

CANADA / JUDGMENT

R. v. Grewal

2021 BCSC 751

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2021 BCSC 751 R. v. Grewal

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Grewal,

2021 BCSC 751

Date: 20210422

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Registry: New Westminster

Regina

v.

Rituraj Grewal

Before: The Honourable Madam Justice Watchuk

Oral Reasons for Judgment

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New Westminster, B.C.

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I. Introduction

- [1] Rituraj Kaur Grewal is charged with criminal negligence causing death, criminal negligence causing bodily harm, and failing to remain at the scene of an accident, contrary to ss. 221, 220(b), and 252(1)(b) (as they read at the time of the offence) of the Criminal Code, R.S.C. 1985, c. C-46, respectively. All offences are alleged to have occurred within a short period of time at about 9:00 p.m. on May 3, 2017 on 64 Avenue at or near the intersection with 176 Street in Surrey, B.C.

- [2] The charges alone do not reflect the enormity of this tragedy. The person who died in one of the two collisions was Travis Selje, then 17-years-old. He and a friend were waiting at a red light when his vehicle was struck from behind by the vehicle driven by the accused, Ms. Grewal.
- [3] Ms. Grewal does not dispute the fact that the impact of the vehicle she was driving resulted in the death of Travis Selje and bodily harm to Gary Mordecai and the collision with Michael Douglas. However, adding to the tragedy of the circumstances, Ms. Grewal says that she was experiencing an epileptic seizure at the time of the alleged offences. She submits that the effects of the seizure negate any mens rea with the result that the Crown has failed to prove all elements of the offences beyond a reasonable doubt.
- [4] In these Reasons, I will first describe the evidence generally, then with more specificity. I must consider the totality of the evidence and make findings of fact. There is a complex area of the law to be discussed, then I must apply the law to the facts determined in order to arrive at a conclusion.
- [5] Throughout the process leading up to, and throughout, the trial, Ms. Grewal is, as are all persons charged with criminal offences, presumed innocent. The presumption of innocence is one of the fundamental premises of our judicial system. The process of the trial is followed in order to assist the determination of whether the Crown has proven the guilt of Ms. Grewal beyond a reasonable doubt. The requirement of proof beyond a reasonable doubt is another of the fundamental premises of the judicial system. It has been described as more than "probably guilty" and less than an absolute certainty, though it falls much closer to absolute certainty on a sliding scale: *R. v. Starr*, 2000 SCC 40 at para. 242.
- [6] What must be proven by the Crown beyond a reasonable doubt are all the elements of each offence. Those elements are included in the actus reus, or actions, and the mens rea, or mental requirement of each offence. As I discuss the law below, I will refer frequently to the mens rea and actus reus, and counsels' able submissions on their interpretation in these offences.

II. OVERVIEW OF THE EVIDENCE

- [7] On May 3, 2017 in the Cloverdale area of Surrey, Ms. Grewal was driving a black Cadillac ("the Cadillac") on 64 Avenue. A vehicle of varying descriptions was observed by other drivers in the area as it proceeded towards 176 Street. The witnesses described observing a vehicle driving faster than the other cars on the road, and changing lanes several times to pass the slower vehicles.

- [8] Shortly after the intersection of 168 Street, at about 169 Street, in attempting to change lanes to move past the vehicle being driven by Michael Douglas, a vehicle struck Mr. Douglas' vehicle. The witnesses described watching as the vehicle did not stop after the collision and continued at a high rate of speed. This is the subject of Count 2, failing to remain at the scene of an accident. There is an issue as to whether this vehicle was the Cadillac driven by Ms. Grewal.
- [9] Shortly before the intersection at 176 Street, the Cadillac struck the rear of the silver Honda Prelude being driven by Travis Selje. This collision is the subject of Count 3, criminal negligence causing death.
- [10] Corporal Craig Huitson testified as an expert in collision reconstruction. He testified that 0.5 seconds prior to the impact with the Prelude, the Cadillac was travelling at 142 km/hr. There was no evidence of braking. The right front of the Cadillac struck the left rear of the Prelude. The force of the impact caused the Prelude to spin such that the rear of the Prelude struck the vehicle in front of it, the white Kia being driven by Gary Mordecai. This collision is the subject of Count 1, criminal negligence causing bodily harm. The Cadillac, as a result of the collision, moved across the other lane, over the median and struck another vehicle being driven by Usman Chohan in the intersection of 176 Street.
- [11] This series of three related collisions at the intersection of 64 Avenue and 176 Street will be referred to collectively as the second collision.
- [12] Gary Mordecai suffered bodily harm as a result of the collision. Travis Selje was grievously injured. He later died in the hospital.
- [13] The other evidence at trial consisted of a number of Admissions pursuant to s. 655 of the Criminal Code, and the testimony of several witnesses who observed the driving of the vehicle, the collisions with the vehicles of Mr. Douglas and Travis Selje, and Ms. Grewal's state following the collision. Ms. Grewal testified on her own behalf. She also called as witnesses her mother, Birender Grewal, and two neurologists who began seeing Ms. Grewal approximately two years after the events of May 3, 2017. Those neurologists were qualified to provide expert opinion evidence in the areas of the diagnosis and treatment of epilepsy.

III. The Law

- [14] The accused, Ms. Grewal, is charged with criminal negligence causing death, criminal negligence causing bodily harm, and failure to stop at the scene of an accident.
- [15] I will first address the negligence-based offences. I will then turn to the alleged failure to stop at the scene of an accident.

A. Negligence-Based Offences

1. Elements

[16] Section 219 of the Code defines criminal negligence, and ss. 220 and 221 establish the offences of criminal negligence causing death and criminal negligence causing bodily harm. A finding of criminal negligence is a prerequisite to establishing the offences under ss. 220 and 221:

Causing death by criminal negligence

220 Every person who by criminal negligence causes death to another person is guilty of an indictable offence and liable

- (a) where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and
- (b) in any other case, to imprisonment for life.

Causing bodily harm by criminal negligence

221 Every person who by criminal negligence causes bodily harm to another person is guilty of

- (a) an indictable offence and liable to imprisonment for a term of not more than 10 years; or
- (b) an offence punishable on summary conviction.

[17] In *R. v. Hughes*, 2011 BCCA 220 at para. 29, the Court of Appeal explained criminal negligence as follows:

- s. 219(1), criminal negligence is established where an accused, in doing anything, or in omitting to do anything that it is his or her legal duty to do, shows wanton or reckless disregard for the lives or safety of other persons. The mens rea or mental element in criminal negligence is the same for both acts of commission and omission: *R. v. Tutton*, [1989] 1 S.C.R. 1392.

[18] In *R. v. Javanmardi*, 2019 SCC 54, Abella J. set out the elements of criminal negligence causing death specifically as follows:

- [19] The actus reus of criminal negligence causing death requires that the accused undertook an act -- or omitted to do anything that it was his or her legal duty to do -- and that the act or omission caused someone's death.
- [20] The fault element is that the accused's act or omission "shows wanton or reckless disregard for the lives or safety of other persons". Neither "wanton" nor "reckless" is defined in the Criminal Code, but in *R. v. J.F.*, 2008 SCC 60, [2008] 3 S.C.R. 215, this Court confirmed that the offence of criminal negligence causing death imposes a modified objective standard of fault -- the objective "reasonable person" standard (paras. 7-9; see also *R. v. Tutton*, [1989] 1 S.C.R. 1392, at pp. 1429-31; *R. v. Morrissey*, [2000] 2 S.C.R. 90, at para. 19; *R. v. Beatty*, [2008] 1 S.C.R. 49, at para. 7).

- [21] As with other negligence-based criminal offences, the fault element of criminal negligence causing death is assessed by measuring the degree to which the accused's conduct departed from that of a reasonable person in the circumstances.[3] For some negligence-based offences, such as dangerous driving, a "marked" departure satisfies the fault element (J.F., at para. 10; see also: Beatty, at para. 33; R. v. Roy, [2012] 2 S.C.R. 60, at para. 30; R. v. L. (J.) (2006), 204 C.C.C. (3d) 324 (Ont. C.A.), at para. 15; R. v. Al-Kassem, 2015 ONCA 320, 78 M.V.R. (6th) 183, at para. 6). In the context of criminal negligence causing death, however, the requisite degree of departure has been described as an elevated one -- marked and substantial (J.F., at para. 9, applying Tutton, at pp. 1430-31, and R. v. Sharp (1984), 1984 CanLII 3487 (ON CA), 12 C.C.C. (3d) 428 (Ont. C.A.)).
- [22] These standards have much in common. They both ask whether the accused's actions created a risk to others, and whether "a reasonable person would have foreseen the risk and taken steps to avoid it if possible" (see Roy, at para. 36; Stewart, at p. 248). The distinction between them has been described as a matter of degree (see R. v. Fontaine, 2017 QCCA 1730, 41 C.R. (7th) 330, at para. 27; R. v. Blostein, 2014 MBCA 39, 306 Man. R. (2d) 15, at para. 14).

[Underlining added]

- [19] The Crown has established the offence of criminal negligence causing bodily harm if it proves beyond a reasonable doubt that the accused "showed wanton or reckless disregard for the lives or safety of other persons in doing anything, or in omitting to do anything, that it is [her] duty to do, which causes bodily harm to another": R. v. D.J.W., 2011 BCCA 552 at para. 69, aff'd 2012 SCC 63.
- [20] To establish the offences of criminal negligence causing death and criminal negligence causing bodily harm, the Crown must establish not only the wrongful act or omission but also causation in fact and law: R. v. Nette, 2001 SCC 78 at paras. 44-48; Hughes at para. 34.

2. Consequences of Seizure

- [21] Of particular relevance to this decision are the legal consequences that flow from the accused's alleged seizure. Counsel present two alternatives to the Court. For the purpose of this discussion, it is presumed that there was a seizure. That issue will be discussed below.
- [22] The Crown submits that the accused's seizure goes towards the voluntariness of her actions, a component of the actus reus. Defence suggests that the proper framework in which to consider the seizure is under mens rea. He states that the accused's seizure offers an exculpatory reason for her actions, with the result that the Crown has failed to prove mens rea beyond a reasonable doubt. As a result, counsel submits that the accused should be acquitted.

- [23] The onus rests with the Crown to prove every element of an offence beyond a reasonable doubt, including any mental elements. Thus, if the defence's view is correct, the seizure will be considered in the context of the modified objective test for mens rea for the offences involving criminal negligence.
- [24] If the Crown's view is correct, however, then the defence must prove, on a balance of probabilities, that the accused's actions were involuntary, consistent with the defence of non-mental disorder automatism as described in *R. v. Stone*, [1999] 2 S.C.R. 290.

3. Defence of Automatism

- [25] Before embarking on an analysis of the preferred approach, it will be helpful to set out how the automatism defence operates. The law presumes that people act voluntarily: *Stone* at para. 171. Because a claim of automatism amounts to a claim that one's actions were involuntary, the accused must establish a proper evidentiary foundation for the defence. The trial judge must consider whether there is evidence upon which a properly instructed jury could find that the accused acted involuntarily on a balance of probabilities. It falls on the defence to make an assertion of involuntariness and to call confirming psychiatric evidence. This is often referred to as the "evidentiary burden": *Stone* at paras. 164, 167, 182; *R. v. S.H.*, 2014 ONCA 303 at paras. 65, 69.
- [26] A mere assertion of involuntariness will not be enough to satisfy the accused's evidentiary burden: *Stone* at para. 183. The claim must be confirmed by expert psychiatric evidence. Other relevant factors include: "the severity of the triggering stimulus, corroborating evidence of bystanders, corroborating medical history of automatistic-like dissociative states, whether there is evidence of a motive for the crime, and whether the alleged trigger of the automatism is also the victim of the automatistic violence.": *Stone* at para. 192. No one factor is determinative. The trial judge must weigh all of the available evidence on a case-by-case basis: *Stone* at paras. 189-191.
- [27] If the accused discharges their evidentiary burden, the trial judge must decide whether non-mental disorder automatism or mental disorder automatism should be left with the trier of fact: *Stone* at para. 193. This is a question of characterization, although the trial judge is to start with the proposition that "the condition the accused claims to have suffered from is a disease of the mind" within the meaning of s. 2 of the Criminal Code: *Stone* at para. 199.
- [28] There are two approaches used for characterization of whether a claim of automatism stems from a disease of the mind, though they are not mutually exclusive. First, the "internal cause" theory compares the automatistic reaction of the accused with the actions one would expect of a "normal" person in the circumstances: *Stone* at paras. 204, 206; *Rabey v. The Queen*, [1980] 2 S.C.R. 513 at 517, 519. It is for the trial judge to determine whether this theory is "useful" in the circumstances: *Stone* at para. 211. Second, the "continuing danger" theory holds that, if the accused's action pose a continuing danger to the public, the accused's automatistic state should be treated as a "disease of the mind". In other words, the likelihood of a recurring episode that would cause danger to the public is a policy

consideration in the disease of mind inquiry: Stone at para. 212. The judge may consider either or both theories, or factors, as well as any policy factors that suggest the accused's automatistic state should be defined as a disease of the mind: Stone at paras. 203, 213, 218.

- [29] If the trial judge determines that the state of the accused stems from a disease of the mind, the defence must prove "on a balance of probabilities that the accused suffered from a mental disorder which rendered him or her incapable of appreciating the nature and quality of the act in question". If the defence succeeds, the accused will be exempt from criminal responsibility by virtue of ss. 16(1) of the Criminal Code.
- [30] If the trial judge is satisfied that the accused's automatistic state did not stem from a "disease of the mind" within the meaning of s. 16, only the defence of "non-insane automatism" (or non-mental disorder automatism) remains. The burden of proof, often called the legal burden, rests on the accused. The question for the trier of fact will then be whether the defence has proven, on a balance of probabilities, that the accused acted involuntarily. If there is a positive answer to this question, the accused is entitled to an absolute acquittal: Stone at paras. 179, 219.

4. The Two Approaches

- [31] Is the accused's epileptic seizure to be considered under the framework for the defence of automatism as set out in Stone, or is it properly addressed under the mens rea?
- [32] A useful starting point for the analysis is the reasons of Cory J. in *R. v. Hundal*, [1993] 1 S.C.R. 867, a case that addressed whether a subjective fault requirement was required for the offence of dangerous driving. Cory J. held the fault element was a "modified objective standard", which is consistent with negligence-based offences: *R. v. Tutton*, [1989] 1 S.C.R. 1392 at 1413.
- [33] Cory J.'s discussion of the modified objective test at 886 has particular relevance to Ms. Grewal:

.. it will remain open to the accused to raise a reasonable doubt that a reasonable person would have been aware of the risks in the accused's conduct. The test must be applied with some measure of flexibility. That is to say the objective test should not be applied in a vacuum but rather in the context of the events surrounding the incident.

- [34] The most relevant aspect of Cory J.'s analysis for this case is at 887, where he explained how a driver's seizure could, in certain circumstances, offer an exculpatory explanation for the accused's actions:

There will be occasions when the manner of driving viewed objectively will clearly be dangerous yet the accused should not be convicted. Take for example a driver who, without prior warning, suffers a totally unexpected heart attack, epileptic seizure or detached retina. As a result of the sudden onset of a disease or physical disability the manner of driving would be dangerous yet those circumstances could provide a complete defence despite the objective demonstration of

dangerous driving. Similarly, a driver who, in the absence of any warning or knowledge of its possible effects, takes a prescribed medication which suddenly and unexpectedly affects the driver in such a way that the manner of driving was dangerous to the public, could still establish a good defence to the charge although it had been objectively established. These examples, and there may well be others, serve to illustrate the aim and purpose of the modified objective test. It is to enable a court to take into account the sudden and unexpected onset of disease and similar human frailties as well as the objective demonstration of dangerous driving.

[Underlining added]

- [35] Cory J. proceeded by explaining at 889 that, if the accused offers an explanation, "such as a sudden and unexpected onset of illness, then in order to convict, the trier of fact must be satisfied that a reasonable person in similar circumstances ought to have been aware of the risk and of the danger involved in the conduct manifested by the accused."
- [36] Cory J. did not clearly situate these examples in the context of *actus reus* or *mens rea* nor in terms of the burden of proof. McLachlin J. (as she then was), considered this issue in concurring reasons in *Hundal*; see also *R. v. Jiang*, 2007 BCCA 270 at para. 10. In McLachlin J.'s view, the better analysis was that circumstances of an epileptic seizure would render the accused's actions involuntary, with the result that there would be no *actus reus*. At 875, she stated:

Nor does Cory J.'s example of "a totally unexpected heart attack, epileptic seizure or detached retina" (at p. 886) [sic], which renders an accused unable to control his or her motor vehicle, require the introduction of an element of subjectivity. The better analysis, in my view, is that the onset of a "disease or disability" makes the act of losing control of the motor vehicle involuntary, with the result that there is no *actus reus*. Thus we do not reach the question of what a reasonable person would have been thinking or adverting to as the car goes off the road, much less what the accused was in fact thinking or not thinking...

[underlining added]

- [37] McLachlin J. acknowledged at 875-876, however, that such circumstances could also be addressed under the *mens rea*:

Alternatively, if the *actus reus* were taken as established in these examples, the heart attack or epileptic seizure might be viewed as a circumstance which negates the ordinary inference of want of care which flows from the fact of having lost control of a motor vehicle.

- [38] *Hundal* was followed by *R. v. Beatty*, 2008 SCC 5 and *R. v. Roy*, 2012 SCC 26, which also addressed the fault element for the offence of dangerous driving and clarified some of the uncertainty remaining in *Hundal*. Defence counsel submits that, whatever uncertainty remained on the preferred approach to be followed in this case based on the reasons of Cory and McLachlin JJ. in *Hundal*, the issue was squarely put to rest in *Beatty* and *Roy*.

- [39] Beatty and Roy clearly set out the actus reus of dangerous driving. The Crown must prove, beyond a reasonable doubt, that viewed objectively, the accused was driving in a manner that was "dangerous to the public, having regard to all the circumstances, including the nature, condition and use of the place at which the motor vehicle was being operated and the amount of traffic that at the time was or might reasonably be expected to have been at that place": Beatty at para. 43; Roy at para. 28. The focus is on the manner of driving, and not the consequences (such as death) that may have flowed from it. However, causing death may make the offence a more serious one under s. 294(4) of the Code [since repealed: S.C. 2018, c. 21, s. 14; now s. 320.13(3)]: Beatty at para. 46.
- [40] Turning to the mens rea for dangerous driving, the Court in Beatty and Roy held that it requires "marked departure from the standard of care that a reasonable person would observe in the accused's circumstances.": Beatty at para. 43; Roy at paras. 1, 28. As Cromwell J. explained for the Court in Roy, at para. 36, it is helpful to approach the test for mens rea based on two inquiries:

The first is whether, in light of all the relevant evidence, a reasonable person would have foreseen the risk and taken steps to avoid it if possible. If so, the second question is whether the accused's failure to foresee the risk and take steps to avoid it, if possible, was a marked departure from the standard of care expected of a reasonable person in the accused's circumstances.

- [41] Contrary to dangerous driving, the mens rea for offences involving criminal negligence requires a marked and substantial departure from the standard of care expected of a reasonable person in the circumstances: J.F. at para. 9; Tutton at 1430-1431. The distinction between a "marked and substantial departure" and a "marked departure" has been described as a matter of degree": Javanmardi at para. 22, citing R. v. Fontaine, 2017 QCCA 1730 at para. 27; R. v. Blostein, 2014 MBCA 39 at para. 14.
- [42] Neither Fish J. in J.F. nor Abella J. in Javanmardi resolved the distinction between the two standards. At para. 23 of Javanmardi, Abella J. stated:

In J.F., Fish J. did not fully explain how to distinguish between a "marked" and a "marked and substantial" departure, as the case did not "turn on the nature or extent of the difference between the two standards" (paras. 10-11). In this appeal, as well, the differences in etymology are not dispositive and need not be resolved

- [43] The fault element is essential, as it ensures that only conduct that is truly morally blameworthy will be caught by the offence: Roy at para. 37; Beatty at para. 34. Generally, the fact that the accused drove in a manner that constituted a marked departure from the norm may permit an inference of the required mens rea. However, the trier of fact must examine all of the evidence to determine whether it is appropriate to draw an inference of mens rea from the manner of driving: Roy at para. 40. It is an error to infer that, simply from the fact that the accused committed a dangerous act while driving, the accused's conduct displayed a marked departure from the standard of care expected of a reasonable person in the circumstances, without a meaningful inquiry into the fault element: Roy at paras. 4, 27.

- [44] Defence counsel relies on paras. 36-43 of Beatty, which address exculpatory explanations in the context of the modified objective test for mens rea. At para. 37, under the heading "Second Modification to the Objective Test: The Allowance for Exculpatory Defences", Charron J. for the majority wrote:
- [37] The underlying premise for finding fault based on objectively dangerous conduct that constitutes a marked departure from the norm is that a reasonable person in the position of the accused would have been aware of the risk posed by the manner of driving and would not have undertaken the activity. However, there will be circumstances where this underlying premise cannot be sustained because a reasonable person in the position of the accused would not have been aware of the risk or, alternatively, would not have been able to avoid creating the danger

However, because the accused's mental state is relevant in a criminal setting, the objective test must be modified to give the accused the benefit of any reasonable doubt about whether the reasonable person would have appreciated the risk or could and would have done something to avoid creating the danger

[emphasis added].

- [45] After reciting Cory J.'s examples of exculpatory explanations in Hundal (at para. 37), Charron J. clarified, at paras. 38-40, the circumstances which must be taken into account in applying the modified objective test. Personal characteristics are relevant only if they go towards one's incapacity to appreciate the risk. At this point, Charron J. again referred to the examples Cory J. put forward in Hundal, in the context of the modified objective test for mens rea:
- [40] Short of incapacity to appreciate the risk or incapacity to avoid creating it, personal attributes such as age, experience and education are not relevant. The standard against which the conduct must be measured is always the same -- it is the conduct expected of the reasonably prudent person in the circumstances. The reasonable person, however, must be put in the circumstances the accused found himself in when the events occurred in order to assess the reasonableness of the conduct. To reiterate the example used above, the reasonable person becomes the one who "without prior warning, suffers a totally unexpected heart attack, epileptic seizure or detached retina" or becomes the one who "in the absence of any warning or knowledge of its possible effects, takes a prescribed medication which suddenly and unexpectedly" causes him to drive in a manner that is dangerous to the public. By so placing the reasonable person, the test is not personalized and the standard remains that of a reasonably prudent driver, but it is appropriately contextualized.

- [42] there appears to be much uncertainty in the case law on how to deal with evidence about the accused's mental state. In particular, when is evidence about the accused's actual mental state relevant? Is it relevant in determining whether the conduct constitutes a "marked departure" from the norm or, as the courts below in this case have done, should it be considered only as part of a distinct analysis on potential exculpatory defences?
- [43] The trier of fact must also be satisfied beyond a reasonable doubt that the accused's objectively dangerous conduct was accompanied by the required mens rea. In making the objective assessment, the trier of fact should be satisfied on the basis of all the evidence, including evidence about the accused's actual state of mind, if any, that the conduct amounted to a marked departure from the standard of care that a reasonable person would observe in the accused's circumstances. Moreover, if an explanation is offered by the accused, then in order to convict, the trier of fact must be satisfied that a reasonable person in similar circumstances ought to have been aware of the risk and of the danger involved in the conduct manifested by the accused.

[underlining added]

- [46] In *Javanmardi*, Abella J. confirmed at paras. 37-38 that the "reasonable person" in the modified objective fault standard is viewed in the context of the activity being undertaken and the circumstances. This has been the law since *R. v. Creighton*, [1993] 3 S.C.R. 3, which endorsed an "activity-sensitive approach" to the modified objective standard. Abella J. cited *Beatty* at para. 38 as an example of a case in which the "activity-sensitive approach" from *Creighton* was applied and the reasonable person standard was appropriately contextualized, having regard to the circumstances of the accused.
- [47] In concurring reasons in *Beatty*, McLachlin C.J.C. took the view that both the actus reus and mens rea of dangerous driving required a marked departure from the norm. Interestingly, she did not return to her clear statements in *Hundal* concerning the voluntariness defence as a component of actus reus. At para. 58, she wrote:
- [58] The jurisprudence of this Court offers assistance on what constitutes the actus reus and mens rea of dangerous driving and how the two elements of the offence should be described. *R. v. Hundal*, [1993] 1 S.C.R. 867, confirmed in *R. v. Creighton*, [1993] 3 S.C.R. 3, indicates that the characterization of "marked departure" from the norm applies to the actus reus of the offence, and that the mens rea of the offence flows by inference from that finding, absent an excuse casting a reasonable doubt on the accused's capacity.
- [underlining added]
- [48] In the accused's view, McLachlin C.J.C.'s comments in *Beatty* reflect a change in her view since *Hundal* such that an exculpatory excuse going to the accused's incapacity to appreciate risk is a component of mens rea.

[49] Counsel for the defence also relies on *R. v. Sharp* (1984), 12 C.C.C. (3d) 428 at 434 (O.N.C.A.). He submits that Sharp employs similar language to that of Cory J. in *Hundal*, and establishes that an exculpatory excuse on the part of the accused could negate the mental element required by dangerous driving and criminal negligence. At 434, Morden J.A. for the Court wrote:

Both criminal negligence and dangerous driving are offences which require fault, in the sense of a blameworthy state of mind, to be proven, but in each case (assuming the criminal negligence to involve driving) it is open to a jury to find the required fault in the nature of the accused's driving if, objectively viewed, it amounts to that which is defined in the statute. A jury should not find fault, and hence that the accused is guilty, if there is an explanation which arises from the evidence that would account for the deviant conduct in a manner which would negative the element of fault. A cause resulting from circumstances beyond the accused's control, for example, a sudden malfunction of the steering mechanism would afford such an explanation

[50] As applied to the facts at hand, the defence's approach asks two questions: first, can the Crown prove beyond a reasonable doubt that Ms. Grewal did not have a seizure prior to the collision? And second, would a reasonable person in the place of Ms. Grewal, having a seizure in the same circumstances, have been aware of the risk and danger involved?

[51] The Crown agrees that the examples posed in *Hundal*, and adopted in *Beatty* and *Roy*, might invoke a mens rea analysis in certain circumstances. Such circumstances would include a situation in which the accused demonstrates care and control of a vehicle while driving, and then suddenly and unexpectedly, without prior warning, experiences an event that requires them to lose consciousness or experience impaired consciousness. This may include circumstances of a general convulsive seizure, if the driving prior to that event showed care and control of the vehicle.

[52] The Crown says that the facts here and explanation offered by Ms. Grewal are inconsistent with the kind of seizure that would fit the circumstances described in *Hundal*. Crown counsel says the accused was driving in an unsafe and dangerous manner for a relatively lengthy period of time and distance prior to colliding with Mr. Selje. She repeatedly changed lanes to move around slower moving vehicles. Witnesses observed her driving in a manner that would have required acceleration, deceleration, and steering input. After the collision with Mr. Douglas' vehicle, she was able to steer her vehicle away from the collision in a manner that did not involve hitting the curb. Further, witnesses on 168 Street observed that her vehicle was moving at a high rate of speed, but it could not have been moving at a 142 km/hr. Therefore, she must have accelerated at some point.

[53] The Crown submits that either there was no seizure, and the accused's driving was dangerous but intentional; or, there was a progression of seizures during the course of driving. In the latter case, when the witnesses first observed Ms. Grewal's vehicle, she was conscious but with impaired awareness; by the time of the collision with Mr. Selje's vehicle, she was unconscious and unable to control the vehicle. If the Court determines that this is

what happened, the Crown says the analysis requires a determination of the accused's mental state going beyond what was contemplated in Hundal. It says that where there is evidence of an ability to move a vehicle to a point, but unconsciously or with impaired awareness, this goes towards voluntariness and not mens rea. The Crown submits these circumstances fit the explanation of automatism in Stone at para. 155, where Bastarache J. cited *R. v. K.* (1970), 3 C.C.C. (2d) 84 at 84 (O.N.S.C.):

Automatism is a term used to describe unconscious involuntary behaviour, the state of a person who, though capable of action, is not conscious of what he is doing. It means an unconscious, involuntary act, where the mind does not go with what is being done.

[54] Crown submits that the policy reasons for the defence of automatism are apposite here, because the Crown should not be put in a position to disprove that Ms. Grewal was having a seizure. As such, it submits that it is more appropriate, as a matter of policy, to set the legal burden of proof on the accused. This arises from the fact that automatism may be easily feigned and a genuine defence of non-mental disorder automatism will be rare. As set out in Stone at paras. 175, 180:

175 An appropriate legal burden applicable to all cases involving claims of automatism must reflect the policy concerns which surround claims of automatism. The words of Schroeder J.A. in *R. v. Szymusiak*, [1972] 3 O.R. 602 (C.A.), at p. 608, come to mind:

... a defence which in a true and proper case may be the only one open to an honest man, but it may just as readily be the last refuge of a scoundrel.

180 ...The law presumes that people act voluntarily in order to avoid placing the onerous burden of proving voluntariness beyond a reasonable doubt on the Crown. Like extreme drunkenness akin to automatism, genuine cases of automatism will be extremely rare. However, because automatism is easily feigned and all knowledge of its occurrence rests with the accused, putting a legal burden on the accused to prove involuntariness on a balance of probabilities is necessary to further the objective behind the presumption of voluntariness. In contrast, saddling the Crown with the legal burden of proving voluntariness beyond a reasonable doubt actually defeats the purpose of the presumption of voluntariness.

[55] The Crown also relied on *R. v. Jiang*, 2007 BCCA 270, which pre-dates Beatty. In Jiang, the Court of Appeal considered the comments of McLachlin and Cory JJ. in Hundal in the context of a driver who had fallen asleep at the wheel. The Court held that the accused's condition of chronic insomnia could offer an exculpatory explanation for her actions. In doing so, it elected to follow McLachlin J.'s approach in Hundal. Smith J.A. for the Court determined that falling asleep at the wheel would put the accused in a state of non-mental disorder automatism, such that there was no actus reus. However, he clarified at para. 22 that:

such a driver may be convicted of dangerous driving if the trier of fact is satisfied beyond a reasonable doubt that the driver embarked on driving or continued to drive in circumstances in which he knew or ought to have known that it was dangerous to do so because there was a real risk he would fall asleep at the wheel.

- [56] The only case specifically considering the issue of whether an epileptic seizure is properly characterized under mens rea or as a component of the actus reus is the Ontario authority of *R. v. Taylor*, [2008] O.J. No. 946 (S.C.J.). Taylor follows Beatty but predates Roy. In Belobaba J.'s view, the former was the correct framework: at para. 14. However, he considered the factual circumstances of the accused's seizure under both frameworks, and concluded that the accused should be acquitted under either framework.
- [57] In applying the mens rea framework, Belobaba J. followed Beatty and asked, "whether "a reasonable person in similar circumstances ought to have been aware of the risk and danger involved in the conduct manifested by the accused.""": at para. 11, citing Beatty at para. 43.
- [58] In applying the involuntariness actus reus framework, the Court defined automatism as, "a state of impaired consciousness in which an individual, though capable of action, has no voluntary control over that action.": at para. 16. In Belobaba J.'s view, an epileptic seizure was not, as a matter of law, a "disease of the mind". Thus, if the accused was to establish the defence, he would have to do so on the basis of non-mental disorder automatism: at para. 23.
- [59] The Crown submits that the circumstances in Taylor differ from the present circumstances. In Taylor, there was evidence consistent with the kind of seizure contemplated in Hundal. Specifically, the Court in Taylor heard evidence that Mr. Taylor's vehicle had continued to accelerate, but there was no steering or braking input. Neurological evidence explained as a partial complex seizure which rendered the accused unaware of his surroundings and what he was doing, and caused his foot to remain on the gas pedal, which was the only driving input: at para. 29. Thus, the Crown suggests that Belobaba J.'s view that mens rea was the correct framework in which to consider the accused's seizure is confined to its facts.
- [60] I will return to these issues below in the Analysis section.

B. Failure to Stop at Scene of Accident

- [61] The offence of failing to stop at the scene of an accident in force on May 3, 2017 was set out in s. 252 of the Criminal Code:

Failure to stop at scene of accident

252(1) Every person commits an offence who has the care, charge or control of a vehicle, vessel or aircraft that is involved in an accident with

- (a) another person,

- (b) a vehicle, vessel or aircraft, or
- (c) in the case of a vehicle, cattle in the charge of another person,

and with intent to escape civil or criminal liability fails to stop the vehicle, vessel or, if possible, the aircraft, give his or her name and address and, where any person has been injured or appears to require assistance, offer assistance.

(1.1)...

Evidence

- (2) In proceedings under subsection (1), evidence that an accused failed to stop his vehicle, vessel or, where possible, his aircraft, as the case may be, offer assistance where any person has been injured or appears to require assistance and give his name and address is, in the absence of evidence to the contrary, proof of an intent to escape civil or criminal liability.

[62] To establish the actus reus of this offence the Crown must prove the following beyond a reasonable doubt:

- (a) The accused had the care, charge or control of a vehicle;
- (b) The vehicle was involved in an accident;
- (c) The accident was with a vehicle, vessel or aircraft;
- (d) The accused failed to (1) stop the vehicle; (2) give her name and address, and (3), where any person has been injured or appears to require assistance.

[63] To establish the mens rea the Crown must prove:

- (a) The accused knew they were involved in an accident; and
- (b) The accused failed to do these things with the intent to escape civil or criminal liability.

[64] Section 252(2) lists three duties on a person who has care, charge or control of a vehicle involved in an accident: (1) Stop; (2) offer assistance; and (3) provide their name and address. Proof that the accused failed to complete any one of these requirements triggers a rebuttable presumption of intent to escape criminal or civil liability. The evidence need only raise a reasonable doubt that the accused did not have the required intent: *R. v. Siepp*, 2017 BCCA 54 at para. 30, aff'd 2018 SCC 1.

IV. Evidence

A. Admissions and Facts Not in Issue

- [65] It is not in dispute that Ms. Grewal was the driver and sole occupant of the Cadillac, a 2013 black Cadillac ATS owned by her father. She drove that vehicle eastbound on the evening of May 3, 2017 from her home near 152 Street to 64 Avenue, and on 64 Avenue from 152 Street to 176 Street where the second collision occurred.
- [66] Travis Selje's Prelude was stopped or virtually stopped in the right hand eastbound lane on 64 Avenue at 176 Street when it was struck from behind by the Cadillac driven by Ms. Grewal. Both Travis Selje and his passenger, Brendan Slawter, were wearing seat belts. The force of the impact caused the Prelude to spin around, such that the rear of the Prelude struck the vehicle that was in front of it, a Kia SUV driven by Gary Mordecai.
- [67] After colliding with the Prelude, the Cadillac continued onto the raised centre median then into oncoming westbound traffic on 64 Avenue resulting in a head on collision with a Mazda Protégé being driven by Usman Chohan.
- [68] The force of the impact with, and the resulting severe damage to, his vehicle caused injuries to Travis Selje so serious that he could not survive. He never regained consciousness and on May 5, 2017, two days later, he was taken off life support after confirmation of brain death from Hypoxic-Ischemic brain injury due to multiple blunt force injuries and hypovolemic shock. It is admitted that Ms. Grewal's operation of a motor vehicle on May 3, 2017 resulted in the death of Travis Selje.
- [69] The secondary collision with Gary Mordecai caused him bodily harm. He suffered a concussion and soft tissue injuries to his neck and back. It is also admitted that Ms. Grewal's operation of a motor vehicle on May 3, 2017 resulted in bodily harm to Gary Mordecai.

B. Evidence of Driving

- [70] It is admitted that Ms. Grewal left her home just before 8:55 p.m. driving the Cadillac east on 66A Avenue. She turned south on 152 Street, and then at 8:56 p.m. turned left onto 64 Avenue proceeding eastbound. Traffic cameras at those two intersections show nothing unusual about the manner of driving.
- [71] Eleven witnesses testified and described seeing a vehicle on 64 Avenue over a total distance of 12 blocks or approximately 2.2 km from 164 Street, before the scene of the first collision with Michael Douglas' vehicle at about 169 Street, to the scene of the collision with the Prelude at 176 Street. The road was dry, and it was dusk or starting to get dark at about 9:00 p.m. All witnesses were initially driving at the speed of traffic, about 60 to 70 km/hr, in a 60 km/hr zone when they observed the vehicle they described.
- [72] There are some inconsistencies in the varying levels of detail. The witnesses generally describe the vehicle driving at a high speed, not braking or signalling, and at some points changing lanes to pass other vehicles on the road.

- [73] Terri-Lynn Vidal described seeing a black car with a Cadillac logo quickly pass her and cut into her lane to pass a van in the left lane as she was driving up the hill at about 164 Street. It then moved into the left lane and then back to the right changing lanes a total of three times without signals or brake lights. She lost sight of the vehicle at 165 Street before she got to 168 Street where she saw a damaged vehicle on the median, which was the aftermath of the first collision. Quickly thereafter, "a couple of minutes if that" or "a minute or two", at 176 Street, she saw a Cadillac vehicle, that in cross-examination she agreed she was not sure was the same vehicle, at the scene of the second collision.
- [74] Tanya Nagy testified that as she was driving east in the left lane on 64 Avenue at about 166 Street, a black Cadillac suddenly came into her lane ahead of her such that she slammed on the brakes to avoid a collision. She then saw the Cadillac change into the right hand lane and back into the left hand lane moving in and out of traffic without signals or brakes in a manner that she described as "gliding in and out of traffic" or "coasting" which was "quite odd". Several seconds later all traffic came to a stop because someone ahead of them had been hit at least past 168 by the Cloverdale Athletic Park. When they pulled up next to that vehicle they asked her to try to get the licence number. She lost sight of the Cadillac, and then saw it again at the intersection of 176 Street after the collision with the Prelude. When she stopped at the gas station she offered assistance to the passenger from the Prelude.
- [75] Sarah Uzagara Boundy, also driving east on 64 Avenue before the Athletic Park at 168 Street, testified she saw an SUV in her rear view mirror weaving between lanes and coming close to her vehicle. She thought that "something was going on". She described the vehicle as a big black Escalade or Cadillac type from the symbols displayed, although she had described it in her witness statement at the time as a Cadillac or Lincoln. The vehicle did not use its high beams, signals or horn. When asked in cross-examination if it was "weird", she said it was like someone under the influence or with a mental illness. Ms. Boundy was behind Mr. Douglas' vehicle when the Escalade "smoked" into it, lifted it up, then took off at about 80-100 km/hr, "way faster than the rest of us and trying to pass all of us". After stopping at the first collision, she arrived at 176 Street and the second collision about 3 minutes, and no more than 5 minutes, later. She remembers seeing the Escalade in the middle of the intersection. It stood out for her that it was the same vehicle.
- [76] Gregory Toews was driving his dark blue mini-van east on 64 Avenue at about 9:00 p.m. with his wife and daughter. He testified he saw a black sedan, that he believed to be a Cadillac, close behind him as he travelled about 60-70 km/hr in the curb lane. He thought it may strike his vehicle, but the Cadillac passed his vehicle on the left going faster than him, between 75-90 km/hr. It swerved through other vehicles, changing lanes at least once without showing turn signals.
- [77] As it continued east it glanced off or clipped another vehicle in front of him and continued east on 64 Avenue without stopping and out of sight of Mr. Toews. His wife called 911, and he accelerated to try to get the licence number. At 80-90 km/hr, he was not able to keep up with the Cadillac. When Mr. Toews got to 176 Street, he saw a major accident scene, and parked

by the gas station. He saw the Cadillac come to a stop, then stood and watched it. After some minutes during which several other people attended to the Cadillac, a young South Asian female exited in what he believed was a state of shock. The time from the first collision between 168 Street and 172 Street to the scene of the second collision at 176 Street was less than minutes, and could have been 40-50 seconds or 20-30 seconds.

- [78] Manjinder Gill testified that at about 172 Street, before the collision at 176 Street, he saw a black Cadillac sedan, similar to his own Cadillac sedan, come from behind, change lanes and pass him. It then drove off at about 100 km/hr passing three other cars by changing lanes without turn signals or brake lights. He lost sight of the Cadillac after 172 Street, and saw the same car again in the middle of the intersection after the collision at 176 Street. He was not sure how long after it was that he saw the Cadillac again, but the police were on scene then. He approached the driver, heard her say "I'm fine", and took a photo of her exiting the Cadillac with a police officer nearby. He described the driver as appearing intoxicated by the look on her face and in her eyes.
- [79] Stefan Gerwin witnessed both collisions. He testified that he was driving east on 64 Avenue east of 168 Street in the right lane when he noticed a Cadillac pull up close behind a vehicle in the left lane. He slowed down to make some room for the Cadillac to pass. The Cadillac then split the lane merging into the right lane in front of him. As it did so its front left bumper hit the rear right bumper of the Camry without applying any turn signals or brake lights.
- [80] The Cadillac which had been going at about 60 km/hr seemed to take off at more than 100 km/hr. He followed the Cadillac, trying to keep up while attempting to phone 911, and got a partial licence plate: CF9. The Cadillac did not to his knowledge change lanes subsequently, although for a moment early on he was looking at his phone, and was not veering and passing. It had a "straight shot" down 64 Avenue.
- [81] 20-30-40 seconds and definitely less than one minute after the first collision Mr. Gerwin witnessed the Cadillac strike the Prelude in the second collision at 176 Street. When he went to the Cadillac, although the air bags had deployed, he was able to see one arm of the driver and noted shaking which he thought was like shock.
- [82] Mr. Gerwin had an unobstructed view in front of him and did not lose sight of the Cadillac between the first and second collisions except when looking down at his phone. He is knowledgeable about cars and testified that this was not an Escalade but rather a 2005-2007 CTS Cadillac sedan.
- [83] Constance Jeffrey was travelling east in the centre lane on 64 Avenue approaching the red light at the intersection of 176 Street with her granddaughter in the car. There were stopped vehicles in all three lanes -- the two straight-through lanes and the left turn lane. As she saw headlights approaching quickly from behind, she pulled over as far as she could into the beginning of the left hand turn lane to avoid the vehicle that seemed to be approaching in the middle lane, the same lane as her. She pumped her brakes to make her vehicle visible

from behind. The approaching vehicle did not slow down, and passed her on the right by inches. She then saw it hit the Prelude, but not directly, which was also stopped at the red light in the curb lane. There were no brake lights from the vehicle before the collision. On cross-examination Ms. Jeffrey stated she did not see it go left or go right, and could not tell whether the vehicle changed lanes but she was focussed on her granddaughter.

- [84] There are some inconsistencies among these witnesses' descriptions and evidence regarding the vehicle they observed, its speed and specific movements. This is to be expected as each driver observed the vehicle from a different viewpoint and all observations were made in the context of moving traffic. In addition, the witnesses had varying levels of knowledge about makes and models of vehicles.
- [85] However, taken as a whole, the evidence of these witnesses which I accept consistently describes the vehicle being driven fast and aggressively through traffic from 164 Street to 172 Street. To that point, they describe a driver who has control of the vehicle, other than hitting the Douglas vehicle in the first collision, and generally responds to changing traffic patterns on the road in order to pass vehicles at a high speed. However, the careful evidence of Mr. Gerwin is that he did not see the vehicle, now driving even faster, change lanes after the first collision after 168 Street. Mr. Gill did not see a lane change after 172 Street although he lost sight for a short time. Ms. Jeffrey observed the vehicle approach 176 Street but did not see it go right or left, although the expert evidence is that it veered between lanes without steering.
- [86] In determining if the vehicle observed by all witnesses was the Cadillac driven by Ms. Grewal I have considered the evidence of the vehicle descriptions, and also the time, distance and sequence of the witnesses' observations. In a short period of time and over a short distance, twelve blocks or about 2.3 km from 164 Street where Ms. Vidal first saw the Cadillac, and seven blocks or about 1.3 km from 169 Street and the first collision to 176 Street, I am satisfied that the vehicle observed by the witnesses was the Cadillac. That conclusion is confirmed by the evidence of Mr. Gerwin who witnessed both collisions in which the Cadillac was involved.

C. The Collisions

- [87] Corporal Craig Huitson testified as an expert in collision reconstruction. He attended the scene of the second collision at 176 Street and collected physical evidence. He also had the data recorder from the Cadillac to assist in the preparation of his report. His investigation had three objectives: to determine from the series of events (1) what happened; (2) where the impact was; and (3) the speed of the Cadillac. His conclusions are set out in the Fatal Vehicle Collision Report that he authored.

- [88] With regard to the first collision in which the Douglas vehicle was hit while driving east of 168 Street, Corporal Huitson noted that that scene had been cleared of physical evidence. There was also no physical evidence of contact between the Cadillac and Mr. Douglas' vehicle as the damage to the Cadillac was too extensive to collect paint samples or match contact points. Corporal Huitson was therefore not able to do an investigation of that collision, and his report deals only with the second collision.
- [89] Michael Douglas testified regarding the circumstances of the first collision in which his Nissan Altima was hit by the Cadillac driven by Ms. Grewal. She did not stop after the collision. No brake lights were observed. He first identified the vehicle that hit him as a black SUV, and added that its purple headlights were those only of a Cadillac. He also observed that there was another car beside that vehicle, as if in a road race.
- [90] Mr. Douglas was driving east on 64 Avenue after the stop light at 168 Street when a vehicle came up very fast behind him in the left lane. He tried to speed up to get out of the way, but was hit by the front driver's side of the other vehicle as the driver changed lanes. The collision was hard enough to send him into the meridian. It occurred about one block past 168 Street, or at about 169 Street.
- [91] Mr. Douglas was shook up and very upset after the collision as it re-injured his back. When he phoned 911, the operator asked him if he was in the collision at 176 Street. As Mr. Douglas could see the emergency vehicle lights ahead of him at 176 Steet, about seven blocks ahead, he offered to get a ride to the hospital with a friend.
- [92] Corporal Huitson's conclusions in his report and testimony regarding the second collision describe the series of collisions. The right front of the Cadillac struck the left rear of the Prelude, driven by Travis Selje. The force of the impact caused the Prelude to spin such that the rear of the Prelude struck the vehicle in front of it, the white Kia being driven by Gary Mordecai. The Cadillac, as a result of the collision, moved across the other lane, over the median and struck another vehicle, driven by Usman Chohan, in the intersection of 176 Street.
- [93] With regard to the speed of the Cadillac, he concluded based on a mathematical calculation of time and distance, confirmed by the data recorder retrieved from the Cadillac, that 0.5 seconds prior to the impact with the Prelude the Cadillac was travelling at 142 km/hr which is 100% throttle. The speed had increased as it approached 176 Street. There was no evidence of braking. He confirmed that the speed limit on 64 Avenue was 60 km/hr.
- [94] The left rear corner of the Prelude was struck by the right front corner of the Cadillac. From his examination of the vehicles, the road markings, and the street video cameras, Corporal Huitson concluded that at the time of the collision with the Prelude, the Cadillac was transitioning from the #2 (curb) lane to the #1 (straight-through) lane. He testified that it may well have been that nobody was in control of the car and it veered and hit the Honda. He agreed that the veering to the left could have happened without the driver's hands being on the steering wheel. If the driver had steered to the left, there would have been tire marks.

The damage profile was not consistent with any extensive steering.

- [95] In cross examination Cpl. Huitson agreed that it was bizarre that the Cadillac was approaching the hazards at 176 Street at a high rate of speed without braking and without steering. He also agreed that it could be explained, in the absence of it being an attempted suicide, by the only other reasonable explanation being some medical condition.
- [96] There was no evidence of mechanical issues with any of the vehicles involved in any of the collisions.

D. Evidence of the Post Collision Condition of Ms. Grewal

- [97] The evidence of Terry Grumbles, Jennifer Hannan and Tyler Soames at the Preliminary Inquiry was, by Admissions, part of the evidence at this trial.
- [98] Mr. Grumbles was at the intersection when the second collision occurred. As part of his job he receives first aid and CPR training every year. He heard a noise and looked over to see the Cadillac crossing the median and striking the Usman Chohan vehicle. He parked and got out of his truck and first ran to the Chohan vehicle, satisfied himself that the driver did not require immediate assistance, and then went to the Cadillac.
- [99] Mr. Grumbles was the first person to arrive at the Cadillac. When he opened the driver's side door he saw the driver unconscious and her whole body convulsing, shaking, foaming and drooling with blood coming out of her mouth. After calling 911 from his truck, he went back to the driver of the Cadillac and was there when the first police car arrived with a nurse several minutes, probably five minutes, later. When the driver regained consciousness she looked very dazed and confused and disoriented. She was panicking and swinging at the officer and screaming and asking to get out of the car when Mr. Grumbles left the vicinity.
- [100] Tyler Soames was travelling with the same group as Mr. Grumbles when he also saw the collision at 176 Street. He testified that Mr. Grumbles described the driver of the Cadillac to him as convulsing and foaming at the mouth. Mr. Soames was able to see the driver, but noted that it was dark and the airbags had deployed. He remembered her body spasming and convulsing and looking like she was having a seizure. He was still there when the nurse arrived and when the driver regained consciousness. The driver was agitated, very wide-eyed and exhibiting erratic behaviour.
- [101] Jennifer Hannan was in her vehicle stopped on 176 Street at the red light at 64 Avenue when she heard the first crash and then saw a second crash in front of her vehicle. She got out of her vehicle, called 911 and went to the black Cadillac where she saw the driver in convulsions, her body shaking, and having a seizure. There were medics attending to her. She then became aggressive struggling to get out of her vehicle and yelling. Ms. Hannan noted that she was barefoot and thinking that was odd, and that the convulsing was odd. She also thought that maybe the driver had had a seizure and that was why the accident had happened, and maybe she was epileptic. In her statement at the time, Ms. Hannan noted

that the driver was unconscious and there was foam coming out of the driver's mouth. She also stated that her daughter has had seizures and the driver was fully having a seizure.

- [102] After he was hit by the Cadillac in the intersection, Usman Chohan was stuck in his vehicle and able to observe the driver of the Cadillac, Ms. Grewal, from the vantage point of his vehicle a few feet away. He could see that she was unconscious. Her head and hands were on the steering wheel with the air bag inflated. He did not observe her shaking or convulsing. When she became conscious she was screaming frantically and scared and confused, not knowing where she was or what had happened. He described her as looking as though she was in shock.
- [103] Mr. Gerwin, who arrived at the intersection after following the Cadillac from the first collision, stopped to offer assistance and peeked into the windows of the Cadillac. The airbags had deployed, and he was able to see one arm of the driver shaking, he thought like shock. He could not see if she was conscious.
- [104] Tina Baker is a psychiatric nurse who works with the R.C.M.P. in Car 67. That night she and her partner in Car 67 were close by the intersection and arrived at the scene before any other emergency responders. She was directed to the Cadillac but could not see the face of the driver because the airbag had deployed. When she moved the airbag, she noted the driver to be unconscious. After regaining consciousness the driver started screaming, and trying to punch and grab the airbag. Ms. Baker assumed it to be shock not realising what was going on. At that point, she was directed to the Prelude in order to assist Travis Selje.
- [105] Sergeant Michael Paysen of the Surrey R.C.M.P arrived at the scene at about 9:04 p.m. His tasks were to close the road and look for injured people. When he arrived at the Cadillac the driver was partway out of the vehicle with her feet outside. Her eyes were very wide and she was not understanding. He testified that she did not look right, and that her eyes stayed wide. He agreed that in his notes he had recorded a "female foaming at the mouth", and confused and incoherent.
- [106] Patricia Walters was a paramedic who attended the scene shortly afterwards and dealt with Ms. Grewal at scene and in the ambulance. She was conscious and wanted out of the car. The driver asked to call her mother, and asked what had happened. Ms. Walters testified that she had been alerted to a woman with a seizure but did not observe any seizure activity. In the ambulance she noted behavioural oddities such as indifference to the situation, and her being "just a little off".
- [107] When Ms. Grewal was taken to the hospital by ambulance, Constable Bradley Reeves accompanied her in the ambulance. He noted that she seemed complacent, calm and out of place and out of normal with trauma and the events of the collision. He watched for but did not notice any obvious signs of impairment. The officer cautioned her, and later at the hospital he arrested and Chartered Ms. Grewal for dangerous operation of a motor vehicle causing bodily harm.

- [108] At the hospital blood samples were taken for testing. The tests showed the presence of oxycodone and oxycodone metabolites in Ms. Grewal's blood, but due to an insufficient sample size a quantitative analysis could not be performed. It could not be determined how recently Ms. Grewal had used oxycodone.
- [109] Ms. Grewal was then taken to Surrey Cells where swabs were taken from her hands and face for analysis for the presence of any controlled substances. No such substances were located.
- [110] When Ms. Grewal was searched at the cells, the officers located a broken crack pipe and two lighters. The residue was not analysed. In her wallet was located a pill which analysed as oxycodone.

E. Evidence of Ms. Grewal

- [111] Ms. Grewal testified in her own defence. At the time of the collisions, she was 22-years-old, lived at home with her parents and worked as a dental hygienist. During the day on May 3, 2017, she was at home watching TV and playing with the family dogs. She did not consume any drugs or alcohol that day. She was feeling well with no physical symptoms of illness, or auras which are a warning sign before a seizure.
- [112] Prior to May 2017 she had not been diagnosed with any medical conditions. She was diagnosed with epilepsy in 2019. Ms. Grewal had three incidents prior to 2017 which at the time she did not understand to be serious. Once playing hockey she had involuntary muscle spasms for a few seconds while conscious. When at school in Toronto her roommate once observed her to collapse on the floor shaking and convulsing. Ms. Grewal had no memory of the events and recovered quickly. Her doctor told her to monitor. She had never had a seizure while driving nor was she concerned that she would have a seizure. Since 2017, she has had one further seizure at home and was taken by ambulance to the hospital. After this seizure in 2018, she was referred to Dr. Gurwant Singh by her family doctor. She was diagnosed with epilepsy and has been taking anti-convulsant medication since then.
- [113] After dinner on May 3, 2017, just before 9:00 p.m., she left the house driving her father's black Cadillac sedan on her way to visit a friend. She has a clear recollection of driving on 66A Avenue east to 152 Street, stopping and looking left and right before making a right turn. She drove south to 64 Avenue in the left lane, signalled left, made a left shoulder check and turned left onto 64 Avenue. After driving up the hill to just before 164 Street, she has no recollection. She has no recollection of driving at a high rate of speed, weaving in and out of traffic, being involved in a minor collision with the Nissan, or of the collision at 176 Street.
- [114] Ms. Grewal stated clearly that she was not deliberately driving and striking vehicles, and that she was not attempting to commit suicide.

- [115] The next memory that she has after becoming conscious is of the Mazda in front of her and seeing Mr. Uzman. She was not aware that she had lost consciousness, and has no memory of having a seizure. She did not know what had happened, or that she had been in an accident or that she had caused an accident. When she became conscious she does not remember becoming combative, but remembers being extremely frightened, scared and confused.
- [116] Ms. Grewal also testified regarding her drug use. When she was arrested, she had on her person a glass pipe and lighters, an oxycodone tablet, and indications of an unknown amount of oxycodone in her blood. She only used oxycodone occasionally for pain relief from intense migraine headaches, and had last used it on the preceding weekend. (May 3 was a Wednesday.) She felt no continuing effects. The drug was not prescribed to her but had been given to her by a friend and she kept one in her wallet. The glass pipe located in her jacket pocket with a lighter was only used for cannabis oil and she had not used it for weeks.
- [117] Ms. Grewal's testimony concerning her drug use did not accord with the evidence of Dr. Singh and Dr. Agha Khani regarding what she had told them when they were taking her medical history. Dr. Singh testified Ms. Grewal denied using any drugs other than some past use of cannabis. Dr. Agha Khani's understanding of her drug use was also different. It appeared that Ms. Grewal minimized her past history of drug use in her appointments with the doctors.
- [118] Ms. Grewal's testimony of her visits with Dr. Singh was also inconsistent with the evidence of the doctor. She testified she first saw Dr. Singh in October 2018 and told him about the motor vehicle collision on the second visit. She later agreed the first visit had been in May 2019, and she had not told him about the collision until January 2020. Dr. Singh testified that this January 2020 appointment was his fifth appointment with Ms. Grewal. Ms. Grewal explained that she had not told Dr. Singh of the collision earlier because she did not want him to judge her.

F. Expert Medical Evidence

- [119] The evidence of Ms. Grewal is that after starting to drive on the evening of May 3, 2017, she began to have an epileptic seizure which continued throughout the two collisions. She called two neurologists to testify at the trial and provide expert opinion evidence for the Court. In addition to providing their opinions, they both gave direct evidence as they were involved in the diagnosis and treatment of Ms. Grewal.
- [120] Dr. Singh described epilepsy as a disorder of the brain which is defined as two or more unprovoked seizures and a sudden unexplained increase in electrical activity of the brain cells called neurons. As epilepsy involves unprovoked seizures, there is no secondary cause but rather an underlying problem with the brain that predisposes the individual for seizures.

- [121] In assisting the Court's understanding of epilepsy, Dr. Singh also explained that there are many types of seizures, and a convulsion is a type of seizure with the associated motor activity. It is now referred to as a tonic-clonic seizure, rather than a grand mal seizure. A complex partial seizure, also called a focal seizure, is another type of seizure which localizes to the temporal lobes of the brain and presents as impaired awareness where someone experiencing one is not aware of what is happening with them. An aura is the stage at an onset of seizure where an individual is partially aware but has a distorted perception.
- [122] Dr. Singh began seeing Ms. Grewal on May 1, 2019 after she had been referred to him by her family doctor, and has seen her five times. At the first appointment he took a medical history from her in which he was told of some prior instances where Ms. Grewal may have had a seizure. He ordered an MRI and an EEG, two diagnostic tests that are commonly used to diagnose epilepsy. The routine and sleep deprived EEG's were considered normal, which is a result that occurs in 20% of epilepsy patients as there is no gold standard testing. The EEG recording is from the surface of the brain but does not register the "spikes" or activity that is deeper in the brain as is the temporal lobe activity. The MRI revealed an arachnoid cyst on the right temporal lobe.
- [123] Dr. Singh diagnosed Ms. Grewal with epilepsy with two different types of seizures, both complex partial and generalized or tonic-clonic seizures which are convulsions. Dr. Singh prescribed Lamotrigine for the management of seizures. He agreed in cross-examination that his diagnosis of epilepsy was based on the history that was provided to him by Ms. Grewal. As long as a patient agrees to take medication and not to drive, there is typically no reason to investigate further.
- [124] However, as a result of the MRI which showed that there is an arachnoid cyst pressing on the right temporal lobe, he referred Ms. Grewal to Dr. Agha Khani for further investigation. The right temporal lobe is one of the common areas of the brain where complex partial seizures are defined to rise from. This cyst, which is congenital, is applying pressure to and displacing the temporal lobe. Dr. Singh opined that it could be causing seizures.
- [125] Dr. Agha Khani is a practising neurologist sub-specialized in Epilepsy/Seizure Disorder. He began to treat Ms. Grewal around January 2020. At the first appointment Ms. Grewal informed him of her involvement in the collision. Dr. Agha Khani ordered a 48-hour ambulatory EEG in September 2020, and recently ordered a second MRI.
- [126] On the history provided to him by Ms. Grewal, although she was not a good historian, and with the results of the first MRI, Dr. Agha Khani also diagnosed her with epilepsy, and most likely focal epilepsy coming from the right temporal lobe. Although an arachnoid cyst does not always cause epilepsy, given the observations of Ms. Grewal's right temporal lobe in the MRI, he is confident that she has right temporal lobe epilepsy.

- [127] Some of the evidence regarding Ms. Grewal's driving before the collision at 176 Street and her condition after the collision was put to both doctors. Both agreed that Mr. Grumbles' and Ms. Hannan's observations of her convulsing, shaking, foaming and drooling with blood coming out of her mouth was consistent with having a generalized convulsive seizure.
- [128] Both doctors were asked to opine about the driving that was observed and testified to the possibility of a progression from a focal seizure, where in the words of Dr. Agha Khani, a person may have impaired awareness and continue to drive without incident, to a generalized convulsive seizure, in which a person cannot operate a motor vehicle and is no longer conscious.
- [129] Both doctors testified, with slightly different language, that in some cases a person may have a focal seizure (in the words of Dr. Agha Khani) or aura or complex partial seizure (in the words of Dr. Singh) in which as a result of a seizure, they have some form of impaired perception. In such a state, they may be able to perform basic functions. Dr. Agha Khani described such functions, including driving as being almost automatic or routine. In Dr. Agha Khani's evidence, there is a possibility of someone maintaining the ability to drive for some time before having an accident or not having an accident at all.
- [130] As neither doctor observed the driving and no direct evidence regarding her medical state at the time of driving is available, they were not able to say whether in their opinion Ms. Grewal was having a seizure at the time of driving. Their evidence was that the observations made of Ms. Grewal after the collision were consistent with her having had a seizure. Having had a seizure while driving, and not having control over her vehicle by the time she reached 176 Street, suggested in Dr. Agha Khani's opinion a possibility that a focal seizure became a generalized convulsive seizure.

V. Submissions of the parties

A. Crown Submissions

- [131] The Crown submits that it has proven all elements of the offences beyond a reasonable doubt.
- [132] With respect to the offences for criminal negligence, the Crown submits that Ms. Grewal's driving on 64 Avenue, from approximately 168 Street to 176 Street on May 3, 2017, showed a wanton and reckless disregard for the lives and safety of others sharing the road.
- [133] In the Crown's submission, the appropriate analysis of Ms. Grewal's claim that her driving was not the result of a conscious act should be conducted within the rubric of non-mental disorder automatism. The Crown submits that, while Ms. Grewal has discharged her evidentiary burden, she has not met her legal burden to prove, on a balance of probabilities, that her driving was as a result of an involuntary act. Therefore, the Crown says that it has proven the *actus reus* of the offences for criminal negligence beyond a reasonable doubt.

- [134] For the same reasons, the Crown submits that, having proven the *actus reus*, the evidence of the accused does not raise a reasonable doubt regarding her mental state sufficient to negate the *mens rea*. It submits that the accused has not provided any evidence of her actual state of mind at the time of driving and as such, the Court should have reservations about accepting that she was actually having a seizure.
- [135] Similarly, says the Crown, while the motive for driving in the manner observed is unclear, the modified objective test for *mens rea* does not require that such a motive be proven, only that the driving constituted a marked and substantial departure from the standard of care expected of a reasonably prudent driver in the circumstances. It says the speed of the vehicle and erratic driving behaviour as observed by several witnesses constitutes such a departure from the norm. A reasonable driver in a similar situation would have been aware of the danger that such driving posed.
- [136] Finally, with respect to the offence for failing to remain at the scene of an accident, the fact that Ms. Grewal was involved in a motor vehicle collision with Michael Douglas and did not remain at the scene of the collision creates a rebuttable presumption that the intent in leaving was to evade civil or criminal liability.

B. Defence Submissions

- [137] The defence submits that Ms. Grewal has offered an exculpatory excuse for her manner of driving. It says that she was suffering from an epileptic seizure at the time of the accidents. Defence relies upon the evidence of her pre-accident state, that Ms. Grewal was unaware that she was epileptic, the observations of witnesses post-collision with the Prelude, and the evidence of Corporal Huitson, which noted full acceleration towards the Prelude with no attempt at steering or braking. As for the medical evidence, the defence relies on the diagnoses of Dr. Singh and Dr. Agha Khani, the medical imaging, and the doctors' evidence as to the general progression of seizures.
- [138] In the absence of evidence for suicide, the defence says that there is no other rational explanation for the manner in which Ms. Grewal was driving aside from this exculpatory medical cause. As a result, says the defence, the Crown has failed to prove the *mens rea* of the criminal negligence-based offences beyond a reasonable doubt, and there must be an absolute acquittal.
- [139] The defence also disputes the identity of the black car observed colliding with Mr. Douglas' vehicle. It says that the witnesses' observations on the black car's manner of driving prior to the collision with the Prelude at 176 Street is fraught with inconsistencies and frailties, and as such the Court should be hesitant in making a finding of fact that the vehicle in Count 2 (failing to remain at the scene) was the Cadillac driven by Ms. Grewal.

VI. ANALYSIS

- [140] At the centre of this case is the tragic death of Travis Selje. The central issue is whether or not Ms. Grewal bears criminal responsibility for the death, the injuries to Mr. Mordecai and the collision with Mr. Douglas is her epilepsy at the time -- its manifestation during the driving throughout, and particularly at the time of the two collisions, and the legal consequences thereof.
- [141] I will therefore turn first to the issue of the epilepsy of Ms. Grewal. In doing so I will address three periods of time and make findings of fact: her state and her knowledge when she left home that evening; the duration of the driving from her home to the intersection of 64 Avenue and 176 Street; and her post-collision state.
- [142] On May 3, 2017, Ms. Grewal, who was 22-years-old and lived with her parents, spent a normal and unremarkable day at home watching TV and playing with the dogs. She was feeling well with no symptoms of illness. She did not consume any drugs or alcohol that day. After a family dinner, she left the house just before 9:00 p.m. driving her father's Cadillac on her way to a friend's home. In this regard I accept the evidence of Ms. Grewal and her mother.
- [143] As at that time Ms. Grewal had not been diagnosed with epilepsy. She had had a few prior incidents, one with convulsions, which at the time she did not understand to be serious. She and her mother had been advised by her doctor to monitor the situation, and that it may be the result of low iron. Ms. Grewal did not know that she had epilepsy.
- [144] However, at that time on that date Ms. Grewal did have epilepsy. I accept and rely upon the evidence of Drs. Singh and Agha Khani. After the collisions, in 2019 and 2020, they diagnosed Ms. Grewal with epilepsy, specifically focal epilepsy arising from the right temporal lobe. The cause of the epilepsy is the arachnoid cyst which is clearly visible on the MRI.
- [145] Ms. Grewal was therefore a person with undiagnosed epilepsy when she set out in her father's car that evening and drove down 64 Avenue.
- [146] I turn next to Ms. Grewal's state after the collision with the Selje vehicle at 176 Street. The Cadillac had come to rest in the intersection, and Ms. Grewal was in the driver's side with the airbags inflated. The first person to arrive at the Cadillac was Mr. Grumbles, who had first aid training. He saw the driver unconscious, her whole body convulsing and shaking, and her foaming and drooling with blood coming out of her mouth. Ms. Hannan, who also stopped at the scene, also observed her unconscious with convulsions, shaking and foaming from her mouth. As Ms. Hannan's daughter has had seizures, she thought that the driver may be epileptic. I find, based on this evidence, that Ms. Grewal suffered convulsions with the symptoms as described by these two witnesses after the second collision.

- [147] Mr. Chohan, whose vehicle was also damaged and stuck in the intersection, observed the driver of the Cadillac to be unconscious, although he did not see the convulsions. He described her as scared and confused when she became conscious.
- [148] After about five minutes the first police car arrived with a nurse, Ms. Baker. Ms. Grewal regained consciousness and started to scream and became combative. Ms. Baker assumed the driver was in shock. It is not clear if the earlier observations of convulsions had been communicated to the police and ambulance who attended at the scene.
- [149] After Ms. Grewal had regained consciousness, she was observed by Sergeant Paysen, Constable Reeves, and Ms. Walters, an ambulance attendant. Their observations include behavioural oddities and being "off". Although observing closely, they did not note any signs of impairment. There is no evidence of impairment by drugs or alcohol. The hands and face swabs were negative, and although the blood test showed oxycodone, the amount and date of usage was not able to be determined.
- [150] Ms. Grewal's evidence is that she had taken one tablet of oxycodone for a severe migraine three to five days prior on the weekend. She testified that she did not consume any drugs or alcohol on that day. I accept her evidence in this regard.
- [151] Ms. Grewal testified that when she regained consciousness she did not know what had happened, or that she had been in an accident, or that she had caused an accident. She does not remember becoming combative, but remembers being extremely frightened, scared and confused.
- [152] Drs. Singh and Agha Khani testified that the symptoms observed by Mr. Grumbles and Ms. Hannan were consistent with a tonic-clonic epileptic seizure. The confusion and disorientation of Ms. Grewal after the seizure were also consistent with having had a seizure.
- [153] I conclude that after the second collision at 176 Street, Ms. Grewal was having a tonic-clonic epileptic seizure.
- [154] When did the seizure begin, and if it was before the collisions, how did Ms. Grewal drive while having a seizure? I turn to the evidence of Ms. Grewal's driving from her home to the 176 Street intersection where the second collision occurred.
- [155] Ms. Grewal remembers driving from her home on 66A Avenue to 152 Street, south to 64 Avenue and up the hill to just before 164 Street. I accept her evidence that her clear recollection to this point is a result of trying to remember what happened. From this point, however, she has no memory, of the driving or the collisions, until regaining consciousness after the collision. I also accept Ms. Grewal's evidence that she has no memory for this period of time.

- [156] As the issue of Ms. Grewal's credibility arises most clearly here regarding her absence of memory of driving on 64 Avenue after 164 Street, I will add that I find her to be credible not only in this respect, but in her evidence generally. Ms. Grewal is a young woman who I observed to be continually troubled by the collisions and deeply remorseful for the death of Travis and the harm done by her driving. She was a forthright witness, giving her testimony in a calm manner. She has admitted causation; at trial the only issue is the legal implications of her epilepsy. As Dr. Agha Khani observed, she is not an excellent historian of past dates and previous incidents of seizure activity. However, regarding the events of May 3, 2017 I accept her evidence in its entirety.
- [157] Other witnesses described the fast and aggressive driving on 64 Avenue after 164 Street where, as noted, the speed limit is 60 km/hr. There were also descriptions of the driving being odd or as if the driver had a mental illness. No witness observed any brake or signal lights on the Cadillac at any time. I have found above that the eastbound vehicle observed by all witnesses, also driving east, was the black Cadillac sedan driven by Ms. Grewal. It follows that I find that it was the Cadillac driven by Ms. Grewal that hit the Douglas vehicle and did not stop after the first collision.
- [158] Ms. Vidal observed a black Cadillac at about 164 Street changing lanes three times without signals or brakes. Ms. Nagy saw a black Cadillac also drive in that manner at about 166 Street. She described the driving as "quite odd" and as "gliding in and out of traffic". At 168 Street Ms. Boundy saw a black vehicle she thought was an SUV weaving between lanes. She thought something was going on or that the driver was under the influence or with a mental illness. She also saw the first collision, and observed the vehicle take off at about 80-100 km/hr after that collision.
- [159] Mr. Toews also observed the first collision at about 169 Street. He then attempted to follow the Cadillac but could not keep up at its 80-90 km/hr. When he arrived at 176 Street he saw the scene of the second collision, and saw the driver of the Cadillac exit her vehicle in a state of shock.
- [160] Between 170 and 171 Streets, Mr. Gill saw the Cadillac coming from behind, changing lanes and passing him at about 100 km/hr and passing other vehicles. After the 172 Street intersection, he lost sight of the Cadillac, and then saw it again after the second collision. When Ms. Grewal exited the Cadillac, he described her as appearing intoxicated by the look on her face and in her eyes.
- [161] Mr. Gerwin witnessed both collisions. After the first, he followed the Cadillac, attempting to keep up as it took off at about 100 km/hr. He had an unobstructed view and did not lose sight of the Cadillac between the first and second collisions except when looking at his phone to call 911. The Cadillac had a "straight shot" down 64 Avenue and he did not see it change lanes. He witnessed the Cadillac strike the Prelude. Mr. Gill did not observe any lane changes after 172 Street as he lost sight of it then. There is no evidence that the Cadillac continued passing vehicles through traffic after 172 Street.

- [162] However, there is evidence that the Cadillac did change lanes or veer between lanes as it approached 176 Street.
- [163] Ms. Jeffrey was approaching the red light at the 176 Street intersection when she saw headlights approaching quickly from behind her in the centre lane. After she pulled over as far as she could into the left turn lane, the vehicle passed her on the right by inches. She did not see it go left or right and could not tell if it changed lanes, although her focus was on her granddaughter who was in the car with her.
- [164] In the Fatal Vehicle Collision Report of Corporal Huitson, he described his conclusions about the sequence of events in the second collision. At this location, 64 Avenue has three lanes -- a left turn lane, and two driving lanes, including the curb lane. The Kia and Honda Prelude were eastbound and virtually stopped in the #2 lane, or curb lane. The left rear corner of the Prelude was struck by the right front corner of the Cadillac that was transitioning from the #2, or curb, lane to the #1 lane (the centre driving lane).
- [165] In the evidence of Ms. Jeffrey which I accept, as she drove in the centre or #1 lane, she saw the Cadillac's headlights in the lane behind her. It was for this reason that she moved over as far as possible into the left turn lane (and I note on the totality of the evidence either the left turn lane to 175A Street or to 176 Street) - to avoid being hit by the Cadillac, especially as she was with her young granddaughter. However, as discussed in the report of Corporal Huitson, the Cadillac is shown on the traffic cameras as being in the #2 lane as it travels at 142 km/hr closer toward the intersection.
- [166] In other words, after the Cadillac passed Ms. Jeffrey by inches while she was in the left turn lane and it was in the #1 lane, it moved to the #2 lane, and at the time it hit the Prelude, it was moving back to the #1 lane. Corporal Huitson testified that there was no evidence of the Cadillac steering in the move to the #1 lane as that would have been able to be determined by the tire marks or damage profile. Ms. Grewal, I conclude, was not controlling the Cadillac as it was moving between lanes and accelerating approaching the intersection at 176 Street.
- [167] The medical expert witnesses both described a progression of seizures which they could not say had occurred, as there is no direct evidence. However, on examination of their evidence and the evidence of the driving, I conclude that Ms. Grewal suffered a seizure which progressed from a focal seizure to a tonic-clonic seizure as she drove on 64 Avenue from 164 Street to 176 Street.
- [168] The distance and time must be considered. The evidence of time is provided by the Fatal Vehicle Collision Report and the City of Surrey Intersection cameras. The camera at the intersection of 152 Street and 64 Avenue shows Ms. Grewal turning onto 64 Avenue at approximately 8:56 p.m. The photos in the Report show the Cadillac within feet of the 176 Street intersection at 9:03 p.m. The evidence of distance is provided by City of Surrey maps to scale. In addition, Corporal Huitson testified that between the first and second collisions was as little as 40 seconds and a little over 1.5 kilometres.

- [169] Thus, the total driving time on 64 Avenue between 152 and 176 Streets was approximately seven minutes. For the first half of that 24-block distance Ms. Grewal was fully aware and there is no evidence that the driving was anything but normal driving. From about 164 Street Ms. Grewal has no memory, and the witnesses describe the fast, odd and aggressive driving for the next twelve blocks to 176 Street. Since the speed increases, the time for the second half of the distance from 164 Street is less than the time for the first twelve blocks, or less than a half of seven minutes, or less than three and one-half minutes.
- [170] The first collision occurred at about 169 Street. Corporal Huitson estimates the time between collisions, the first of which he understood to be at 168 Street, at as little as 40 seconds. That estimate accords with the evidence of a number of the witnesses to the driving of the Cadillac. Ms. Vidal said that a minute or two after she saw the aftermath of the first collision, she arrived at the scene of the second collision. Mr. Toews who saw the first collision testified that it was between 20 and 50 seconds after that he arrived at the scene of the second collision. Mr. Gerwin who witnessed both collisions testified that the collisions occurred within 20 to 40 seconds, and definitely less than one minute. On the basis of all of the evidence, the duration of the driving from 164 to 176 Street (12 blocks or 2.3 km) at the speeds in evidence would be approximately two minutes, and not more than two and one half minutes.
- [171] The medical evidence of the sequence and timeframes of the types of seizures is summarised as follows. In his report Dr. Agha Khani stated with regard to a question about the duration of the seizure:
- In general, the majority of epileptic seizures last less than 2 minutes, but at times seizures can last for several minutes, and even for hours and days. The last two mainly apply to focal seizures rather than generalized convulsive seizures. Patients with generalized convulsive seizures, while driving, almost immediately lose their ability to drive, but patients with focal seizures, depend of the degree of change of awareness, may or may not lose the control. It is possible a patient with focal seizure, even with impaired awareness, to drive for a while before he/she has an accident or no accident at all. As there is possibility of seizures to be focal at onset, during which patient may drive fine, and later progress to generalized convulsion, it would be very difficult to know the duration of a seizure before accident, unless there is a witness to see patient's behaviour and response before accident.
- [172] In his testimony, Dr. Agha Khani further explained the progression wherein a focal seizure can start in the temporal area, then it may spread to the other temporal lobe, other side of the brain, and then to the upper part of the brain leading to convulsions. As the seizure and impairment of awareness progresses, so too does the ability to exercise motor control such as driving a car, which the person may do but not do well.
- [173] Dr. Singh also discussed the progression of a seizure leading to loss of motor control from a complex partial (or focal) seizure when the patient is unaware which has a normal duration of less than a minute to two minutes or a longer time, to a tonic-clonic seizure. The

complex partial seizure may be preceded by an aura for usually about a minute. The loss of awareness is quite sudden. During the complex partial seizure the individual is still capable of some level of functioning but it is involuntary functioning where their actions are not under their control. When the complex partial seizure progresses to convulsions, the sequence can take several minutes.

- [174] The medical evidence is consistent with the evidence of driving over about two minutes. At 164 Street, and to about 172 Street Ms. Grewal was exercising control in passing other vehicles, and exercising it poorly in speeding and hitting Mr. Douglas' vehicle. After about 172 Street, there is no evidence of intentional lane changes, and evidence that the Cadillac was veering without steering from the curb lane to the centre lane. At this time the Cadillac also accelerated to the maximum speed. I conclude that this driving evidence is consistent with the medical evidence of the progression of epileptic seizures wherein there is an increasing loss of motor control.
- [175] With regard to the application of the law, there is no issue that Ms. Grewal's driving was a marked and substantial departure from the norm. In the analysis suggested by the defence, and with causation admitted, the actus reus of the negligence offences is proven. I have found that the actus reus of the charge of leaving the scene is made out.
- [176] As in Taylor, I prefer the approach, discussed in these Reasons above, that examines the mens rea of the negligence offences. In dangerous driving cases such as this, where the governing dynamic of the epileptic seizure is an inability to act or react, like a heart attack or a detached retina, in my view it is better and more sensibly characterised as a sudden illness or physical disability: Taylor at para. 14.
- [177] The explanation put forward for this very dangerous driving is that Ms. Grewal was having an epileptic seizure, and not engaging in conscious driving. This explanation was supported by the observations of many of the witnesses and the medical evidence which was not seriously challenged. There is no evidence that the driving of Ms. Grewal was deliberate or suicidal. I would, on the evidence, reject that as an inference.
- [178] Although I accept Ms. Grewal's evidence that she does not remember driving on 64 Avenue after 164 Street, her amnesia may or may not be a symptom of the epileptic seizure. The convulsions and foaming of her mouth, and following the tonic-clonic seizure, the confusion, disorientation, and unusual reactions to circumstances are symptoms of epileptic seizures.
- [179] As stated in Taylor which also relies on the law set out above, the Supreme Court of Canada has considered similar situations as follows:
- [10] In Hundal, Justice Cory considered the situation where a driver without prior warning suffers a sudden onset of an illness or disability that causes him to drive in a dangerous manner. Cory J. referred to "heart attack or epileptic seizure or detached retina" as examples of a disease or physical disability that would provide a complete defence despite the

objective demonstration of dangerous driving. In Beatty, the Supreme Court noted that these were "useful examples" of situations where it would be unjust to enter a conviction and brand the driver as a criminal.

- [11] According to Beatty, the question in situations where a credible explanation has been offered for the dangerous driving is whether "a reasonable person in similar circumstances ought to have been aware of the risk and the danger involved in the conduct manifested by the accused." In other words, has the Crown proven beyond a reasonable doubt that it was unreasonable for Mr. Taylor to be driving a car knowing that he had a pre-existing epileptic condition?

[underlining added]

- [180] I find that a credible explanation has here been offered. In these circumstances it was not a risk that a reasonable person would have foreseen. On the totality of the evidence that Ms. Grewal was having an epileptic seizure that commenced at about 164 Street, the Crown has not proven beyond a reasonable doubt that it was unreasonable for Ms. Grewal to be driving a car on May 3, 2017.
- [181] As the mens rea is therefore not proven, I therefore find that the Crown has not proven the criminal negligence offences in Counts 1 and 3 beyond a reasonable doubt. With regard to the offence of leaving the scene, Count 2, I also find that the Crown has not proven the mens rea of that offence of Ms. Grewal's specific intent to escape civil or criminal liability. The presumption has been rebutted.
- [182] It is the Crown's submission that the correct analysis is to examine the actus reus to determine if the defence has proven on a balance of probabilities that the driving of Ms. Grewal was not voluntary. In the event that I am wrong on the mens rea analysis, I will also deal with the actus reus issue.
- [183] Here too, I agree with the reasoning of Belobaba J. in Taylor:
- [15] It is a fundamental principle of criminal law that people should be punished only for acts that are voluntary on their part. We do not punish conduct that is involuntary: Stone. In circumstances where the accused did not have voluntary control over conduct that would otherwise be an offence, the defence of automatism may be available.
- [16] The law has defined automatism as a state of impaired consciousness in which an individual, though capable of action, has no voluntary control over that action. Two forms of automatism are recognized at law: mental disorder (insane) automatism and non-mental disorder (sane) automatism. If mental disorder automatism has been established (i.e. a disease of the mind) then the accused will be entitled to a verdict of insanity and will be found not criminally responsible. If non-mental disorder automatism has been established, then this is a complete defence and the accused will be entitled to a verdict of acquittal: Stone, at para. 156 to 161 and 169.

- [17] The law presumes that people act voluntarily. It is up to the accused to rebut the presumption of voluntariness. The defence must prove involuntariness (automatism) on a balance of probabilities: Stone at para. 171 and 179.
- [184] In this case, it is the Crown's submission that epilepsy ought to be categorised as non-mental disorder automatism because that would apply to an involuntary action not arising from a disease of the mind. In this regard I agree with the Crown submission regarding the application of Stone to the evidence regarding the disease of epilepsy.
- [185] On the issue of voluntariness, however, on the evidence set out above, I conclude that the defence has satisfied its burden to prove on a balance of probabilities that the actions of Ms. Grewal in driving were not voluntary.
- [186] Thus, the actus reus on the criminal negligence charges is not established, and verdicts of acquittal on Counts 1 and 3 follow. Similarly, there is an acquittal on Count 2.

VII. CONCLUSION

- [187] Ms. Grewal, will you stand please.
- [188] After consideration of the evidence, the facts as found based on the totality of the evidence, the law, and the application of the law to these facts, all as set out above, I therefore find you Not Guilty on Counts 1, 2, and 3.
- [189] You are free to leave the courtroom.
- [190] Thank you counsel for your assistance throughout.
- "The Honourable Madam Justice Watchuk"

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