. Upon learning that two of her children had died (and the other two had been injured), this fear could have been overwhelmed by feelings of extreme grief.

[444] Holly Mecheder testified that Ms. Bekkers had not had problems with her memory before the accident, but that she did have such problems after the accident. I accept that evidence.

[445] In the circumstances of this case, while I am suspicious of some of Ms. Bekkers' professed inabilities to remember, I am not persuaded that she was being dishonest.

[446] With respect to the alleged previous inconsistent statements, Ms. Bekkers did not think that she had told Carolyn Daniels she took a sip of beer when she woke up, but she did not firmly deny making that statement. At trial, Ms. Bekkers testified that (regardless of whether she said it) she did not take a sip of beer after she woke up. There is a conflict between what she allegedly told Ms. Daniels, and what she testified to at trial, on the same subject.

[447] Ms. Daniels testified that she visited with Ms. Bekkers at the hospital in Nanaimo on December 26, 2008. She said that, during this visit, Ms. Bekkers made a number of statements, including the following:

a) She told Ms. Daniels that she stopped at a MacDonald's restaurant in Duncan, to get something to eat;

b) She told Ms. Daniels that, while she was at the MacDonald's restaurant in Duncan, she drank a sip of beer (presumably after opening one of the cans of beer that were in the back of her vehicle).

[448] In her trial testimony, Ms. Bekkers testified that she did not recall making any of these statements to Ms. Daniels, and said she did not even remember Ms. Daniels visiting her at the hospital. Ms. Bekkers testified that she stopped in Ladysmith (not Duncan) to get something to eat, and that she did not drink any beer there (or anywhere else) during the trip from Victoria to Nanaimo. If Ms. Bekkers made these statements to Ms. Bekkers, then the statements contradict her trial testimony.

[449] In order to determine whether Ms. Bekkers made the alleged previous inconsistent statements to Ms. Daniels, I must assess the credibility of Ms. Daniels. Defence counsel argued that Ms. Daniels' credibility was suspect, because she was obviously biased against Ms. Bekkers and because she had not given a statement to the police until almost ten months after the accident, had made no notes of the alleged conversations and had no means to refresh or confirm her memory of events.

[450] It appears from the evidence that Ms. Daniels abandoned her friendship with Ms. Bekkers after February or March 2009, and was critical of changes she had observed in Ms. Bekkers' lifestyle. I thought she was overly reluctant to admit that she believed Ms. Bekkers was fine to drive her motor vehicle when she left with Pyper at about 12:30 p.m. on Monday, December 22, and that the only concerns she had about the driving was the adverse weather conditions. Her assertion that she "pretended" to use cocaine at Horne Lake in the summer of 2008 seemed suspicious. If she hated the idea of cocaine use as much as she claimed (and it was implicit in her evidence that all her friends knew this) one wonders why she would feel it was necessary to pretend that she herself was using it.

[451] Notwithstanding the concerns I have expressed, I accept Ms. Daniels' evidence that Ms. Bekkers made the statements to her which I have described.

Findings relating to conflicts between Ms. Bekkers and Ms. Daniels

[452] Ms. Bekkers' statement to Ms. Daniels to the effect that she went to bed at about 4:00 a.m. is not directly contradictory of her trial testimony to the effect that she went to bed "sometime after 1:00 a.m." But I think this statement shows that Ms. Bekkers' trial testimony on the point cannot be relied on.

[453] Soon after getting up that morning, Ms. Bekkers told Ms. Daniels that she had taken a sip of beer, but she testified at trial that she had not drank any beer after waking up. I find it more likely that her pre-trial statement is true. Even so, the amount of beer she drank would obviously have been quite small. Since Ms. Bekkers denied making this statement to Ms. Daniels, there was no attempt to explain the difference between that statement and her trial testimony. It is possible that making this statement and taking a sip of beer that morning are two more events that Ms. Bekkers does not remember.

[454] As to the statements made by Ms. Bekkers to Ms. Daniels at the hospital, I accept Ms. Daniels' evidence that she visited Ms. Bekkers at the hospital on December 26, 2008, and I find that John Harrison is simply mistaken on this point. The evidence shows that Ms. Bekkers was recovering from surgery, was likely sedated by drugs, was suffering intense grief and might still have been in shock. But even so, Ms. Bekkers knew that she had stopped at a MacDonald's restaurant to get something to eat. I find that she mistakenly told Ms. Daniels that she had stopped at Duncan, when she had more likely stopped at Ladysmith. But two police officers (Constable Maizis and Constable Halskov) thought that the empty cup found on the floor of Ms. Bekkers' vehicle smelled of liquor, and the vehicle smelled of beer. I find that Ms. Bekkers probably did take a sip of beer while stopped at the restaurant. In the aftermath of a serious accident for which Ms. Bekkers no doubt felt responsible, it seems highly improbable that she would say she had taken a drink of beer during the trip home, if she had not done so. In view of her injury and medical condition, she may not now remember taking the sip of beer, or telling Ms. Daniels that she had done so. Again, the amount she drank would have been very small.

[455] Ms. Daniels testified that she put the remaining cans of beer in the back of Ms. Bekkers' vehicle before she left, and I accept that evidence. Ms. Daniels said that she believed Ms. Bekkers knew she had put the beer in the vehicle, but Ms. Bekkers said she did not know this. I find that, although Ms. Bekkers may not have known the beer was in her vehicle at the time she drove away, she would have seen it later when packing her children's belongings in preparation for the drive home.

[456] I am unable to resolve all of the conflicts between Ms. Daniels and Ms. Bekkers. It does seem likely to me that they had some discussion about cocaine, and that Ms. Bekkers told Ms. Daniels that she had used cocaine the previous night. Of course, there was no actual conflict with respect to facts which were asserted by Ms. Daniels, but which Ms. Bekkers said she did not recall.

[457] Some of the matters which I have just discussed cause me to have some concern about the reliability of some parts of Ms. Bekkers' trial testimony. As with most witnesses, the possibility exists that Ms. Bekkers has lied or been mistaken about key parts of her trial testimony. But I am not persuaded there is any significant risk that Ms. Bekkers did not believe in the truth of her testimony on the two essential issues in the case. Those issues are whether her ability to drive was impaired by alcohol or a drug at the relevant time and whether she lost control of her vehicle when she changed lanes and drove over black ice.

[458] Of course, the test for impairment is objective, not subjective, and so Ms. Bekkers' belief that she was not impaired is not determinative of the issue. Her belief is relevant, because a person has direct knowledge of his or her present physical and mental condition. But all of the relevant circumstances must be determined and weighed, before that issue can be decided.

Rules of law relating to circumstantial evidence

[459] In making findings as to what relevant circumstantial facts should be accepted, the law directs that the evidence relating to any individual fact must not be isolated and subjected separately to the standard of proof beyond a reasonable doubt. That standard is only to be applied in determining the issue of whether an essential element of the offence has been proved (in this instance, impairment). See R. v. Morin, [1988] 2 S.C.R. 345.

[460] In my opinion, the method that should be used to determine whether an alleged circumstantial fact should be included in the body of circumstantial facts to be considered when deciding whether the inference of impairment should be drawn is this. Where the Crown has alleged a circumstantial fact which points to impairment, such facts must be proved on the balance of probabilities. Where the defence has alleged a circumstantial fact which points to non-impairment, such facts will be eligible for consideration if they are proved on the balance of probabilities, or if they are shown to have a 50% probability of truth. (It would be error to include any alleged "defence fact" which was rejected as being probably false.) In my opinion, this method of reasoning logically follows from statements

made by the Supreme Court of Canada in R. v. Arp, [1998] 3 S.C.R. 339 at paras 70 and 71; and in R. v. Evans, [1993] 3 S.C.R. 653 (under the heading "3 Procedure for Determining Admissibility").

Ms. Bekkers' condition before leaving Victoria

[461] From the evidence of Carolyn Daniels concerning her observations and interaction with Ms. Bekkers between about 11:00 a.m. and 12:30 p.m. on Monday, December 22, I infer that Ms. Bekkers was not exhibiting any symptoms of impairment of any kind up to the point in time when she left the home of Ms. Daniels' mother. I am satisfied that, if Ms. Bekkers had been exhibiting any such symptoms, her life-long friend would have observed them. Moreover, since she has long been estranged from Ms. Bekkers, I am satisfied that Ms. Daniels would have testified to even the most minimal symptoms of impairment, had she perceived that any such symptoms existed. The only concern that Ms. Daniels had about Ms. Bekkers driving a motor vehicle, was the existence of potentially hazardous winter driving conditions.

[462] As to the other Victoria witnesses (John Harrison, Joseph Bekkers, Judith Bekkers and Holly Mecheder), Crown counsel sought to establish inconsistencies in the details of their various versions of events. Only a few minor differences were shown, and these did not have any adverse effect on the credibility of any of these witnesses. Crown counsel also sought to minimize the opportunity that these witnesses had, for any careful observation of Ms. Bekkers that day. No significant inroad was made in this respect. Moreover, these four witnesses all had a close relationship with Ms. Bekkers and were well-equipped to detect any abnormality in her appearance and behaviour.

[463] The Crown submits that the expert opinion evidence of Ronald Pon establishes that Ms. Bekkers' blood alcohol content was over the legal limit up to around the time when she drove away from Holly Mecheder's place heading for Nanaimo. From Mr. Pon's evidence, I find that there is some probability that Ms. Bekkers' blood alcohol concentration was not far below the legal limit, when she set out for Nanaimo from Holly Mecheder's residence (which I find was at about 2:30 p.m.). This fact has the potential to weaken the opinions given by the four defence witnesses.

[464] All four of the said defence witnesses testified in substance that they did not detect the slightest sign that Ms. Bekkers was impaired by alcohol or a drug. They all conveyed the opinion, expressly or explicitly, that her ability to drive a motor vehicle was in no way impaired by alcohol or a drug.

[465] These opinions are admissible. A lay person can give opinion evidence as to whether another person is under the influence or feeling the effects of alcohol, and whether the degree of a person's impairment by alcohol is such that it would impair the person's ability to drive a motor vehicle. See R. v. Graat, [1982] 2 S.C.R. 819 at pp 835-840.

[466] These four defence witnesses do not say: "I could tell she had been drinking, but I do not think it was enough to impair her ability to drive a motor vehicle." They say, in effect: "In my opinion, she was not under the influence of alcohol or a drug, at all."

[467] Notwithstanding the evidence of Mr. Pon, I accept the evidence given by these four defence witnesses as to their observations of Ms. Bekkers and as to their opinions based on those observations. Again, these findings are not conclusive. But I place considerable weight on them.

Ms. Bekkers' condition during the drive

[468] The Crown contends that Mr. Pon's evidence, based on facts admitted by Ms. Bekkers, establishes that Mr. Bekkers could have been in a "compromised state" at the time of the accident, due to a combination of fatigue from the "crash phase" following cocaine use, and the depressant effect of alcohol (or alcohol combined with Effexor) on the central nervous system. It is argued that if Ms. Bekkers was in this compromised state, then her ability to drive would have been impaired, and moreover, this combination of effects could have caused her to fall asleep at the wheel.

[469] Ms. Bekkers testified to the effect that she was not feeling any adverse effects from alcohol or drugs, or from hang-over, or from cocaine withdrawal (or any combination of these things) at the relevant time. There is no suggestion in the evidence of Carolyn Daniels that Ms. Bekkers was going through any phase from cocaine withdrawal. The evidence of the four defence witness who saw Ms. Bekkers after she left Ms. Daniels' place before she left the Victoria area, is to the effect that she was entirely normal.

[470] The evidence of Tana Liew and Daniel Lundstrom is contentious in several respects, and I must return to consider it again. But it does seem clear from their evidence that, in the minute or so before the accident, Ms. Bekkers was driving somewhat aggressively and anxious to pass, which I find indicates alertness on her part. I reject the notion that Ms. Bekkers might have fallen asleep, and I am not satisfied that she was feeling any significant fatigue.

[471] In my view, the evidence does not go beyond establishing a possibility that Ms. Bekkers was in the "compromised state" contended for by the Crown. I conclude that the possible adverse effects of Ms. Bekkers' prior cocaine use, and her ingestion of Effexor should be given no weight.

Ms. Bekkers' manner of driving just before the accident

[472] The Crown submits that another indication of impairment is to be found in the manner of Ms. Bekkers' driving in the few minutes leading up to the accident. Based on the evidence of Tana Liew and Daniel Lundstrom, the Crown alleges that Ms. Bekkers was driving in an "erratic manner" shortly before the accident occurred.

[473] Ms. Bekkers testified, in effect, that she could not recall whether the events described by Ms. Liew and Mr. Lundstrom did or did not occur. The only exception to this was her testimony that she was driving in the slow lane shortly before she changed lanes and lost control, which could be interpreted as being inconsistent with Mr. Lundstrom's evidence on the point. As a consequence, her manner of driving in the few minutes before she lost control, will have to be determined from an assessment of the evidence given by Ms. Liew and Mr. Lundstrom. There are a number of conflicts between Tana Liew and Daniel Lundstrom, some of which are significant.

[474] Ms. Liew says that she was driving in the fast lane at all times, right up to the point where she pulled over to let the black SUV pass. Mr. Lundstrom testified that he was driving his vehicle in the fast lane, there was a red pickup truck driving alongside him in the slow lane and that he slowed down and pulled in behind the red pickup truck in the slow lane to let the dark coloured SUV pass.

[475] Ms. Liew testified that she was driving in the fast lane at a speed of 80 kph when the black SUV was tailgating her vehicle and the vehicle which was travelling alongside her. Mr. Lundstrom testified that he was travelling in the fast lane at a speed of 65 to 70 kph when the dark SUV was close behind him and wanting to pass.

[476] Ms. Liew said that the travel lanes of the highway were bare and dry. Mr. Lundstrom testified that the road was covered in snow, and it was snowing.

[477] Ms. Liew testified, in effect, that it was still daylight. Mr. Lundstrom said it was getting dark.

[478] Ms. Liew testified that the black SUV was tailgating both her vehicle and the vehicle travelling beside her, and that it switched lanes back and forth many times. Mr. Lundstrom agreed that the dark SUV was tailgating him, but did not mention anything about it switching lanes back and forth.

[479] Ms. Liew testified that the black SUV moved into the slow lane to pass her truck, and stayed in that lane. Mr. Lundstrom said that the SUV was in the fast lane when he last saw it (implying that it had remained in the fast lane after passing his car and the red pickup ahead of him).

[480] In view of the evidence given by Douglas Priest and other witnesses, I do not accept Ms. Liew's evidence or Mr. Lundstrom's evidence about the condition of the road surface. It was neither bare and dry, nor covered with snow (and it was not snowing).

[481] I find that Ms. Bekkers was following behind the vehicles being driven by Ms. Liew and Mr. Lundstrom more closely than was prudent, in the circumstances. I find that the two vehicles ahead of Ms. Bekkers were travelling at a speed of between 70 and 80 kph when she came up close behind them, to indicate that she wished to pass. On the issue of whether Ms. Bekkers repeatedly changed lanes behind the two vehicles as she was tailgating them, I find that she did this only a few times, not enough to attract Mr. Lundstrom's attention.

[482] I am unable to determine whether it was Ms. Liew or Mr. Lundstrom who was driving in the fast lane when the black SUV was following closely behind their two vehicles. As a consequence, I do not accept Ms. Liew's evidence that Ms. Bekkers passed her truck "on the inside." I find it more probable that Ms. Bekkers was in the fast lane when she passed the two vehicles, which were then travelling one behind the other, in the slow lane.

[483] I find that, after passing Mr. Lundstrom and Ms. Liew, Ms. Bekkers moved over into the slow lane, before crossing the Haslam Creek Bridge. The evidence of Kenneth Wilson (coupled with that of Ms. Liew) supports the further finding that Ms. Bekkers continued to drive in the slow lane, after crossing the bridge, before moving to the left. I do not accept Ryan Doucet's evidence to the effect that Ms. Bekkers passed one or more motor vehicles after crossing the Haslam Creek Bridge.

[484] On the issue of the speed of Ms. Bekkers' vehicle, I find that it was travelling at a speed of about 100 kph when she lost control of it, just before it veered to the left and across the centre line. The only features of Ms. Bekkers' driving that were out of the ordinary leading up to her loss of control, was her tailgating of the Liew and Lundstrom vehicles and her increasing the speed of her vehicle to about 20 kph above the speed limit after passing them. But that was only about 10 or 15 kph faster than some of the southbound vehicles that were oncoming across the Nanaimo River Bridge. There was evidence that many, perhaps most drivers travelled at about 90 kph through that area, in normal driving conditions. Moreover, the curve in the road may be described as a slight curve, from the evidence of Corporal Irving, and could be safely negotiated at a much higher speed than 100 kph (even if black ice was present) if a driver maintained a consistent speed, and position on the road, as his or her vehicle rounded the curve. Mr. Toor gave similar evidence on this subject. I accept their evidence relating to the critical curve speed.

[485] Finally, I infer from the evidence of both Tana Liew and Daniel Lundstrom that when she was behind their vehicles, when she passed them and increased her speed, and up to the point where she lost control, Ms. Bekkers had maintained full and proper control of her vehicle.

[486] I would not describe Ms. Bekkers' manner of driving in the few minutes leading up to her loss of control as being "erratic". The facts that she lost control of her vehicle, that she was unable to regain control, and that her vehicle collided with two other oncoming vehicles as a result, are circumstantial facts that could be relevant to the issue of impairment, if her loss of control of her vehicle was caused by some irrational or reckless act or omission on her part. If black ice was present on the road surface (which drivers usually cannot see), and if the speed of Ms. Bekkers' vehicle was about 100 kph, then her loss of control could have been caused by an ordinary act of driving, such as steering to the left to move from the slow lane into the fast lane. In my opinion, no irrational or reckless conduct has been shown.

[487] Ms. Bekkers testified that after deciding against turning off the highway on the north side of the Nanaimo River bridge, she decided to move from the slow lane into the fast lane, because she thought the fast lane was more clear, and safer to drive in. She said that she made a fairly quick steering motion and that when she steered to the left, her vehicle suddenly just kept going, she was unable to make it straighten out in the fast lane, and she lost all control of it. She testified that her vehicle "slid straight across" the highway, and that she has no memory of seeing or colliding with any oncoming vehicle.

[488] Ms. Bekkers' description of her loss of control is not contradicted by the evidence of Tana Liew or Kenneth Wilson. Her description is consistent with the presence of black ice on the road surface, and with the tires of her vehicle losing traction on the ice. Ryan Doucet and Jaron Dubyna both said that they saw Ms. Bekkers' vehicle sliding. I accept Holly Mecheder's evidence (under cross-examination by Crown counsel) as to what Ms. Bekkers told her about how the accident happened (she hit ice, the car slid and she lost control), which is consistent with Ms. Bekkers' trial testimony. I will assess the evidence relating to the accident more fully, later in these reasons. At this point, I need say only that I accept Ms. Bekkers' general description of how the accident occurred.

[489] I do not accept the estimates of Tana Liew and Ryan Doucet that the angle at which Ms. Bekkers' vehicle travelled toward and across the centre line was almost 90 degrees. I find that this angle of travel would likely not have exceeded 45 degrees (as estimated by Jaron Dubyna) and could have been less than that. I accept that the angle would have appeared quite sharp, to oncoming drivers, and that it probably was fairly sharp.

[490] In my opinion, the manner of Ms. Bekkers' driving in the minute or two leading up to her loss of control is a factor which carries no weight on the issue of whether her ability to drive was impaired by alcohol or a drug. It also seems to me that her failure to regain control of her motor vehicle before it crossed the centre line has no probative value on this issue.

Ms. Bekkers' condition at the scene of the accident

[491] From the evidence given by Glenn Budd and Douglas Priest, I find that Ms. Bekkers was probably knocked unconscious as a result of the collisions, but that she regained consciousness a minute or two after her vehicle went into the snow bank. I infer from the evidence of all of those persons who observed Ms. Bekkers soon after the accident that she was so emotionally upset upon realizing that her children had been injured and perhaps killed, to the point where she was hysterical and had to be restrained. Notwithstanding her injuries, she was able to get out of the vehicle and walk around. No one suggested that she exhibited any symptoms of impairment by alcohol or drugs other than the odour of liquor on her breath. On this point, there was conflicting evidence. Douglas Priest spent considerable time close to Ms. Bekkers after the accident, and took her and Pyper to the paramedic, Dan Brown, when his ambulance arrived. Mr. Priest testified that he smelled an "alcohol-perfume smell", coming from Ms. Bekkers. Edith Eaton had a much shorter

amount of contact with Ms. Bekkers and she did not smell any odour of alcohol. The paramedic, Dan Brown, was very close to Ms. Bekkers, also for a significant length of time, and was automatically looking for any signs of impairment. He did not detect any smell of alcohol. Tana Liew was briefly within arm's length of Ms. Bekkers, and did not notice any smell of alcohol coming from her, but Ms. Liew was paying more attention to the injured children.

[492] I accept the evidence of Douglas Priest, and I find that there was some odour of alcohol coming from Ms. Bekkers' person. I find it likely that the odour was coming from her breath. But I find that this was a faint odour, in any event. The trained paramedic Dan Brown did not detect any smell of alcohol at all. But it is admitted that at least one hospital staff person did smell alcohol on Ms. Bekkers' breath a short time later.

[493] The emotional upset of Ms. Bekkers, which some witnesses described as being hysterical, was consistent with the traumatic events that had occurred. Ms. Bekkers was able to get out of the vehicle and walk on her own, despite her significant injuries. Dan Brown testified that he was able to calm down Ms. Bekkers and that after that, she followed his directions and gave intelligent and responsive answers to his questions. He said that Ms. Bekkers did not look tired and exhausted, but her alertness at that point could be a reaction to the traumatic events. There is no evidence that M. Bekkers exhibited any other unusual behaviour or condition after the accident.

[494] I conclude that Ms. Bekkers was not exhibiting any signs of impairment by alcohol or drugs, after the accident (other than a faint odour of alcohol on her breath).

The alcohol and drugs in Ms. Bekkers' blood

[495] I accept the opinion of Ronald Pon and I find that, at the time of the accident, Ms. Bekkers' blood alcohol concentration was somewhere in the range between 59 milligrams and 76 milligrams of alcohol per 100 millilitres of blood. In view of the uncertainty which is inherent in the assumption concerning rates of elimination of alcohol from the body, I am not prepared to find that her blood alcohol content was higher than 59 milligrams of alcohol in 100 millilitres of blood.

[496] I accept Mr. Pon's evidence that there was Effexor in Ms. Bekkers' blood, and that the amount was significant. It may have been a little higher than what would be expected based on Ms. Bekkers' usual daily dosage. But Mr. Pon did not describe the amount he detected as being "excessive" and I would not draw that inference from his testimony. Mr. Pon did not say that the combination of alcohol and Effexor in Ms. Bekkers' blood would have impaired her ability to drive a motor vehicle.

[497] It should be noted that Mr. Pon did not express the opinion that Ms. Bekkers' ability to operate a motor vehicle was impaired by alcohol, or was impaired by alcohol or a drug, or was impaired by a combination of alcohol and drugs. Mr. Pon's opinion, as I understood it, was that Ms. Bekkers' ability to drive a motor vehicle could have been impaired by alcohol or a drug, or by a combination of these substances.

[498] I have not mentioned the statement that Carolyn Daniels said was made to her by Ms. Bekkers at the hospital on December 26, 2008, to the effect that she "was fine to drive" during the trip from Victoria to where the accident occurred. I accept that Ms. Bekkers made that statement. I think the defence was entitled to elicit this statement from Ms. Daniels, on the principle that where the Crown introduces a statement made by an accused person, the whole statement should be presented. It is also well settled that inculpatory parts of an accused's statement are evidence against him or her, and exculpatory parts are evidence for him or her. On this reasoning, Ms. Bekkers' statement to the effect that she was fine to drive is admissible on the issue of impairment. However, I would not attach significant weight to it.

[499] Robert Leyland's evidence established that, to his knowledge as her supervisor, Ms. Bekkers had never been under the influence of alcohol while at work. But this evidence had no probative value on the issue at trial.

The Law relating to proof of impairment

[500] The Crown bears the burden of proof on the issue of impairment, and must prove this essential element of the offence, beyond a reasonable doubt. This means that the allegation that Ms. Bekkers' ability to operate a motor vehicle was impaired by alcohol or a drug, at the time and place charged, must be proved to be true, to that degree of certainty where there is no reasonable doubt that it is true.

[501] Proof beyond a reasonable doubt does not require proof to an absolute 100% certainty. But it does require proof to a much higher degree of certainty than the civil standard of proof on the balance of probabilities, which only requires proof that the existence of the fact in issue is more probable than not. In a civil case, proof to a 51% degree of certainty can, in theory, justify a finding of fact. Proof beyond a reasonable doubt lies much closer to absolute certainty than to proof on a balance of probabilities, on the scale of certainty. See R. v. Avetysan [2000] 2 S.C.R. 745 at para. 13; R. v. Starr [2000] 2 S.C.R. 144 at paras 241-242.

[502] The kinds of things that can and cannot legitimately contribute to the creation of reasonable doubt have been described in general terms by the Supreme Court of Canada in many cases, including R. v. Avetysan [2000] 2 S.C.R. 745. I think that two of the points outlined at para. 10 of R. v. Avetysan have particular importance in this case. They are:

a reasonable doubt is not a doubt based upon sympathy or prejudice;

and

it [a reasonable doubt] is logically connected to the evidence or absence of evidence.

[503] In this case, there exist strong and proper reasons for feeling sympathy for Ms. Bekkers. She has lost two of her children and the other two were injured. But such feelings can have no influence on the court's decision as to whether the evidence raises a reasonable doubt as to her guilt.

[504] Both parts of the second proposition have significance here. First, there is defence evidence which I have accepted, which is capable of raising a reasonable doubt on the issue of impairment. Second, there is an absence of evidence of several indicia of impairment which commonly exist in cases of this kind. For example, there is no evidence of any deficiency in Ms. Bekkers' physical or mental abilities, at any time during the four hours leading up to the time of the accident.

Application of the Law

[505] I must consider the whole body of circumstantial facts asserted in the evidence that I have accepted and that are relevant to the issue of impairment (both for and against). I have indicated my findings, and my opinions as to the relative weights that should be attached to the facts that I have found.

[506] I must decide whether the only reasonable inference to be drawn from these circumstantial facts is that Ms. Bekkers' ability to operate a motor vehicle was impaired by alcohol or a drug, at the time of the accident. See R. v. Cooper, [1978] 1 S.C.R. 860 at 881, and many subsequent cases, including R. v. Khela [2009] 1 S.C.R. 104 at paras 57-58, and R. v. Griffin [2009] 2 S.C.R. 42 at paras 33-34.

[507] Applying the law to the group of eligible circumstantial facts in this case, I am not satisfied beyond a reasonable doubt that the inference of impairment sought by the Crown is the only reasonable inference that can be drawn. In my opinion, impairment has not been proved, even to the civil standard.

Verdict on Counts 5 to 8

[508] As the essential element of impairment has not been established, it follows that I find Ms. Bekkers not guilty of any of the offences charged in Counts 5 through 8 of the Indictment.

Counts 1 to 4: The dangerous driving charges

Potential issues

[509] As I have stated (at para. 35), the potential issues relating to the dangerous driving charges are the following:

a) Did Ms. Bekkers lose control of her motor vehicle because her manner of driving fell below the standard of a reasonable driver?

b) If so, then was her negligent driving also objectively dangerous?

c) If so, then did Ms. Bekkers' dangerous manner of driving fall so far below the standard of a reasonable driver that it amounted to a marked departure from that standard?

d) If so, then was the dangerous driving of Ms. Bekkers a significant contributing cause of the collision (which caused the deaths and injuries)?

The credibility of witnesses

[510] The defence questioned the reliability of some of the evidence given by the drivers (and in one instance, a passenger) of the other vehicles involved in or connected with the accident. I have already assessed the evidence of Tana Liew and Daniel Lundstrom. Except to the extent that I state otherwise, or make a finding that is inconsistent with their evidence, I accept the evidence given by Kenneth Wilson, Jone Yang, Glenn Budd, Jaron Dubyna and Douglas Priest.

[511] As to the expert evidence, the defence did not seriously dispute any of Corporal Irving's opinions, but did attempt to weaken some of the opinions expressed by Mr. Toor. No issue was taken with Mr. Fry's evidence. The Crown challenged Mr. Evans on a number of his opinions (and of course challenged Ms. Bekkers' account of how the accident occurred). I will assess the disputed evidence given by these witnesses on the issues, as they arise.

[512] With respect to the evidence of Ryan Doucet, I consider that his statement to the police on January 8, 2009, is a more accurate account of events than he gave in his testimony at the preliminary hearing on October 27, 2010. However, his statements describing Ms. Bekkers' vehicle as having "vehicles all around her" and as having passed another car on the inside just before going out of control, are contradicted by Tana Liew. I do not accept those parts of Mr. Doucet's evidence, nor his preliminary hearing testimony that his speed was only 70 to 80 kph.

Did Ms. Bekkers lose control of her motor vehicle because her manner of driving fell below the standard of a reasonable driver?

Preliminary findings

[513] The Crown concedes that the road surface was slippery. From all of the relevant evidence, particularly the evidence of Douglas Priest, Daniel Lundstrom, Ryan Doucet, Edith Eaton and Constable Armstrong, I find that black ice was present on the surface of the highway at the time when and at the place where Ms. Bekkers lost control of her vehicle. I find that black ice was also present on a considerable area of the northbound and southbound lanes in the general area where the collisions occurred. I am unable to say whether, at the relevant time, the black ice was continuous or whether it existed in large patches. I accept Ms. Bekkers' evidence that she lost control of her vehicle after steering to the left, to change lanes.

[514] The expert evidence relating to how the accident occurred cannot be determinative in the present case. By the end of the evidence, neither the Crown nor the defence was suggesting that the expert evidence had decisive effect. There are simply too many unknowns. The unknown facts include the following:

a) the location on the highway where Ms. Bekkers lost control of her vehicle;

b) The location where Ms. Bekkers' vehicle collided with Mr. Wilson's vehicle;

c) the pathway or angle followed by Ms. Bekkers' vehicle from the place where she lost control, to the place where it collided with Mr. Wilson's Monte Carlo (and the distance travelled between those two points);

d) whether the black ice was continuous or patchy, along that pathway to the first collision;

e) which wheel or wheels of Ms. Bekkers' vehicle lost traction on the ice, and over what distance or distances the loss (or losses) of traction occurred;

f) the direction (or directions) in which the front wheels of Ms. Bekkers' vehicle were facing, at the time she lost control, or during the time while her vehicle travelled to the point where the first collision occurred; and

g) the radius of the curve steered by Ms. Bekkers, when she steered to her left to change lanes.

[515] I find that these unknowns prevent the experts from reconstructing the events relating to this accident, with any reasonable degree of accuracy. I accept Corporal Irving's opinions that Ms. Bekkers' vehicle was rotating in a counter-clockwise direction when it crossed the centre line, and that the speed of the vehicle was then between 80 and 100 kph. I also accept Corporal Irving's opinions as to the nature and sequence of the several collisions that occurred, and as to the speeds of the vehicles involved.

[516] In light of the evidence given by Mr. Toor and Mr. Fry, I do not accept Mr. Evans' "fulcrum theory" as an explanation of how the accident occurred. Mr. Evans was mistaken as to the specific nature of the transmission with which Ms. Bekkers' vehicle was equipped. But even so, if Mr. Evans' other assumptions existed, the transfer of power from the right front wheel to the (slipping) left front wheel would not have been instantaneous; and it is possible that residual drive power in the right front wheel could have added to any counter-clockwise rotation of the vehicle that might have already begun to occur.

[517] I did find Mr. Evans' opinions helpful concerning the conditions necessary for rapid formation of black ice. Mr. Heaslip, whose evidence I accept, agreed that black ice could form quickly in conditions similar to those which existed here. I find that black ice probably started to form on the road surfaces in question, at about 4:00 p.m. or within a few minutes thereafter.

[518] Another opinion expressed by Mr. Evans was to the effect that a driver could lose control of a motor vehicle upon encountering black ice on the highway, even at quite slow speeds (which I took to mean speeds that were considerably below the posted speed limit). Mr. Evans seemed reluctant to concede that a driver would be more likely to lose control, if he or she drove over black ice at a higher speed (which seemed like a common sense proposition, to me). But he eventually did concede this point. Moreover, he agreed that a driver could more easily regain control of a motor vehicle, if the loss of control occurred at slower speeds. This evidence was generally consistent with Mr. Toor's opinion to the effect that speed is often an important factor in the occurrence of accidents which occur in winter driving conditions. Again, I think this is a matter of common, accepted knowledge.

[519] Corporal Irving gave an opinion to the effect that, if a northbound vehicle lost traction on ice while rounding the curve to the left involved here, and began sliding out of control, then it would tend to travel straight ahead, and not go off to the left. Mr. Toor expressed the same opinion, and gave more detailed reasons for his opinions, which took into account the sideways slope of the highway as it followed the curve.

[520] Mr. Toor also expressed the opinion that, if Ms. Bekkers' vehicle veered sharply to the left when she lost control, then her steering wheels must have had traction, and she must have continued steering to the left, because if the road surface was covered with ice, there would be no traction and her vehicle would have slid straight ahead.

[521] I do not accept that the "slide straight ahead" theory can be applied in this case.

[522] I accept Ms. Bekkers' evidence that she steered fairly quickly to her left to change lanes, that her vehicle changed direction and moved over to the left, but that it just kept going and she could not control its direction of travel. I infer that she did not take her foot off the accelerator, until after she began to lose control.

[523] I infer from Corporal Irving's opinion that Ms. Bekkers' vehicle began rotating in a counter-clockwise direction when she lost control of it. But I find that, when this rotation commenced, her vehicle was probably already travelling at an angle toward the centre line, and that it continued to travel in that same direction, while sliding on black ice.

[524] Mr. Wilson saw that something went wrong with Ms. Bekkers' vehicle. Mr. Doucet said that her vehicle "slid" and came sliding straight across the centre line. Mr. Dubyna said her vehicle was sliding. I accept this evidence. Black ice had formed on the highway, and Ms. Bekkers' lost control of her vehicle when the wheels slipped on black ice.

[525] The finding that Ms. Bekkers lost control of her vehicle due to black ice does not mean that the Crown must fail on the issue of whether she lost control by reason of her negligence. It is but one, although an important one, of the circumstantial facts which must be considered when deciding the issue.

Positions of the parties

[526] The Crown alleges that a reasonable driver, in the circumstances facing the accused, would have known of the risk that there would be black ice on the road surface at the time and place, and so would not have driven above the speed limit of 80 kph, would not have unnecessarily changed lanes, and as a consequence would not have lost control of his or her motor vehicle. It seems implicit in the Crown's position that, even if a reasonable driver might have lost control at a speed of 80 kph, such a driver would have been able to regain control, without crossing the centre line, at that slower speed.

[527] The main facts relied on by the Crown to establish that Ms. Bekkers' loss of control of her vehicle was caused by her negligent driving are:

a) She was driving at a speed of 100 kph when the speed limit was 80 kph and when winter driving conditions existed.

b) She ought to have known (but admittedly did not know) that a significant risk existed that black ice would be present on the road surface at the time when, and at the place where, she lost control.

c) In the face of that risk (which she should have been aware of), she should have reduced her speed at least to 80 kph (but failed to do so) and she should not have changed lanes at a speed of 100 kph (but she did do so).

[528] The defence to the four dangerous driving counts is that Ms. Bekkers lost control of her motor vehicle because a tire or tires suddenly lost traction and slipped on black ice. It is not admitted that a reasonable driver in the same circumstances would have been aware of the risk that black ice would be present on the road surface at that time and place. In the alternative, the defence submits that even if Ms. Bekkers ought to have known of the risk that black ice would be present on the road surface, her manner of driving was not objectively dangerous. In the further alternative, the defence submits that if Ms. Bekkers' manner of driving was a departure from the civil standard of the reasonable driver, and was objectively dangerous, then it did not amount to the "marked departure" required to support the conclusion that the degree of her moral blameworthiness amounted to the mens rea required for the crime of dangerous driving.

Discussion and further findings

[529] It must be kept in mind that there is no onus on the accused to provide an explanation which shows that the accident occurred without any fault on her part. More than that, there is no onus on the accused to establish that the accident occurred for innocent reasons which are equally as probable as the blameworthy reasons advanced by the Crown.

[530] In my opinion, all reasonable drivers on Vancouver Island would know that when there is moisture on the roads and the temperature drops to below freezing, there is a risk that black ice will form on the road surface. I think the existence of those conditions would raise the risk of black ice above a mere possibility, to a level requiring that it be taken into account by reasonable drivers. I find some support for this conclusion in McPhee v. British Columbia 2005 BCCA 139 at paragraph 29.

[531] I am also of the opinion that a reasonable driver would know that the presence of black ice on the road surface, particularly on a curve in the road, could cause the tires of his or her motor vehicle to lose traction which in turn could cause him or her to lose control of the motor vehicle. That seems to me to be a matter of common sense. See Benoit v. Farrell Estate 2004 BCCA 348, at para 67, where the court stated: "We know from common experience that ice on highways often results in drivers losing control of their vehicles."

[532] In my view, a reasonable driver would also know that travelling at a speed of 90 kph or higher on a curved section of highway posted at 80 kph, where black ice could be present, would increase the risk of losing control of one's motor vehicle in the event that black ice was in fact present. Such loss of control could be caused by applying the brakes, or rapidly accelerating, or steering sharply to one side or the other, or driving too fast around a curve. In my opinion, a reasonable driver would know these things and would avoid doing them when there is a foreseeable risk of black ice being present.

[533] All drivers of motor vehicles are required to meet the standard of a reasonable driver. They must not do what a reasonable driver would not have done, and must not fail to do or know what a reasonable driver would have done or known, in the same circumstances. All drivers are deemed by law to have reasonable driving skills and to have the knowledge that a reasonable driver would have had, in the prevailing circumstances. If a driver fails to exercise reasonable driving skills, or fails to possess or properly act upon such knowledge as a reasonable driver would have done, then his or her driving conduct falls below the standard of a reasonable driver. Simply knowing about a risk to safety that a reasonable driver would have foreseen, is not enough. A driver must apply that knowledge to the existing circumstances, and exercise the degree of care required to match that risk.

[534] Any sub-standard driving conduct is a breach of the duty of care owed by all drivers of motor vehicles, namely, to take reasonable care for the safety of other persons using the highway (including any passengers riding in one's own motor vehicle).

[535] If a driver's sub-standard act or omission causes an accident (which causes injury to another person), then the driver will be civilly liable in negligence for such injury. In such a case, the defendant driver's act or omission (in breach of the standard of care) is said to have created an unreasonable risk of injury to other persons using the highway, i.e., a risk that a reasonable driver would have foreseen and avoided.

[536] In the case at bar, I have found that black ice was present on the road surface at the place where Ms. Bekkers lost control of her motor vehicle. The evidence establishes that black ice is an invisible hazard. The first question is whether a reasonable driver would have known of the risk that black ice would be present at that time and place. From Ms. Bekkers' testimony, I find that she did not know that such a risk existed.

[537] Several of the other drivers who were called as witnesses by the Crown acknowledged that the prevailing road and weather conditions could result in the formation of black ice, at the place where the accident occurred. But those drivers who were travelling southbound and were involved in the accident (or its aftermath) did not say they were anticipating the presence of black ice at that location. Some of those drivers were driving at speeds which indicated either that they were not aware of the risk that black ice might be present or that they disregarded such risk. It seems to me that, in common sense, a driver who believed that there was a risk of black ice being present, would not be driving at a speed of 90 kph. In making this observation, I do not mean to suggest that any of the other drivers were at fault for the collisions which occurred.

[538] I find that a reasonable driver, in the circumstances facing Ms. Bekkers, would have known that there was a risk (more than a mere possibility) that black ice would be present on the road surface, at the time and place where Ms. Bekkers lost control of her motor vehicle. The road surface had been wet from melting snow. In the hour or so before the accident, the temperature was at or below freezing, and was getting colder as the afternoon progressed. Drivers approaching from either direction could see that the road surface looked wet. The area of highway in question was shaded from the sunlight at an earlier time than the sections of highway north and south of that area. A reasonable driver would have known that the temperature would be dropping as sunset was approaching.

[539] In my opinion, a reasonable driver would have been aware of the risk that black ice would be present and, having that knowledge, would not have been travelling at a speed of 90 kph or higher, through that area at that time. Ms. Bekkers ought to have known of this risk, and should not have been driving at a speed of 100 kph. Her steering to make a "quick" lane change was a lawful and ordinary act of driving, but I find that it resulted in her losing control because of the presence of black ice and her excessive speed.

[540] I am not satisfied that Ms. Bekkers' failure to regain control so as to prevent her vehicle from crossing the centre line, was a separate act of negligence. That is because I am not persuaded that a reasonable driver who had lost control at 100 kph in the same circumstances, would have been able to regain control and avoid crossing the centre line. Extrapolating from the expert evidence given by Mr. Toor, I calculate that, at a speed of 100 kph, the vehicle would travel 27.8 metres in one second. I reject the Crown's submission on this issue, which was to the effect that Ms. Bekkers negligently panicked when she lost control.

Conclusion on negligence issue

[541] I am satisfied beyond a reasonable doubt that Ms. Bekkers' manner of driving fell below the standard of care that would have been exercised by a reasonable driver in the same circumstances and that her driving conduct in breach of the standard of care, was a cause of her losing control of her vehicle (which in turn was a significant contributing cause of the accident).

Was Ms. Bekkers' negligent manner of driving also objectively dangerous?

Discussion

[542] In R. v. Beatty, [2008] 1 S.C.R. 49, it was held that the driving conduct of the accused was objectively dangerous, where he had been driving on a straight stretch of well travelled highway at the posted speed limit of 90 kph, failed to steer around a curve at the end of the straight stretch, and continued driving straight, crossing the centre line into the path of closely-approaching oncoming traffic. In that case, the road conditions were excellent (unlike in the present case) and there was no apparent explanation for the accused to cross over the centre line, other than a momentary negligent lapse of attention. The driving of the accused was held to be both negligent, and objectively dangerous. The trial judge's acquittal of the accused was reinstated, on the ground that mens rea had not been proved.

[543] Ms. Bekkers' failure to confine her vehicle to the northbound lanes of travel clearly subjected the drivers and occupants of oncoming southbound vehicles (and the occupants of her vehicle) to the risk of serious injury. As I see it, if Ms. Bekkers lost control on the black ice and her vehicle travelled across the centre line, by reason of her driving at an excessive speed, then her manner of driving would be objectively dangerous. In deciding this issue, the tragic consequences of Ms. Bekkers' driving conduct should not be considered: See R. v. Beatty at para. 46.

Conclusion

[544] I have found that Ms. Bekkers' driving at 100 kph was excessive in the face of the foreseeable risk of black ice that existed and that this speed was a significant contributing cause of her loss of control (which caused her vehicle to cross the centre line, into the path of oncoming traffic). As a consequence, I find beyond a reasonable doubt that Ms. Bekkers' manner of driving was objectively dangerous.

Did the negligent driving conduct of Ms. Bekkers amount to a marked departure from the standard of a reasonable driver?

Issue

[545] The next question is whether the evidence establishes beyond a reasonable doubt that Ms. Bekkers' manner of driving in breach of the standard of care amounted to a marked departure from that standard. In order to succeed on this issue, the Crown must prove that the accused's degree of negligence was so high as to justify criminal punishment.

Discussion

[546] If Ms. Bekkers had actually known that black ice was present on the road surface (or if she knew there was a high probability that black ice would be present) and, having that knowledge, deliberately drove at a speed of 100 kph and executed a quick lane change, I think that would amount to recklessly creating a danger to other users of the highway and would constitute a marked departure from the standard of a reasonable driver.

[547] But there is no evidence that Ms. Bekkers knew that black ice was present, or knew that there was a strong chance of black ice being present. She had driven about 100 kilometres from Victoria to the place where the accident occurred, apparently without having encountered any ice on the highway. This tends to confirm that Ms. Bekkers was not aware of the risk that black ice would be present, when she crossed the Haslam Creek Bridge and drove at a speed of 100 kph. It seemed implicit in Ms. Bekkers' testimony that she believed that there was no ice on the road at that location, and her uneventful 100 kilometre drive provided some foundation for a mistaken belief. I have found that such a belief would be unreasonable in the circumstances that existed. But she was not alone in her unawareness of the risk. Several of the other drivers who testified obviously did not believe there was a high (or even a significant) risk of black ice.

[548] In certain circumstances, evidence that the accused voluntarily consumed alcohol before driving a motor vehicle may be relevant and admissible on the issue of whether the mens rea for dangerous driving has been proved, even if the accused was acquitted of impaired driving. This change to the long-standing rule against the admissibility of such evidence was made by the Court of Appeal in R. v. Settle 2010 BCCA 426. At para 48, the court stated:

[48] Therefore, if evidence of intentional conduct is relevant to determining whether the "marked departure" test has been met, evidence of reckless or wilfully blind conduct must also be relevant. It is for this purpose that evidence of an accused's voluntary consumption of alcohol may be relevant in establishing the mens rea of the offence of dangerous driving. Where such conduct demonstrates a recklessness in creating a risk or danger to other users of the highway it may, when considered with the evidence of driving conduct, establish a pattern of disregard for the safety of other users of the highway that amounts to a marked departure from the standard of care of a reasonably prudent driver.

Also see para 55:

[55] The Beatty restatement of the Hundal test, has, in our view, opened the door to including, in a consideration of the mens rea of the offence of dangerous driving, evidence of an accused's state of mind, including evidence of the voluntary consumption of alcohol prior to driving. That evidence, when considered with evidence of driving conduct, may demonstrate a "pattern" of conduct that shows a disregard for the safety of others using the highway, which in its totality may be sufficient to establish a marked departure from the standard of a reasonably prudent driver.

[549] The trial judge in R. v. Settle acquitted the accused of impaired driving, but had made the finding that the accused was "under the influence of alcohol to some degree" at the time of the accident (see paras. 16 and 17). The Court of Appeal held that the trial judge did not err in considering the evidence of alcohol consumption on the dangerous driving charge (see paras 58-60).

[550] I am not persuaded that Ms. Bekkers was under the influence of alcohol to any degree in the minutes leading up to and including her loss of control of her vehicle. Nor do I find that the other drugs in her system, combined with the alcohol in her blood, had any adverse effect on her ability to drive a motor vehicle. Moreover, there was no appreciable drinking for more than 12 hours before the accident occurred. To my mind, Ms. Bekkers' voluntary consumption of alcohol is not capable of supporting an inference of recklessness, or of contributing to "a pattern of disregard" for the safety of other persons. Accordingly, I hold that the evidence of alcohol and drug consumption is not admissible on the issue of mens rea. If I am wrong, and this evidence should be admitted on this issue, I would give it little weight, and I would conclude that it does not increase the degree of Ms. Bekkers' negligence to the point where it would constitute a marked departure from the standard of a reasonable driver.

[551] Crown counsel made a submission based on s. 215(2) of the Motor Vehicle Act, which empowers police officers to suspend a driver's licence for 24 hours, where a police officer believes on reasonable and probable grounds "that a driver's ability to drive a motor vehicle is affected by alcohol." It was pointed out that s.215(6) requires a driver to prove that his or her blood alcohol level is not over 50 milligrams of alcohol in 100 millilitres of blood, in order to have the suspension terminated.

[552] Crown counsel referred to the comments of Fish J. at para. 87 of R. v. Beatty, and argued that this law represented a social policy that should be taken into account by the court when deciding whether the mens rea for dangerous driving should be inferred. It was said that, where the s. 215(2) test was met, and/or where a driver's blood alcohol level was 50 milligrams or higher, these facts could carry significant weight on the issue of the moral blameworthiness of a driver who is charged with dangerous driving.

[553] Assuming the validity of this argument, I would not accede to it in this case. As previously stated, I have not been persuaded that Ms. Bekkers' ability to drive a motor vehicle was "affected by alcohol."

[554] Crown counsel referred to several other cases that I have not yet mentioned, which included R. v. Relkie 2011 BCCA 440; R. v. Hughes 2011 BCCA 220; R. v. O'Keefe 2011 NLCA 41; R. v. Jones 2004 ABCA 227; R. v. Brake 2008 NLTD 102; and R. v. Zubrecki (1999), 46 MVR (3d) 153 (MacKenzie J.).

[555] I have read all of the cases presented by the Crown. Some of them pre-date R. v. Beatty, and all are much different on the facts. I see no need to discuss these cases, except for R. v. Relkie.

[556] In that case, the accused had driven across a double-solid line, in or near a curve, then accelerated, in an attempt to pass a vehicle ahead of him, and then collided with an oncoming vehicle. The accused testified that he could remember nothing of the accident, but said that he knew the road very well, and would not have attempted to pass at that location. The trial judge found that he had done so, and convicted him of dangerous driving. The trial judge made the finding that the accused made a "deliberate decision" to try to pass, and intentionally crossed over a double solid line in the process of making that attempt. On appeal, the trial judge's findings of fact were upheld, and the conviction was affirmed.

[557] In the case at bar, Crown counsel submitted there was, to some extent, an analogy between Mr. Relkie's deliberate act of passing, and Ms. Bekkers' deliberate act of changing lanes. I do not agree with this submission. Mr. Relkie's deliberate act was itself illegal, and contrary to the rules of the road. Ms. Bekkers' act of changing lanes was a lawful and ordinary act of driving. Her failure to signal the lane change was a traffic rule violation, but it had nothing to do with the accident.

[558] It will be apparent that I have rejected the Crown's alternate contention that Ms. Bekkers' manner of driving in the few minutes before she lost control, by itself amounted to the offence of dangerous driving.

Conclusion

[559] I am not satisfied beyond a reasonable doubt that the driving conduct of Ms. Bekkers amounted to a marked departure from the standard of a reasonable driver.

Verdict on Counts 1 to 4

[560] I have a reasonable doubt as to whether Ms. Bekkers had the degree of mental fault required to brand her as a criminal. I therefore find Ms. Bekkers not guilty of any offence charged in Counts 1 to 4 of the Indictment.

SUMMARY

[561] With respect to the impaired driving offences charged in Counts 5 to 8 of the Indictment, I find Ms. Bekkers not guilty on all four counts because, in my opinion, it has not been proved beyond a reasonable doubt that her ability to operate a motor vehicle was impaired by alcohol or a drug, at the time and place charged.

[562] With respect to the dangerous driving offences charged in Counts 1 to 4 of the Indictment, I find Ms. Bekkers not guilty on all counts because, while it has been proved that her manner of driving fell below the standard of a reasonable driver, and was objectively dangerous, I am not satisfied beyond a reasonable doubt that her driving conduct was a marked departure from the standard of a reasonable driver.

[563] Ms. Bekkers may be civilly liable for this tragic accident. But in my judgment, she has not committed any crime.

"Mr. Justice D.A. Halfyard"

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